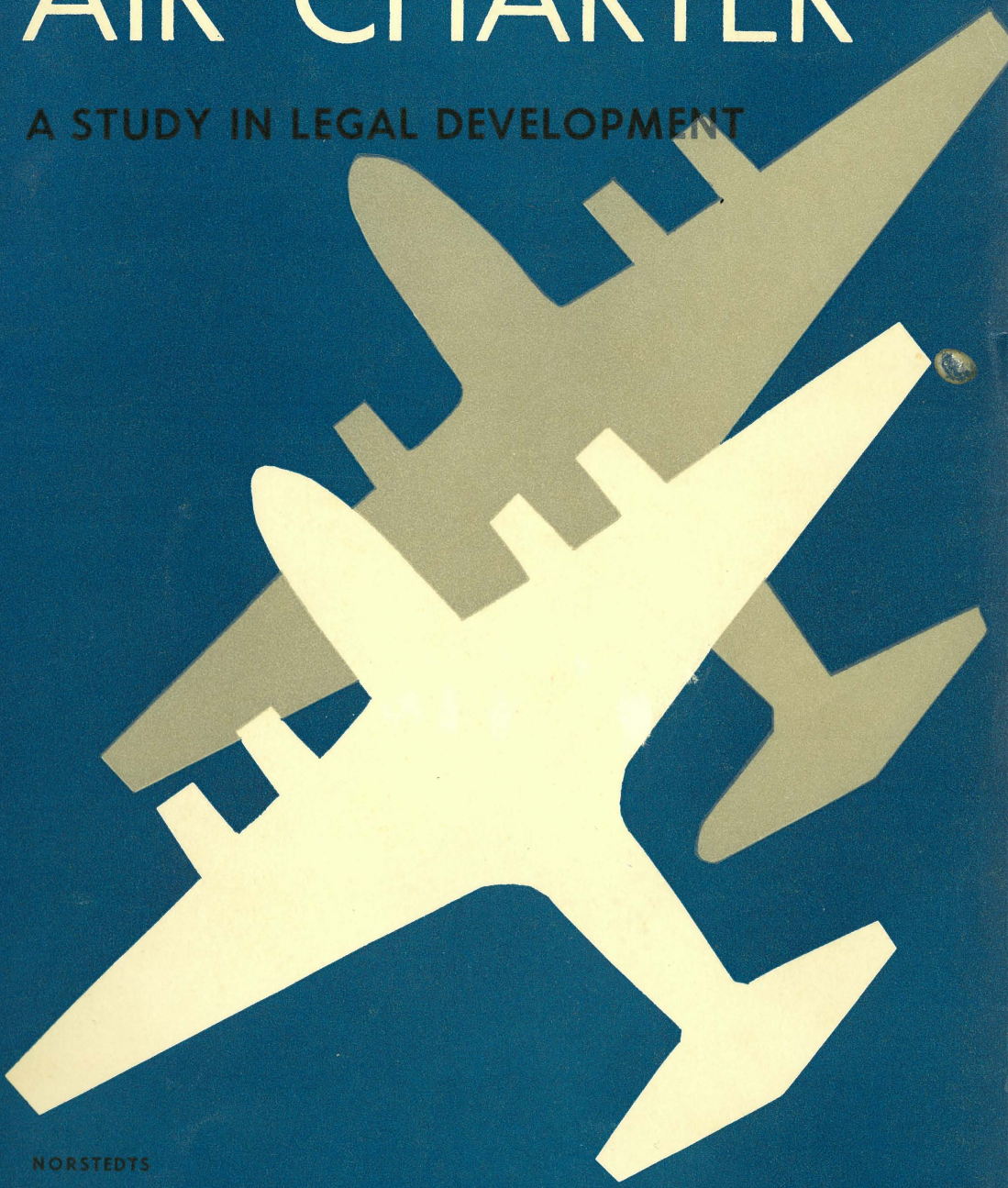
# AIR CHARTER

## A STUDY IN LEGAL DEVELOPMENT



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By JACOB W. F. SUNDBERG

Rec. J Bus Law 1964 s 240.

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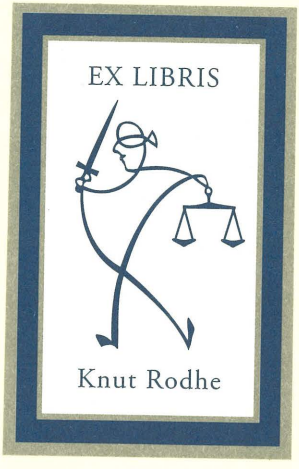

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THIS BOOK IS DEDICATED

TO THE MEMORY OF

ARNOLD WHITMAN KNAUTH

*

JACOB W. F. SUNDBERG

# AIR CHARTER

## A Study in Legal Development

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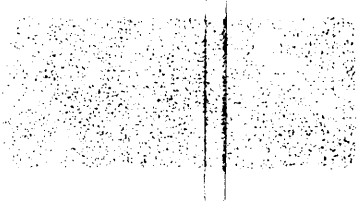
STOCKHOLM

P. A. NORSTEDT & SÖNERS FÖRLAG





STOCKHOLM 1961. KUNGL. BOKTRYCKERIET P. A. NORSTEDT & SÖNER

# INTRODUCTION

## 1. PRINCIPLES

The purpose of this book is to define and describe the legal institution of air charter. Previous treatises on air law have dealt but little with this aspect of air commerce. They concentrate on the ticket and air waybill and thus generally limit themselves to a presentation of the rules relating to air transportation by regular services. On many counts, the law of air chartering is interwoven with the law of regular transportation. The institutions connected with regular services therefore cannot be excluded from the ambit of this book. However, I do not wish to duplicate the previous commentaries on ticket and waybill law. Consequently, in the examination of the relationship between the air chartering and the regular services, once it is established that the air charter rules do not depart from the rules for the regular services contracts they will not be further elaborated.

The principal subject of this book is really the question: *What is air charter?*

I have attempted to find an answer to this question by researching into the law of France, Germany, Sweden, Norway and Denmark, Great Britain and the United States of America. I have felt it prudent to limit the number of legal systems to be investigated to those. When at times I have made references to Italian or Dutch or other materials, the main reason has been either that other writers' references have called for comment or that the materials related to some international phenomenon such as the air charter documents in international use or the Warsaw Convention.

I make a reservation about some of the legal systems investigated. My first remark concerns Scandinavian law. The law of contracts of Sweden, Norway and Denmark is largely unified by uniform legislation. It is therefore no exaggeration to speak about Scandinavian law. From a private law point of view, however, Scandinavia includes not only the three countries now mentioned but Finland and Iceland as well. These countries are not included in this study. The principal reason for this has been that so much of the Scandinavian public law concerned is a direct

result of the cooperation in the SAS in which Finland and Iceland do not participate.

As far as Britain is concerned there are many mysteries involved in the interrelationship between the jurisdiction of English private law and the British legislation implementing international conventions. I have felt it to be beyond the scope of this study to clarify this interrelationship. Readers are therefore asked to consider my statements in this light.

I have striven to incorporate all developments up to Febr. 1, 1961.

The materials collected in this investigation of the idea of air charter have been distributed among five chapters, each centring on one source of rules. The first chapter deals with the general development of air charter as a term and as an institution in its historical context. It covers the period between 1919 and 1961.* It will be shown later that the historical setting in wich the notion of air charter has developed, has reacted considerably upon the development of its rules and thus deserves the classification as a source of rules. The second chapter deals with the meaning of air charter in that mirror of air commerce which is formed by the administrative regulations. The chapter includes a survey of how the administrative notions of operator status interfere with contracts and what terms have been added to air charter contracts as a result of administrative interference. The third chapter deals with how the new concept of air charter was projected onto the established systems of private law and their interlocking concepts. To the extent that differences in outlook between the various jurisdictions have forced me to choose between the different methods of approach advocated in each, I have sought to align myself with the Continental legal tradition. This chapter also follows the course of the phenomenon of air chartering through the years when it began to develop clausal features in an original pattern. Conclusions as to the variants of the air charter contract documents which have *not* developed are also placed in this chapter. The fourth chapter deals with the relationship between air charter and the one piece of positive international legislation which exists in this field, the Warsaw Convention. This chapter expounds the distribution of the Convention rules, surveys the

* It may be proper here to note that to my generation "The War" is the one occuring between 1939 and 1945; expressions like "pre-war" and "post-war" should be understood accordingly.

line of demarcation between the variant of the air charter contract which receives its terms from the Convention *ipso iure,* and the variant which is free to develop its own terms altogether. This chapter, furthermore, pursues some features of the clausal law of the printed air charter forms which have developed as a direct result of the shortcomings of the Warsaw Convention. Finally, this chapter contains a short survey of the recent Convention which was drafted to remedy these shortcomings by legislation. The fifth chapter attempts to give a more distinct picture of that variant of the charter contracts which is evidenced by standardized charterparty forms. In selecting for study the cancellation and non-performance clauses of the charterparty contract, I was guided by the fact that the International Air Brokers Association had found this area worthy of special attention, as is evidenced by their urging the adoption of special clauses in this type of contract. The sixth chapter attempts to present the synthesis of the basic rules relating to the international phenomenon of air chartering reduced to certain legal structures which may possibly serve as a basis for future efforts to elaborate the law of air charter.

This book takes the international phenomenon of air charter into its focus in the belief that it can fruitfully by treated as such. While it has been felt to be beyond the scope of the book to outline in detail the borders between each national legal notion and the international air charter notion which materializes in the course of the investigation, there has been undertaken an exploration of the extent to which the air charter notion is self-sufficient, where it starts to depend upon local law and to what extent local law and local conceptualism have made such an imprint as to modify its international appearance. The inquiry has been pursued to the crossroads where the air charter notion meets the national notions. In this way the international phenomenon of air charter also sets the systematics for the comparison between the various legal systems involved as well as between them and the clausal law of air chartering, thereby avoiding the difficulty which Lawson indicates by his remark: "I do not see how a comparison between two laws can be systematic, . . ." (BUCKLAND & MCNAIR, *Roman Law & Common Law* 2d xii).

An answer to the principal question, "What is air charter?", is offered in the form of the following thesis: Air charter is essentially a notion of form. It refers to contracts concluded by means

of a certain type of document, the charterparty. As attached to the charterparty document, the notion of air charter is contrasted only with the contract concluded by ticket or air waybill.

I hope that the information gathered in this book will be of some assistance even to practitioners not particularly interested in legal discussion. In view of the fact that the monographic principle of presentation may render it difficult for them rapidly to find the information which they consider useful, it has been thought desirable to provide an index.

## 2. PRESENTATION

I have been at pains to present my text in such a manner as to facilitate its communication to other scholars. I have chosen English as a medium. The factual importance of Anglo-American flying seems to now have rendered that language the best vehicle by which to reach aviation lawyers in the majority of countries, in spite of its lateness in achieving recognition in the field of international air law (see FIKE, *The CITEJA*, 1939 10 ALR 178). One reservation is necessary here, however. I use English in the way in which scholars formerly used Latin, as a means of communicating with scholars of other nations including the English-speaking countries but not them alone. Consequently, I am not concerned about the unpopularity of unfamiliar words and phrases with English practitioners. I regret the feeling of irritation which perhaps will beset these at many points, but I hope for some reward from those non-English lawyers who will be enabled to recognize their own institutions more easily when they are not cramped into the fetters of the Anglosaxon legal system. I believe I am serving the cause of accuracy by choosing to use the original terms and phrases rather than resort to transcriptions of little value.

Readers will find that this work is full of quotations from other languages, in particular French and German. I have left the text of most of these passages untranslated, on the assumption that no lawyer can be active in these areas of commercial law without a knowledge of French and at least some knowledge of German. Allowing for some unfamiliarity with German, however, I have printed a translation into English or French when such a translation is available and there has been no special reason to rely on the original German text. As to passages of

more local interest, such as will occasionally appear in a comparative-law work of this size, I have felt free to quote directly from the local languages concerned even if they do not belong to the group of world languages. On the other hand, when quoting from some local work remarks which are of interest mainly to some entirely different part of the world, I have at times provided my own translation where it did not seem profitable to print the original.

Seeing no reason to put large parts of my book in italics, I do not italicize foreign-language quotations or foreign names (whether of courts or statutes) but only foreign words which express some estabilished legal notion (*e.g. mora, force majeure, Halter).*

I have been at pains to support my text and to invite criticism and further research by giving references to sources and literature in a manner which may seem unfamiliar to British readers. This has involved a use of notes from which I hope scholars in the future will benefit. When basing my results on materials not easily accessible, I have felt it to be a corollary to my general approach to give full quotations rather than mere references.

The comparative law approach has brought with it the perpetual problem of how to support the statements in the text about the various legal systems. It is impossible to be exhaustive without expanding the notes out of all proportion. When citing cases and supporting materials I have therefore limited myself to attempts to cite the leading cases, the most authoritative authors, the monographs which focus on the problem; and when materials have appeared in abundant numbers I have selected those which I considered would best convey the historical aspects, if necessary supplemented by reference to some recent work which might serve as a point of departure for a reader wishing to do extra research on the point. I have also tried to give a reference to the principal English or French comparative-law works dealing with the point. However, in view of library hazards, aggravated by war damage in Europe, a Swedish lawyer may perhaps be excused if he has not found all that is relevant in the vast field of law which is spanned by this study.

Some details of the presentation deserve special mention. The comparative-law approach has brought with it a desire to simplify the technical details of the presentation. It is a uniform feature

of most statutes, regulations, contracts and other normative materials that the norms provided are presented broken down into chapters, sub-chapters, sections, sub-sections, paragraphs and sub-paragraphs, etc. The distinctions between the *secessio,* and the *secessio secessionis,* and the *membrum* is brought out differently in the various legal systems. I have not found it profitable to carry throughout the text the full local law insignia for these distinctions, far less to bother to clothe them in the insignia peculiar to English law, when the only requirement of the text has been necessary precision. Under the inspiration of the method of citing the Danish and Norwegian Codes I therefore refer to "Article 29, paragraph (2), sub-paragraph (d), sentence (c)" as "Art. 29-2-d-c." I start by indicating the biggest unit and proceed to the smallest one, using hyphens to separate them. This method is used to refer to all kinds of normative materials, from statutes to charterparties. On the other hand, when dealing with some provision which in the local law is well known as article so and so, or section so and so, or § so and so, I have seen no reason to transcribe it but have preferred to retain the original unit.

A reference to "page" means page in this book, while "p" means page in some other work.

Passages which are supplemented with notes in the original work, are always deprived of these notes when here quoted. The contents of the notes will be indicated separately when they are important to the understanding of the quotation.

Names of months appearing in the notes in this book are here indicated, under the inspiration of the IATA practice, by three-letter abbreviations.

The system of abbreviations used in this book is highly simplified. I have sought to avoid the present preference in many legal systems for periods, commas and parentheses. When lawyers make their notes in handwriting nobody thinks of wasting effort on these matters except in so far as they serve to indicate a relation to the text. The first volume for 1956 of All England Reports will be styled 1956 1 AER, and this indication is completely clear. Since necessary precision is thus not affected I have felt free to omit in the notes all superfluous periods, commas and parentheses except in so far as they indicate something in relation to the text.

The basis of the abbreviations is a positioning system. The

figures preceding a letter abbreviation always refer to the volume, either by volume number or by year or by both. The last-mentioned alternative may appear superfluous since volumes can often be identified by one of these indications. Yet I have thought it useful that the year of publication should appear, since it places the work cited in its historical context. On the other hand, the volume number should not be suppressed if there is one. It is current practice only to indicate volume number, and I believe that it should be possible to compare the citations in two different writings and find out whether they are identical or not. In view of the limited number of volumes appearing in one series, it is believed that no confusion will follow even though both year and volume number without further indications precede the letter abbreviation. The figure following the letter abbreviation refers to the page unless there is an indication to the contrary. Indication to the contrary is present when the terminal letters are added (2d, 3rd etc.); in such cases the figure refers to the edition of the work. Some books are subdivided into several parts, although bound in one volume: in such cases the first figure after the letter abbreviation refers to the part and the following one to the page. The last figure is then preceded by the indication "p". In the case of many books, furthermore, the first figure following the title of the book, or the abbreviation for it, or, in a few cases, the author's name alone, or the edition number, refers to the year of publication. In such cases also, the figure indicating the page is preceded by the letter "p" in order to avoid confusion.

This system of citations is used throughout the book for all materials, Anglosaxon, Continental European and Scandinavian.

### 3. ACKNOWLEDGMENTS

I acknowledge with gratitude the help of the many who, in correspondence and in interviews, have given me the benefit of their comments on particular problems and on parts of my text. I have received so much and such generous help from so many individuals and organizations all over the world that it is impossible to acknowledge specifically my indebtedness to them. I should like, however, to tender my particular thanks to the members of the staffs of the Institut de Transport Aérien in Paris, the Institute of International Air Law (now Institute of

Air and Space Law) in Montreal and the Institute of Advanced Legal Studies in London for their unfailing courtesy and their readiness to help me.

I am specially indebted for help and encouragement to Associate Professor Lars Hjerner, Stockholm, who first suggested that I devote my scholarly efforts to air law; to Professor Kurt Grönfors, Gothenburg, who first suggested the subject of air charter to me; the late Professor Phillips Hult, Uppsala, for his patience and understanding of the difficulties during the first years of my studies which were mainly devoted to the uninspiring work of collecting information and showed little progress; and, above all, the late Professor Arnold W. Knauth of New York University for his inspiring teaching and his warmly generous and tireless advice and encouragement during my year at his university at a time when I was slowly realizing the difficulties of undertaking the present work. My profound gratitude to him defies expression.

I am also deeply indebted to Professor Folke Schmidt, Stockholm, to whom I turned after the death of Professor Hult and whose generous response has greatly helped forward the completion of this work.

I also want to acknowledge the generosity of the French Government, the Ford Foundation, New York, the Emil Heijne Foundation for Legal Research, Stockholm, the Law Faculties of the Universities of Stockholm and Uppsala, the Practising Law Institute, New York, and the Swedish State Council for Research in the Social and Legal Sciences, in financial assistence.

Last, but not least, I want to acknowledge my indebtedness to the Svea Court of Appeals, Stockholm, for its permission to undertake this scholarly work, and to the City Court of Stockholm whose kindness in arranging for me a convenient schedule of commissions to serve on their Bench has afforded me economic assistance and practical experience both most helpful in the course of my studies.

The task of correcting my errors in English has been undertaken of a number of people whose native tongue was English and I am particularly grateful to them all, although I must myself assume full responsibility for the text as it now stands.

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# ABBREVIATIONS

In respect to references to British and American cases, statutory materials, and law reviews, when the abbreviations used do not appear in this list, readers are asked to decode them by use of the Harvard Blue Book of Citations (A Uniform System of Citation — Form of Citation and Abbreviations, published by The Harvard Law Review Association) and Sweet & Maxwell's Guide to Law Reports and Statutes.

## A.

A.bl. d. A. H. K. = Amtsblatt der Alliierten Hohen Kommission

Abs = Absatz

ACA = Aircraft Charter Agreement

AC Bull = Air Charter Bulletin

ACTA = Aircoach Transport Association

*Acta-Imata Exch ExD* = Acta-Imata Commercial Charter Exchange Investigation, Docket No 6580. Examiner's decision

ADHGB = Allgemeines Deutsches Handelsgesetzbuch. 1861

AfL = Archiv für Luftrecht

AIP-SWEDEN = Aeronautical Information Publications. Containing informations of durable nature, which are of importance for the aviation.

Air Fr Mark Rep = Air Freight Market Reports.

AITA = Air Industries and Transport Association of Canada

AJIL = The American Journal of International Law

AL = Airlines

ALR = Air Law Review (New York)

Am Bar Ass'n J = American Bar Association Journal

AMC = American Maritime Cases (Baltimore)

Am JCompL = The American Journal of Comparative Law

Am L R = American Law Report

Am L Rev = American Law Review

AOA = American Overseas Airlines, Inc.

Appx = Appendix

Arch d öfftl R = Archiv des öffentlichen Rechts (Tübingen)

Ark f L = Arkiv for luftrett. Published by Norsk Forening for Luftrett.

ASAL = Annual Survey of American Law, also in New York University Law Review

ATA = Air Transport Association of America

ATAC Rep = Report of the Air Transport Advisory Council. Published by the Ministry of Civil Aviation

ATAF = Accord de coopération entre Transporteurs Aériens de l'union Française; Association des Transporteurs Aériens Français

Avi = Aviation Cases. Published by Commerce Clearing House, Inc.

Avi C Mark Rep = Aviation Charter Market Report

L'Avi March = L'Aviation Marchande Revue économique et commerciale du transport aérien.

AW = Airways

## B.

BEA = British European Airways Corporation

BCL D = Bestämmelser för civil luftfart. Driftsbestämmelser

BGB = Bürgerliches Gesetzbuch, 1896

BGBl = Bundesgesetzblatt

BGH = Bundesgerichtshof

BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen

BIATA = The British Independent Air Transport Association

BIFAP = Bourse Internationale de Fret Aérien à Paris
BOAC = British Overseas Airways Corporation
Braathens SAFE = Braathens South-American & Far East Airtransport A-S
Bull Sté d'Et Legisl = Bulletin de la Société d'Etudes legislatives

C.

CA = Charter Agreement
CAB = Civil Aeronautics Board
CAB 49—99 = Release. Dec 9, 1949 CAB Announces Transatlantic Air Policy for 1950
CAB 51—28 = Release. Mar 22, 1951 CAB Announces Transatlantic Charter Policy a New Charter Regulation
CAB 52—15 = Release. Feb 12, 1952 Reaffirmation of the Policy Respecting Transatlantic Charter Services
Cass civ = [Arrêt de la] Chambre civile de la Cour de Cassation
Cass Req = [Arrêt de la] Chambre des requêtes de la Cour de Cassation
CAVE = Compania Aerea Viajes Expresos de Venezuela
CAvi = Code de l'Aviation civile et commerciale. Décret no 55—1590 du 30 nov. 1955
CC = Charter Contract
CCA = Circuit Court of Appeals
CdA = Contrat d'Affrètement
CFA = Charter Flight Agreement
Cidna = Compagnie Internationale de Navigation Aérienne
CINA = Commission Internationale de Navigation Aérienne
CCiv = Code Civil
Ccom = Code de Commerce
Cf = conferez
Citeja = Comité International Technique d'Experts Juridiques Aériens, document
CJS = Corpus Juris Secundum
COGSA = Carriage of goods by Sea Act
col = column
CPA = Canadian Pacific Airlines
Ct = Court
CTA = Charter Transportation Agreement
CTC = Charter Transportation Contract
CV = Charter-Vertrag

D.

Dalloz = Recueil Dalloz — Hebdomadaire [Chronique — Jurisprudence — Sommaires de jurisprudence — Legislation]
DDL = Det Danske Luftfartselskab
Dept = Department
Deruluft = Deutsch-Russische Luft Transport Gesellschaft
Dig = Iustiniani Digesta
Dt = District
D = District

E.

ECAC = European Civil Aviation Conference
Entsch ROHG = Entscheidungen des Reichs-Oberhandelsgerichts

F.

F [ed] = Federal Reporter
FCV = Flugzeug-Charter-Vertrag
FIATA = Fedération Internationale des Associations des Transporteurs Aériens

G.

GCC = General Conditions of Carriage, Cargo
GCP = General Conditions of Carriage, Passengers

H.

Hans GZ = Hanseatische Rechts- und Gerichtszeitung
Harv L Rev = Harvard Law Review
HB = Handelsbalken
HEL = History of English Law
HGB = Handelsgesetzbuch

I.

i. a. = inter alia
IABA = International Air Brokers Association

IATA = International Air Transport Association, International Air Traffic Association
IATA Bull = IATA Bulletin (Montreal)
IATA Inf Bull = IATA Information Bulletin (The Hague)
ibid = ibidem
ICAO = International Civil Aviation Organization
ICAO LC = Legal Committee, ICAO
ICC = Interstate Commerce Commission; International Chamber of Commerce
ICEM = Intergovernmental Committee for European Migration, Geneva
i. f. = in fine
IFTA = Institut français du transport aérien
[NT = Note de travail]
IMATA = Independent Military Air Transport Association
Inst = Iustiniani Institutiones
*Internat'l Fr Forw Inv ExD* = International Air Freight Forwarder Investigation, Docket No 7132, Initial decision of Paul N. Pfeiffer, Hearing Examiner. Served 30 Apr 1957
IRO = International Refugee Organization
ITA Bull = ITA Bulletin, Institut du transport aérien
[ND = Notes Documentaire]
[IS = Informations selectionnées]

J.

JAL = Journal of Air Law
JALC = The Journal of Air Law and Commerce
JBL = Journal of Business Law
JCLIL = The Journal of Comparative Legislation and International Law
JCP = Juris Classeur Périodique
JFFT = Finländska Juridiska Föreningens Tidskrift
JhJ = Jhering Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts (Jena)
JO = Journal Officiel de La Republique Française. Lois et Décrets
JW = Juristische Wochenschrift

K.

KF = Kunglig förordning
KK = Kunglig Kungörelse
K prop = Kunglig proposition

L.

LAMS = London Aero and Motor Services
LC = Legal Committee
LC&P = Law and Contemporary Problems, Duke University
LVG = Luftverkehrsgesetz
LQR = The Law Quarterly Review
Lufthansa = Deutsche Lufthansa Aktiengesellschaft

M.

MATS = Military Air Transport Service (United States)
MDR = Monatschrift für Deutsches Recht
Mod L Rev = Modern Law Review

N.

n. a. = not available
NDS = Nordiske domme i sjøfartsanliggender
NfL = Nachrichten für Luftfahrer
NJA = Nytt juridiskt arkiv, First Series (Swedish Supreme Court Law Reports)
NJA II = Nytt juridiskt arkiv, Second Series
NJW = Neue Juristische Wochenschrift
NRt = Norsk Rettstidende (Norwegian Supreme Court Law Reports)
NTfIR = Nordisk Tidskrift för International Ret, Acta Scandinavica Juris Gentium (Copenhagen)

O.

*Off-Route Inv ExD* = Foreign Air Carrier Off-Route Charter Service Investigation Docket No. 7173. Examiner's decision. Served 13 Apr 1956.

P.

PICAO = Provisional International Civil Aviation Organization

R.

RAI = Revue aéronautique internationale
RDIC = Revue internationale de droit comparé
RDILC = Revue de droit international et de législation comparée
Recueil = Academy of International Law, Recueil des cours (Paris)
Req = [Arrêt de la] Cour de Cassation chambre des requêtes
Rev hist dr frçs & étr = Revue historique du droit français et étranger
Rev trim dr civ = Revue trimestrielle de droit civil (Paris)
Rev trim dr com = Revue trimestrielle de droit commercial
RFDA = Revue Française de Droit Aérien (Paris)
RGA = Revue Générale de l'Air (Paris) (Extension de la RGDA)
RGBl = Reichsgesetzblatt (since 1923 parts I and II)
RGDA = Revue Generale de Droit Aérien
RGZ = Entscheidungen des Reichsgerichts in Zivilsachen
RJILA = Revue Juridique Internationale de la Locomotion Aérienne (Paris)
Rrd = Railroad
Rly = Railway
Rwy = Railway

S.

Sabena = Société anonyme belge d'exploitation de la navigation aérienne
SAS = Scandinavian Airlines System
SCt = Supreme Court
SFOA = Special Flight Order Agreement
SFS = Svensk författningssamling
Sirey = Recueil de Jurisprudence Sirey (Paris)
SJA = Schmidts Juridiska Arkiv
SOU = Statens offentliga utredningar (Public investigations by the Swedish Government)
sq = sequentes, sequens
S. R. & O. = Statutory Rules and Orders
Stat = Statutes at large
Sv JT = Svensk Juristtidning (Stockholm)
SÖF = Sveriges överenskommelser med främmande makt (Stockholm)

T.

TAI = Transports Aériens Intercontinentaux
TfR = Tidskrift for Rettsvidenskap (Oslo)
TWA = Trans World Airlines, Inc, Transcontinental & Western Air, Inc

U.

UA = United Airlines
UAT = Union Aéromaritime de Transport
UfR = Ugeskrift for Retsvœsen (Copenhagen)
USAvR = U. S. Aviation Reports, U. S. & Canadian Aviation Reports (Baltimore)
USCA = United States Code Annoteted

V.

v = versus
VARIG = S. A. Empresa de Viacao Aerea Rio Grandense
Vw = Versicherungwirtschaft (Karlsruhe)

Z.

ZAIP = Zeitschrift für ausländisches und internationales Privatrecht
Z f d g HR = Zeitschrift für das gesamte Handelsrecht
ZfL = Zeitschrift für Luftrecht (Cologne)
ZLR = Zeitschrift für das gesamte Luftrecht (Berlin & Leipzig)

# AIRLINES: SHORT NAMES

| | |
|---|---|
| ABA | Aktiebolaget Aerotransport |
| Aerotransport | » » |
| Aero Nord | Aero-Nord Sweden Aktiebolag |
| Aigle Azur | Sté Aigle Azur Extreme-Orient |
| Air Algérie | Cie Générale de Transports Aériens AIR-ALGERIE |
| Air France | Cie Nationale AIR-FRANCE |
| Air Laos | Cie Air Laos |
| Airwork | Airwork Limited |
| AOA | American Overseas Airlines, Inc. |
| BEA | British European Airways Corporation |
| BOAC | British Overseas Airways Corporation |
| Braathens SAFE | Braathens South-American & Far East Airtransport A.S. |
| CAVE | Compania Aerea Viajes Expresos de Venezuela |
| Cidna | Cie internationale de navigation aérienne |
| CPA | Canadian Pacific Air Lines, Ltd. |
| DDL | Det Danske Luftfartselskab A/S |
| Flying Tigers | The Flying Tiger Line, Inc. |
| Fred Olsen | A/S Fred. Olsens Flyselskap |
| Lufthansa | Deutsche Lufthansa Aktiengesellschaft |
| MATS | Military Air Transport Service |
| ONA | Overseas National Airways, Inc. |
| Pan American | Pan American World Airways, Inc. |
| TAI | Cie de Transports Aériens Intercontinentaux |
| TWA | Transcontinental & Western Air, Inc. |
| | Trans World Airlines, Inc. |
| UAT | Union Aéromaritime de Transport |
| VARIG | S. A. Empresa de Viacao Aerea Rio Gradense |

KLM

SA

UA

*CHAPTER ONE*

# AIR CHARTER: A PIECE OF AVIATION HISTORY

SUB-CHAPTER 1

# THE PRE-WAR ERA—FROM BARNSTORMERS TO AIRLINES TO AIRLINE SYSTEMS

## SECTION 1. THE OPERATORS

Some landmarks in the technical development — the parallel commercial development — commercial use of aircraft changes from barnstorming to fixed-base operations — the pioneer airline — the organized air transportation system

Near the end of 1954, SAS opened the first Great Circle Northern Polar Route.[1] The earliest noteworthy flight along this route had been made in 1937, by a Russian pilot named Tjakalov, flying from Moscow across the Pole to Vancouver.[2] In 1927, Imperial Airways, attempting to link together the scattered parts of the British Empire, opened up a line from Cairo to Basra in Iraq which required, however, a number of intermediary stops for refuelling. These stopping places necessitated forts complete with battlements to protect the passengers from the tough and hostile tribesmen of the area.[3] Another decade back in history, on February 8, 1919, the first public international air line[4] service was operated between Paris and London by the French Farman Company using a Farman 60 Goliath with 12 passenger seats.[5]

While these events indicate a most amazing technical development they must not be allowed to overshadow the parallel commercial evolution which has taken place. As compressed in the headline of this sub-chapter this evolution reflects a change in the use of the aeroplane which, understandably, has had repercussions on the contracts used in air commerce.

Early commercial aviation, after the first world war, was helped along by adventurous people known as "gypsy fliers" or

[1] CHAMPION, *Famous Air Routes of the World*, London 1956 p 90.
[2] CHAMPION, *op cit* 95.
[3] CHAMPION, *op cit* 39.
[4] Hereinafter "air line" will be used to indicate a *route* served commercially and regularly by aircraft, and "airline" to indicate a *company* undertaking to perform air transport services for hire.
[5] REUSS, *Jahrbuch der Luftfahrt 1954*, München 45,

"barnstormers". They moved around the country, operating ancient wartime airplanes, displaying flying tricks, and selling rides to thrill-seeking and sightseeing passengers. Some of these flyers, the more ambitious, made attempts to set up a permanent business at an established airfield and came to be known as fixed-base operators. Some, engaging in the offering of transportation services to nearby points, dignified their operation with the title of airline.[6] Further than that the early air commerce could not develop until suitable airfields were built and safe airways were established, both costly but indispensable devices for the development of aviation.[7] These obstacles were first overcome in flat and densely populated Central Europe, where the military aviation had left behind much of what was required. Operators there started to fly certain stretches on schedules as regular as the weather permitted. These pioneer airlines were hardly established when a rapid movement towards consolidation began and within a short time there emerged a few large systems of organized air transportation. By about 1930, the airline system had come to dominate the whole field of commercial aviation and it has retained this place ever since.

## SECTION 2. THE CONTRACTS

### § 1. *Tickets, air waybills and charters.*

Three types of contracts for the use of aircraft — the ticket — French Air Navigation Act — 1924 German conditions of carriage — the French air-waybill — reasons for adopting tickets and waybills — the charter contract — examples of use — French particularism — *location* — *contrat de charte*

The contracts account for the difference between aviation and air commerce. Once the picture of a veritable air commerce could be projected, the resulting contracts proved to be of three types: tickets, air waybills and charters. The French Air Navigation Act of 1924 provided that the contract of passenger carriage "doit être constaté par la délivrance d'un billet" but the requirement was not to apply to circular trips without intermediate landing (art. 46). In Germany there was no equivalent legislative provi-

[6] Cf SMITH, *Airways Abroad*, University of Wisconsin Press 1950 p 6. DAURAT, *Dans le vent des hélices*, (Editions du Seuil) 1956 p 33, claims that the term "ligne" was used for the first time on May 15, 1918, when Latécoère exposed his plans to establish air services between Toulouse and Buenos Aires.

[7] Cf 1946 SOU no 58 p 48.

sion but under the conditions of passenger carriage which were produced under the auspices of the Reichsverkehrsministerium in 1924, every passenger must possess a valid ticket — "im Besitz eines gültigen Flugscheines ... sein".[8] Under the French Act, again, the contract of cargo carriage could — but not necessarily should — be "constaté par une lettre de voiture ou un récépissé" (art. 39). Since, furthermore, the provisions of the Code de Commerce were imported into the regulation (art. 45), the rule prevailed: "La lettre de voiture forme un contrat entre l'expéditeur et le voiturier, ou entre l'expéditeur, le commissionnaire et le voiturier" (art. 101).

While ticket and air waybill contracts were adopted in aviation law owing, it would seem, to the anticipation of air carriage as a great system of mass transportation and to a borrowing from other already established means of transportation, practice itself developed the habit of referring to most other contracts relating to the use of aircraft as *"charters"*.[8a] The Anglosaxon use of the term was to signify a contract for the use of an aircraft in the service of one or several persons — Thos. Cook & Son, Ltd., for instance, was said to have "chartered" a special aircraft from Reynolds Airways when sending one of his directors and a party of four on the first escorted tour by air in September 1927.[9] Similarly the term came to be used on the European Continent. Mr. Van Lear Black was said to have "chartered" the KLM Fokker FVII-a which was to take him from Amsterdam to Jakarta in 1927.[10] When the Danish airline, DDL, wanted to start traffic in 1924 on the route Copenhagen—Hamburg—Rotterdam which was also flown by Aero Lloyd and KLM, but DDL did not own aircraft which could compete with that of the other airlines,

[8] Condition no 1, 1924 NfL 361.

[8a] As may be concluded from the following remark by SPAIGHT in 1919, the aircraft was thought of as a ship rather than as a cab, and this opened the door for the adoption of maritime language. Spaight says: "It is conceivable that commercial aircraft may ba chartered like ships; or that sporting aircraft may be leased, ilke racehorses." *Aircraft in Peace and the Law*, London (MacMillan & Co.) 1919 p 21 note 20.

[9] PUDNEY, *The Thomas Cook Story*, London 1953 p 148: "There was no regular passenger air-services between the two cities (= New York, Chicago) at that time, so the tour was made by special chartered aircraft . . ." However, Thos. Cook & Son at that occasion issued tickets to the members of the party on behalf of Reynolds Airways. See further Cook's American Traveler's Gazette for October 1927.

[10] GOEDHUIS, *La Convention de Varsovie*, The Hague 1933 p 94, 96, refers to this type of contract under the heading of "Contrats de charte" and the term "charter" is used in later references such as CHAMPION, *op cit* 126, and 1951 Transport (Basel) (Aug 10) p 5540. The contract itself, however, although written in English only uses the term "hire".

it "chartered" two satisfactorily impressive Fokkers Gruhlich in Germany for service on the route.[11] When German air meet organizers engaged the services of an aircraft operator to fly at the meet it was done by a "Charterung" contract;[12] and the same term for the contract was used when a commercial firm engaged an aircraft operator to make advertising flights or acrobatic flights.[13] Indeed, in the great contract of July 19, 1940, between Lufthansa and the Reich, relating to the wartime services of Lufthansa, the Reich was said to "charter" not only aircraft but also separate aircraft engines. Only in French legal language did the term "charter" have difficulty finding entry. While the equivalent to the maritime time charter was expressly stated to be present in the 1924 Air Navigation Act, the contract was not denominated charter but "location".[14] It would seem that the first appearance of the term "charter" in French air law language was the mention of the "contrat de charte" by Goedhuis in an article in Revue de droit international et de législation comparée of 1932.[15]

§ 2. *Charter contract services.*

Three main types of service: services of non-airlines, inter-carrier services, and special flights — charters with non-airline operators — their protection against passenger injury claims — development towards formal charter contracts — inter-carrier contracts — early predictions — commercial practice — special factors restricting the utility of inter-carrier contracts — Paris Convention — German insurance conditions — situation in Scandinavia, England and the United States — special flight contracts — the market for special flights — gold — rescue — passenger groups — hampering economic factors — government subsidy — taxi flying during the thirties

The services performed under the contracts termed "charter" were manifold, but three main types of service can be discerned. The first related to contracts by the fixed-base operators and the so-called air taxi operators. For the sake of convenience and in

[11] LYBYE, *Det Danske Luftfartselskab 1918—1936*, in *Dansk Flyvnings Historie*, Copenhagen 1936, at p 266.

[12] VON TSCHUDI, *Pflicht des Flugzeughalters und Charterung von Flugzeugen*, 1927 Der Luftweg No 6 p 80.

[13] *Savinsky v Luftreklame*, 1931 1 AfL 77; *The Schindler Case*, 1932 2 AfL 100.

[14] RIPERT. *La navigation aérienne*, 1921 17 Bull Sté d'Et Législ 281; since the Sous-secrétaire d'Etat à l'Aéronautique presided at the sessions of the Société d'Etudes législatives a semiofficial character was conferred upon its works: CONSTANTINOFF, *Le droit aérien français et étranger — droit interne et droit international*, Paris 1932 p 58 note 1.

[15] At p 691. This term was adopted in the IATA French, see 1934 3 RGDA 112 and LEGOFF uses it in his *Traité Supplément* of 1939, see p 200 no 1660—1. In France otherwise, however, the proper expression seems to have remained "un avion spécial loué", see DAURAT, *op cit* 202,

view of the very limited transport services of these operators, this category of operators will be referred to as *non-airlines*.[16] The second type referred to such contracts by which the one airline let carrying capacity to another: they will be termed *inter-carrier* contracts. The third type related to such contracts between airlines and their passengers or shippers as fell outside the ordinary rhythm of the airline's movements.

As to the first group, the contracts of the non-airlines, only very little is known. While they covered a business which generally was referred to as chartering, it appears that these contracts were, for the most part, contained in tickets with simple contents.[17] Particulars not appearing in the tickets were agreed upon orally with apparent satisfaction. It was not until the appearance of air taxi associations and conferences that a change in this general approach was brought about.[18]

Much more important were the contracts of the inter-carrier transactions. Indeed, their appearance was forecast at a very early stage. In 1924 Ripert spoke of contracts by which aircraft were leased by one airline "qui n'utilise pas tous ses appareils à un autre exploitant qui peut temporairement les utiliser."[19] Perhaps this aspect was premature. Sudre argued contrary views. To have different persons as owners and operators of the same vehicle was a maritime practice which was not likely to spread to aviation for the time being, since the factors working for such a splitting of functions did not operate there. There was no problem of finance. The cost of aircraft was small and so was that

The French reluctance is remarkable in view of the fact that the term *charter* originated in the French language. Mention of a ship's "chartre de freight ou endenture" is made in the jury's verdict at the Inquisition of Queensborough in 1369. See FLETCHER, *The Carrier's Liability* 80, where he quotes BENNETT, *The History and Present Position of The Bill of Lading* 3.

[16] Compare note 4 *supra*.

[17] This practice is evidenced in a number of cases. In *Fosbroke Hobbes v Airwork*, 1938 USAvR 194, the pilot handed the charterer an envelope when the latter was getting into the aircraft and said: "Here is your ticket". The envelope contained a document called "Special Charter" addressed to the charterer and including a description of the aircraft and details of the flight plus a number of terms and conditions. In *Curtiss-Wright Flying Service v Glose*, 1933 USAvR 26, 228, it was testified that the operator offered cross-country charter trips to points within a radius of 300 miles from Miami and charged fares according to a regular tariff which was based on 35 cents per running mile. The operator issued tickets for the flights on either of two main forms, one for sea or land flying generally, and another for short flights. See file in Federal Records Center p 362—364.

[18] On April 1, 1946, 23 British air taxi operators formed the Air Charter Association.

[19] 1921 17 Bull Sté d'Et Législ 282.

relating to crew services. There could be no question of airlines not being able to afford the cost of buying and maintaining aircraft. The mere owning of an aircraft could not be made a profitable business: the life of an aircraft was much too ephemeral to permit amortization with lease money alone.[20] A few years later, however, Schreiber observes: "Schon heute sind die für den Luftverkehr erforderlichen Fahrzeuge eine im Verhältnis zur Kapitalkraft der beteiligten einzelnen Gesellschaften sehr teure Angelegenheit" and having explained why equipment becomes so expensive, particularly to the small country airlines, he finds "dass die verkehrstreibenden Gesellschaften es oft vorziehen, mindestens ihre Grossflugzeuge nicht käuflich zu erwerben, sondern das erforderliche Material von den Bauwerften oder von Grossflugzeughaltern, die im Besitz geeigneter Reparaturwerften sind, zu chartern."[21] Besides the arguments of Sudre, which thus had soon become obsolete, there were further factors which militated against inter-carrier charters. Two features of the Paris Convention[22] — the cabotage reservation in Article 16 and the principle of the nationality of aircraft laid down in the third chapter — operated to restrict their feasibility. The French Air Navigation Act closely conformed to the Convention provisions maintaining that foreign aircraft were not permitted to engage in cabotage services in France (articles 4, 5, 8 and 9). As a result, a French operator could find only a limited use for aircraft chartered from foreign owners.[23] These difficulties were of course, further aggravated by the decrease in the number of the national airlines due to mergers, and thus at times the only aircraft offered on charter were those belonging to foreign companies. The concern over these difficulties was at least sufficient to impell a resolution of the International Chamber of Commerce (ICC) at its Washington meeting in 1931.[24] While Germany did

[20] SUDRE, *Responsabilité du propriétaire et de l'exploitant de l'aćronef*, 1922 6 RJILA 200.

[21] SCHREIBER, *Juristische Fragen*, in *Jahrbuch für Luftverkehr 1924*, München p 170.

[22] Convention portant réglementation de la navigation aérienne en date du 13 octobre 1919.

[23] A good illustration of the difficulties created by the French principles relative to inter-carrier charters is offered by *LACE v The Travelers Fire Insurance Co.*, 1958 USAvR 298, 5 Avi 18.095, with reference to the Mexican equivalent to the French provisions, art 345 of the Mexican Law of General Means of Transportation of 19 Feb. 1940. — On the other hand, any foreign undertaking could carry out French cabotage traffic on the sole condition that it used equipment chartered from French owners: WEGERDT, 1931 1 AfL 238—239.

[24] Res no 5, 1931 2 JAL 375—376.

not adhere to the Paris Convention, it adopted principles of similar effect in the 1922 Air Traffic Act. The fact that an operator intended to use aircraft which were not registered in Germany as his own property was a sufficient — although not an obligatory — reason to reject his application for an operation licence.[25] This meant difficulty also in the case of two German carriers engaging in an inter-carrier charter transaction, but the main point was directed against charters from foreign owners. "Die der Behörde gegebene Möglichkeit, vom Unternehmer die Verwendung nur solcher Lfge zu fordern, die als sein Eigentum in die deutsche LfgRolle eingetragen sind, ist gleichbedeutend mit der Möglichkeit, vom Unternehmer den Besitz der Reichsangehörigkeit zu verlangen. Ist er nämlich nicht Reichsangehöriger, so können die ihm gehörigen Lfge nicht in die Rolle eingetragen werden (§ 2 Ges.)."[26] Even German insurance conditions at first disturbed inter-carrier charter contracts since pursuant to the basic provisions of the German Insurance Contract Act of 1908, liability insurance was attached to the "Halter" and not to the aircraft.[27] Change of *Halter,* therefore, terminated insurance coverage. The Air Traffic Ordinance of 1930[28] then intervened to the effect that the insurance contract must be of such contents as to cover the liability of a new *Halter* as well in case the aircraft was entrusted to such.[29] This provision has been described as an attempt towards "'Verdinglichung' der Haftpflichtversicherung"[30] and it was motivated by a desire to secure the *Halter*'s ability to pay — says Wegerdt — "um wenigstens in dem so häufigen Fall der Vercharterung von Luftfahrzeugen".[31]

The French and German hostility to international inter-carrier charters was only slightly reflected in other countries. In Scandinavia the cabotage reservation was attached to the operator rather than the aircraft[32] and particularly DDL used to secure

[25] GOEDHUIS complains of this policy, see 1932 RDILC 691 note 1; *La Convention* 95.

[26] SCHLEICHER *Luftverkehrsgesetz Kommentar* 1st 71 note 7. §§ 3-1, 2-2, 11-2.

[27] Versicherungsvertragsgesetz of 30 May 1908, 1908 RGBl 263.

[28] As to this Ordinance, see further page 69 note 79.

[29] Verordnung über Luftverkehr, 19 Jul 1930, § 106: ". . . Der Vertrag ist so abzuschliessen, dass bei einem Wechsel des Halters . . . auch die Haftpflicht des neuen Halters gedeckt ist."

[30] SCHLEICHER 1st 219.

[31] 1932 2 AfL 143.

[32] The same scheme came to prevail in Germany under § 53-2 of the Air Traffic Ordinance of 1930. This provision, which allegedly was only a development of

carrying capacity by chartering aircraft and crew from foreign owners.[33] Even the liability towards third parties on the surface was attached to the operator rather than the aircraft under Danish and Norwegian law;[34] only the Swedish legislation was hostile here to inter-carrier charters inasmuch as it placed this liability on the owner, joining with him as co-responsible such lessee of the aircraft as was entitled to appoint the pilot or commander or did so without authority.[35] To Swedish owners it was thus made an important matter not to part with the control of the aircraft — the instrument of their liability — but rather retain for themselves the quality of operator and enter into all contracts with the flying customers. If the owner let the charterer himself operate the aircraft, that would mean, in the case of an accident, that the owner was left with all liability for the wrongful acts of the operator and with no better right than that to a possible future indemnity from the operator. The provision for joint liability did little to better his situation.

As to Britain, a few inter-carrier charters are reported[36] and this type of contract appears to have enjoyed a generally favourable legal situation[37]; indeed a tendency appears to have existed around 1930 to engage in this kind of chartering rather than

principles already laid down in § 11 of the Act, see SCHLEICHER *loc cit*, meant that a licence could be conditioned with the reservation to German undertakings of the carriage of passengers or goods between two points in the German Reich.

[33] In 1924 DDL chartered Fokkers Gruhlich in Germany, in 1929 Fokkers FVIII from KLM, in 1937 de Havilland D 89 in England, in 1938 and 1940 Ju 52's from Lufthansa: LYBYE, *Det Danske Luftfartselskab gennem 25 Aar*, Copenhagen 1943 p 76, 105, 109, 118, 125, 143. See also *op cit* 45 and compare note 11 *supra*.

[34] See further page 192 and note 286 *infra*. A number of charters between DDL and Provins Luftfartselskabet and Aalborg Luftfartselskab from 1937, 1938 and 1940 are reported in LYBYE, *op cit* 105, 118 and 153.

[35] Aviation Accidents Act § 4.

[36] In 1929, a company called Indian State Air Services provided a service from Karachi to Delhi by DH. 66's chartered to them by Imperial Airways: CHAMPION, *op cit* 41. For political reasons Imperial Airways were unable to run the service in India under their own name: see SLOTEMAKER, *Freedom of Passage for International Air Services*, Leiden 1932 p 45. In 1933 the Great Western Railway opened a service between Plymouth and Cardiff with a Westland Wessex chartered from Imperial Airways which also supplied the operating staff: PARKE, 1953 British Transport Review, vol 2 no 6 p 459.

[37] Under the Air Navigation Act, 1920, sec 9-2, however, the third party liability remained with the owner as long as any operative member of the crew remained in his employment. Possibly this meant no difficulty in the case of a demise (see further *infra* pages 175 and 206) for a period exceeding 14 days since the theory of the demise was that the crew became the servants of the charterer. Cf McNAIR, *The Law of the Air*, (The Tagore Law Lectures of 1931), 1st London 1932 p 152 — 153.

other kinds.[38] As to the United States, on the other hand, no cases are known,[39] and after the passing of the Civil Aeronautics Act in 1938, administrative policy appears to have been hostile to charters generally.[40]

The third category of contracts designated as charters were such as fell outside the ordinary rhythm of movements of the organized air transport systems. They are most often referred to as *special flight agreements*. As soon as the regular airlines were established, they were called upon to perform special services for which aircraft were particularly suitable. The one classic service was the transportation of great sums of money and gold, which governments during periods of political crisis greatly needed.[41] Other types of special flights were rescue expeditions such as the search of the ABA aircraft "Uppland", under charter to the Swedish Government, for the airship "Italia" lost in the Polar Region. The passenger group market was also tried by several airlines. The Lufthansa sought traffic among the passengers on the Norddeutscher Lloyd vessels approaching Hamburg[42] and the Imperial Airways sought a similar clientele on board the Cunard vessels approaching Cherbourg.[43] Instances of affinity groups chartering aircraft for travel to certain points are also reported; thus a German yachting association on the in 1933 arranged for its transportation to Copenhagen. The Zeppelin airships in late 1929 settled for a policy of chartering the ship to sightseers taking as many as forty on pleasure cruises over the Alps and even as far away as Spitzbergen.[44]

But if many instances of special flights occurred, the overall

[38] McNAIR 1st 153.

[39] It is, however, reported that Eastern Airlines during the thirties had the policy of leasing equipment from other operators in the winter, when such operators had a slack season but Eastern on the Florida tourist trade had a peak demand, thereby securing a low maintenance budget: SMITH, *Airways*, New York 1942 p 296. These aircraft, however, were operated by Eastern without any participation by the owners: PIRIE letter. It appears that labour union hostility must account for the fact that the crews did not go with the aircraft: GATES interview.

[40] In determining the amount of the deficit to be used in finding a carrier's need for subsidy, the Civil Aeronautics Board disallowed depreciation charges on such planes as were found to be in excess of the number required to operate the carrier's regular services: NEAL, 1943 31 Georgetown LJ 359.

[41] In *IATA 1919—1929*, The Hague, 20 (Lufthansa), 47 (ABA). 1951 Transport (Basel) 31 Aug p 5658.

[42] *IATA 1919—1929* p 22.

[43] 1936 Imperial Airways Gazette No 9 (Sep).

[44] VAETH, *Graf Zeppelin, the Adventures of an Aerial Globetrotter*, New York 1958 p 132. Cf KAISER, *Der Personenbeförderungsvertrag im Luftrecht*, diss Erlangen 1936 p 31—32.

significance of these flights was for a long time limited.[45] Resort to this type of service was hampered, it would seem, by economic considerations. The government subsidy policies of the early years were drafted to promote regular services rather than flying generally and rates quoted on the regular line services therefore could be made much lower — due to the subsidy — than could the rates of the special flights. The scheme of gearing the subsidy to route-kilometres flown was abolished at various dates in various countries[46] and replaced by general contributions. The phenomenon of discouraging rates also appeared in the United States. In all likelihood it prevailed there under the auspices of the mail subsidy at least until the advent of the second world war.[47] During the thirties, however, the increasing importance of the special flights was revealed by an International Chamber of Commerce resolution relating to taxi traffic[48] and by a continuous discussion in the Citeja as to the relation between such flights and the Warsaw Convention.

[45] Support for this view is found in *IATA 1919—1929* which supplies details for the period 1919—1929 relative to such flying as the airlines have compressed under the headline of "special flights". The most impressive figures are supplied by KLM (p 16) and ABA (p 47). KLM operated 80.000 kms of tourist flights in 1927, 99.250 kms in 1928. The ABA special flights during its then 5 years of existence are broken down into *i. a.* aerial trips ("circular journeys with a touristic character") involving in 1927 8.428 passengers, in 1928 10.251 passengers. The other companies only report for "several" (DDL) or "numerous" (Balair) special flights.

[46] For instance 1925 in Denmark, 1931 in Sweden.

[47] Pan American testified in a CAB investigation that, originally, charter rates were more expensive than scheduled rates: 22 CAB 803. In 1941 this was no longer the case. This may be inferred from the Air Traffic Conference of America filing with the CAB that year two tariffs entitled "Charter Fares for United States Government" and "Charter Fares for Others Than United States Government": Contract CAB No 183, filed 13 May 1941, and Contract CAB No 195, filed 17 Jun 1941, respectively. The impetus for adoption of these resolutions is believed to have been in part "informal complaints" received by the Board, and apparently referred by it to the Conference, to the effect that 'Chartered services have resulted in the sale of air transportation at less than published tariff rates.'" LUNDMARK letter. See also NEAL, 1943 31 Georgetown LJ 379.

[48] No 6 at the Washington meeting in 1931, 1931 2 JAL 376.

SUB-CHAPTER 2

# THE GOVERNMENT INTERMEDIARY — A WARTIME PRODUCT

Air transportation in World War II — government wartime control of air transport — government intermediary or government operator — destruction of airline's operator identity — Air France — requisition "en pleine propriété — destruction of identity confirmed by the courts — Great Britain — powers of Secretary of State for Air over BOAC — traffic organization — organization of minor companies — relationship more akin to French than to American solutions — governmental policy to retain operator's identity in Germany and United States — Lufthansa's *Regierungsflugdienst* — contract of 19 July 1940 — Lufthansa's identity upheld in litigation — similarity of American situation — governmental arrangements — American complications — war contracts — nature and tabulation of war contracts — letter agreements — fixed price contracts — cost-plus-a-fixed fee contracts — American influence on IRO's and ICEM's postwar air commerce.

World War II forced extraordinary progress and expansion upon air transportation. Transport by air became the normal means of long-distance travel. Thousands of transport aircraft were pressed into the service of wartime travel. Part of the transportation effort was carried on directly by the armed services but part was performed by the operating companies under some sort of governmental wartime priority control.[49] The latter alternative, however, meant that the governments placed themselves in an intermediary position between the airlines and the passengers or — in some cases — between the airlines and the shippers. This position involved that the government reserved for itself the determination of the traffic which the operator was to carry.

Only when the operator identity of the airline was destroyed by cooperation with the government were the legal implications of this intermediary position avoided. The prime example of such destruction of the operator's identity was Air France. In the course of the war this company was subjected to a number of requisition decrees. First, its personnel and equipment were requisitioned by the French Supreme Air Command in North

[49] COOPER, *The Right to Fly*, New York 1947 p 158.

Africa in 1942.[50] Then, in 1943, the General in Command of French Aviation in Africa requisitioned the total use of all civilian air services in Africa operated by Air France.[51] Later, again, by the Ordinance of February 24, 1944[52] and certain decrees of July 5 and November 15 of the same year implementing the Ordinance[53] all the assets of Air France were requisitioned and transferred "en pleine propriété" to the Government (at that time in Algiers). Under Article 3 of the Ordinance the whole of the company's resources of personnel and material were placed under the authority of the "Direction des Transports Aériens"[54] and integrated into the Réseau des Lignes Aériennes Françaises, an administrative agency, subordinate to the Air Ministry.[55] As was demonstrated in a number of subsequent cases, this requisition was sufficiently total to remove all operator quality from Air France.[56]

In Great Britain, at least the big airlines were at the complete disposal of the Secretary of State for Air. When the war broke out Imperial Airways and British Airways were on the verge of merging into a single corporation, BOAC, pursuant to the British

[50] Order No 8.205 of 16 Nov 1942. This order was later, by an Instruction of 5 May 1943 extended to apply also within A. O. F.

[51] Order of 13 Feb 1943. The same General, by one decision of 27 May 1943 decreed the militarization of the company and the transfer was completed on July 5 and 9 by the company's activities in this new capacity being renamed Réseau Aérien Militaire: see 1949 3 RFDA 120.

[52] 1958 12 RFDA 220.

[53] 1949 3 RFDA 118.

[54] 1949 3 RFDA 118.

[55] 1958 12 RFDA 290.

[56] Air France was made the target of a number of attacks as being responsible for accidents having occurred and errors being committed during the period of the requisition. In *Belmont v Air France* (Trib civ Seine, 16 Dec 1948, 1949 3 RFDA 118) — which case concerned damages for a fatal accident with one of the requisitioned Air France planes — the court pointed out that the company had been dispossessed of all its property as well as of any direction and control of aircraft and personnel. This requisition, accordingly, could not be found equal to the ones occurring in railway transportation where only the use of the services was affected but not the personality of the operator; at p 119. A similar holding had previously been pronounced by the Cour d'appel de Dakar (26 Mar 1947) in which it was indicated that not Air France but the Réseau Aérien Militaire Français "avait seul qualité pour donner des instructions" (1949 3 RFDA 120). The principle, again, was reaffirmed by the Cour d'appel de Paris in *Air France v Consorts du Chaylard* (1958 12 RFDA 287) in which case the court indicated that Air France had incurred no responsibility for the wrongful suspension during the requisition period of one of its officers but that all liability rested with the Réseau des Lignes Aériennes. Litigation therefore came to center on the question whether the competent court to try claims against the Government resulting from its operation of the Air France lines was a judicial or an administrative tribunal. See *Veuve Duclos*, Trib Confl, 27 Nov 1952, Rec 646; cf 1958 12 RFDA 224. *Herbin Case*, Conseil d'Etat, 20 Feb 1957, 1958 12 RFDA 72.

Overseas Airways Act, 1939.[57] Section 32 of this Act gave the Secretary the power to require "that the whole ... of the undertaking of ... the Corporation shall be placed at the disposal of the Secretary of State" and the corporation should "comply with any directions which may be given to them by or under the direction of the Secretary of State." These directives, which had been negotiated in advance, were now issued to the corporation and remained in effect until some time in 1946.[58] The directives were to the effect that the flying was administered from the Civil Aviation Department.[59] BOAC flew in accordance with orders received from the Ministry and received a deficiency grant in respect of their undertaking. The Ministry controlled all seats and Government passengers travelled on warrants, but private firms and individuals were billed and paid BOAC current fares.[60] The minor British companies were grouped together in special organizations[61] but "were kept in form as such and operated throughout the war, being subsidized by means of a deficiency grant as was BOAC."[62] When compared with the situation in the United States, which will be reviewed below, it may be concluded that at least the relationship between BOAC and the State "was more akin to that between the French Government and Air France than between CAB and the US carriers."[63]

In Germany and the United States, on the other hand, the governmental policy was to leave operator personality with the airlines. In Germany, as a practical matter, the only airline in existence was Lufthansa.[64] During the war the company operated a "Regierungsflugdienst" to the effect that the company accepted

[57] For text see SHAWCROSS & BEAUMONT 1st 486 nris 1170—1171. — As to the situation generally, see *Merchant Airmen, The Air Ministry Account of British Civil Aviation, 1939—1944* — Prepared by the Ministry of Information, London 1946 p 13; and WHEATCROFT, 1946 9 RGA 401; HIGHAM, 1959 26 JALC 11.

[58] Information supplied by Sir WILLIAM HILDRED, letter 4 May 1961.

[59] The management included *i. a.* the arranging of inter-carrier charters with foreign airlines: thus KLM aircraft operated the route to Lisbon for BOAC and Sabena the trans-Africa route for BOAC. See *Merchant Airmen* 22, 86. At times BOAC aircraft were placed at the disposal of the military forces, *e. g.* the flying boats Cabot and Caribou which were destroyed in the ill-fated attempt to invade Norway. See *Merchant Airmen* 23—24; SMITH, *Airways Abroad* 101.

[60] Information supplied by Sir WILLIAM HILDRED, letters 4 May 1961, 11 May 1961.

[61] See generally *Merchant Airmen* 21, 32.

[62] Information supplied by Sir WILLIAM HILDRED, letter 4 May 1961.

[63] As stated by Sir WILLIAM HILDRED in letter 11 May 1961.

[64] Deutsche Zeppelin Reederei ceased operations at the outbreak of the war: see VAETH, *op cit* 217.

such passengers as had received governmental orders to fly without extra formalities.[65] Besides Lufthansa, of course, the Luftwaffe operated air transports. The relations between Lufthansa and the Reich were controlled by a contract of July 19, 1940, which regularized *inter alia* the distribution of costs between the parties when Lufthansa chartered her equipment to the Luftwaffe, when government-owned equipment was chartered to Lufthansa and when Lufthansa operated government-owned aircraft in the *Regierungsflugdienst*.[66] It appears that in the latter type of service there existed no further contracts either between Lufthansa and the government, or between Lufthansa and the officials carried under the scheme.[67] In subsequent litigation, Lufthansa's identity as operator has been upheld.[68]

The picture in the United States was from one point of view not dissimilar.[69] The War Department arranged for some transportation. When such transportation was a military secret, it happened that information about the transportation was not given in advance even to those to be transported. Arrangements could be administered by independent governmental agencies.[70] On the other hand, the American situation was more complicated because of the number of aircraft operators. The War Department made the airlines participate under contract in certain operations to move men and materials into the war zones or other strategic points. The first war contract of this type made with United Airlines was approved on April 4, 1942. A few months later it was changed into a Military Transport Contract and later on into one Overall Contract, approved on February 11th, 1943.[71] The identity of the airlines participating in such operations has

[65] SCHLEICHER, 1943 12 AfL 5. *Nittka v Lufthansa*, 1958 7 ZfL 421, 1959 13 RFDA 195, see note 482 page 356.

[66] This information is based on a study of the remainders of the Lufthansa files.

[67] Cf RINCK, 1958 7 ZfL 308.

[68] *Nittka v Lufthansa*, 1958 7 ZfL 421, 1959 13 RFDA 195.

[69] On 1 Jun 1942, the number of aircraft available for use in commercial air transportation was reduced from approximately 325 planes to 166. The planes not retained in commercial service were either purchased by the government or used by the airlines for performing military services. See NEAL, *Some Phases of Air Transport Regulation*, 1943 31 Georgetown LJ 362.

[70] This practice was evidenced in the *Jane Froman Case* (*Ross v Pan American*, see chapter 4 note 95): all arrangements with the airline were administered by USO Camp Shows and Ellen Jane Ross did nothing but walk into the plane.

[71] MAYER, MEYER, AUSTRIAN & PLATT, *Corporate and Legal History of United Airlines, and its predecessors and subsidiaries, 1925—1945*, (20th Century Press) 1953 p 639.

been upheld in a number of cases.[72] Contracts of the latter kind came to follow particular lines as to their nature and tabulation. They generally consisted of letter agreements, *i. e.* ordinary letters and acceptances. Letters of intent were used where time did not permit the completion of negotiated contracts.[73] Such letters were established by the Government and addressed to the airline, which signed acceptance thereon. Normally, provision was then made for reimbursement of costs incurred by the contractor. If time permitted, formal contracts were established. These were of two types; fixed-price contracts wherein agreed prices or rates of compensation were specified, and "cost-plus-a-fixed-fee" contracts, under which the contractor received the fixed fee plus reimbursement for allowable expenses incurred and was provided with advances of funds to be used in performing the contract.[74]

The practices which had established themselves in the dealings between the American War Department and the private airlines came to influence parts of the post-war air commerce. Thus, the emigration agencies, IRO and ICEM, solved part of their transportation problem by relying on the services of the airlines. These services were engaged on a commercial basis under contracts which reflected the War Department letter agreements and cost-plus-a-fixed-fee contracts.[75]

[72] *Jackson v Northwest Airlines*, 1949 USAvR 225, 2 Avi 14.437; *Gill v Northwest Arlinies*, 2 Avi 14.890; identity also in issue in *Alansky v Northwest Airlines*, 2 Avi 14.377.

[73] MAYER, MEYER, AUSTRIAN & PLATT, *op cit* 636.

[74] MAYER, MEYER AUSTRIAN & PLATT, *op cit* 635.

[75] The International Refugee Organization (IRO) flew more than 35.000 persons from Europe to Australia, Canada, the United States, South America, and a variety of other overseas destinations, see HOLBORN, *The International Refugee Organization*, (Oxford University Press) 1956 p 466. An instance of a cost-plus-a-fixed-fee contract is described in THRUELSEN, *Transocean: The Story of an Unusual Airline*, New York 1952 p 127—128. The Intergovernmental Committee for European Migration (ICEM) made extensive use of letters of intent when chartering aircraft, see forms ICEM/shp/184 HQ 1463, and ICEM/shp/212 HQ/1865. The similarities may to some extent be explained by the organizations being staffed with American personnel.

SUB-CHAPTER 3

# THE POST-WAR ERA

## SECTION 1. WET LEASE OPERATIONS

### § 1. *Preference of lease*[76]

Utility of inter-carrier charters — financing problems — rise of aircraft cost — currency restrictions — seasonal demand

While the pre-war era had been dominated by features hostile to inter-carrier charters, the post-war period turned out to be governed by factors stressing the utility of this type of contract. Firstly, problems of financing made the lease a more attractive contract than the purchase. Aircraft sales prices rose rapidly — the cost of new equipment, once computed in thousands, was now computed in millions, and this feature, although caused to some extent by the galloping inflation, was mainly due to the growth of the size of aircraft. The common aircraft of 1930 was an 8-seater Fokker FVII;[77] its equivalent one decade later was the DC-3 of some 28 seats and in 1950 the general size was the 50-seater ship: the DC-4 or the DC-6 or one of the Constellations.[78] And, if expense by itself was no deterrent, it was made so by the post-war currency restrictions. Aircraft production was mainly American — at least as far as economical four-engine equipment was concerned — and had to be paid for in American currency which European nations had the utmost difficulty in finding. Both factors operated towards the preference of paying periodic limited rents rather than huge immediate purchase prices.

[76] The term "lease" in this sub-chapter has no precise connotation but indicates merely that in contrast to sale ownership is not affected. See further page 271 sq.

[77] LYBYE, *Det Danske Luftfartselskab gennem 25 Aar* 69 and 87, reports that the foreign airlines serving Copenhagen abandoned the Fokker FVII around 1929—30 and that DDL itself switched to the tri-motor Fokker FXII with 16 passenger seats in 1933.

[78] KNAUTH, 1947 ASAL 725, refers to the 21 passenger DC-3 as the mainstay of the airlines in pre-war days and deals with some changes moved by the arrival after the war of the 40 and 55 passenger types — the DC-4 and DC-6, the Lockheed Constellations, and others. — It will be recalled that the DC-3 aircraft originally was made to carry 28 passengers but soon this capacity was limited to 21 passengers.

Secondly, aviation generally was a feverish activity dependent upon seasonal and short-lived traffic demands which made the need for carrying capacity often not more than temporary. Leases then tended to be more favourable because they could be made to correspond closely to the periods of demand, while purchases left the operator with idle equipment to maintain after the expiration of the traffic flow. Thirdly, the anticipation of future technical developments made operators inclined to postpone expensive purchases until such time as the new constructions were fully developed, and to avoid investments in the meantime by working with leased equipment.[79]

## § 2. *Traffic demand*

Impact of aviation expansion — new services created more often — seasonal variations of traffic flow affect greater numbers of aircraft — decrease of number of aircraft types adds to seriousness of grounding — connection of aviation and political crisis

The dominating post-war feature was the enormous development in the quantity and quality of aviation. This giant increase projected the features of pre-war aviation on an ever increasing scale. This meant, among other things, that the general expansion also increased the field of leasing. New services were inaugurated at a great many points by a great many new airlines and in turn increased the demand for the equipment and the know-how of the already established airlines. This demand could most easily be filled by the latter airlines offering their services under a so-called wet lease contract, meaning the lease of aircraft and crew, sometimes even with managerial services added. Illustrative of such arrangements is the contract under which UAT leased equipment to the Greek Olympic Airways. By mixing crews on the flights a training programme for the Greek company employees was accomplished.[80] A similar agreement was the managerial

[79] 1952 AC Bull (Nov 21) 21: "Certain DC-4's are also available for dollars but even if dollars were forthcoming operators find the prices so high . . . that it would be uneconomical to buy and operate this aircraft, on what must be a relatively short term basis. Certainly charter operators acquiring DC-4's would be forced to think of DC-6's or similar size aircraft in the space of the next two or three years so the purchase of a DC-4 as a short term investment is not a very popular idea. This accounts for owners' preference to timecharter on a bare-hull basis." Similar ideas are found in the United States: the airlines in many cases did not wish to buy the surplus equipment, they preferred to rent it until more suitable airplanes became available. FREDERICK 4th 91.

[80] BRAURE interview.

contract under which Transocean ran the Philippine Air Line services in the Pacific.[81] Indeed, post-war arrangements of this type are commonplace.[82] The device, of course, also greatly mitigated the financing difficulties. Furthermore, the seasonal variations affecting the traffic flow came to be felt on a much greater scale than previously, and consequently increased the need for temporary additional services and thus expanded the usage of lease contracts. The traffic to be handled would not last sufficiently long to permit regular depreciation of purchased new aircraft. Moreover, the general concentration on a small number of aircraft types for the handling of the ever increasing traffic meant greater vulnerability in the event of the grounding of new equipment and a corresponding possibility of sudden needs for additional equipment during the time of the grounding. The Comet accidents are one instance of such groundings; it has been estimated that BOAC lost one third of its carrying capacity when its Comet fleet was grounded owing to the then inexplicable disasters that occurred on some of the Comet flights in 1953—54.[83] Finally, the expanded use of aircraft services, particularly as a means of mass transportation, led to a close connection between air commerce and political crises. Once aircraft were accepted as a means of carrying out great transport operations every political crisis resulted in calls upon aircraft operators to

[81] This contract is mentioned in *Transocean Air Lines, Inc., Enforcement Proceedings*, 11 CAB 350, at 358 and in 15 CAB 574. A colourful account of the contracting is found in THRUELSEN, *op cit* 66—88.

[82] Further examples: Agreement between CAVE and US Overseas Airlines 25 Jul 1951, mentioned in 1956 USAvR 452; Agreement between Eagle Aviation and Eskilstuna Omnibustrafik 4 Dec 1954, mentioned in 1961 USAvR 218, 1 Ark f L 255, 1960 NJA C 126; Fred Olsen's contract with Austrian Airlines in 1958, mentioned by PELADAN, *Inclusive Tours in Western Europe*, ITA Feb 1959 p 53. Compare WAGER, *International Airline Collaboration in Traffic Pools, Rate-Fixing and Joint Management Agreements*, 1951 18 JALC 192—199, 299—319; and SLOTEMAKER, *Cooperation between Airlines: Economic Aspects*, May 1959, Centro per lo Sviluppo dei Trasporti Aerei. Note in 1959 ITA Bull (13 Jul) IS 476. DUTOIT, *La collaboration entre compagnies aériennes*, thèse Lausanne 1957, offers a general discussion of the forms of collaboration and at p 107 sq, 195, reviews a number of inter-carrier contracts classified as "contrats d'affrètement."

[83] The first Comet accident occurred 2 May 1953 at Calcutta, the second at Elba, 10 Jan 1954. Thereafter all Comets were grounded for more than two months. Traffic recommenced 23 Mar 1954 but 8 Apr 1954 the third Comet disappeared above Stromboli. This time not only were all Comets grounded but further production of this aircraft was stopped. — Aviation history is full of groundings. When mention is now made of the grounding of the Vikings in June 1953 it is because this grounding brought considerable charter business to the Baltic Exchange where operators of Vikings subchartered their commitments to Dakota operators. 1953 AC Bull 24.

provide lifting capacity, while at the same time the airlines systems experienced an increased demand for their regular services and so became willing to employ temporarily the services of any aircraft not already directly affected by the crisis. Not only can airlines with idle equipment profit by contracts with the governments because of the immediate military demand — as was the case during the Berlin airlift 1948—49 and during the Korean airlift in 1950—51[84] —, but furthermore they can profit by the increasing demand for regular air line services by leasing their equipment to those airlines that are operating such services.

## § 3. *Aircraft supply*

Equipment policy of airlines — economic factors — room for operators providing aircraft reserves — military policy — early European underequipment — reasons — war agreement — failure of European production programmes — aircraft obsolescence

While traffic demand thus rose most irregularly, aircraft operators very soon experienced difficulty meeting the demand with aircraft of their own[85] and therefore responded positively to offers of aircraft on lease terms. Firstly, for economic reasons, airlines were not willing generally to maintain more aircraft and crews than were necessary to keep the scheduled services running and an indispensable break-down reserve.[86] Such a policy left room

[84] As a matter of fact, the continuous political parcelling of the world has been productive of a number of upheavals which have been most helpful in keeping the airlines flying. Almost every formation of a new State has brought a flow of traffic — Communist China brought the White Russian refugees in 1949 (THRUELSEN 127—137), the formation of Indonesia made most Dutchmen just as happy to get out in 1948 as the native rule in Congo made the Belgians in 1960; the creation of Israel brought a flow of immigrants by air in 1949—50 (IFTA Notice Sommaire 4 Apr 1949). The formation of Pakistan and India immediately brought forth a war between them in which the forces of both sides were served by one and the same operator, *Transocean* (THRUELSEN 162). The Hungarian Revolution in 1956 was followed by a stream of refugees overseas. At times these mass movements were left to be managed by one operator contracting for the whole business and engaging necessary extra capacity by charters with other airlines: in this way Sabena organized the Congo airlift. At times separate organizations were burdened with all or part of the movement: thus IRO was responsible for the White Russians, ICEM arranged for 133 flights with 9,664 Hungarians, and MATS brought 9,700 Hungarians on 110 flights between 11 Dec 1956 and 3 Jan 1957.

[85] While massive numbers of government surplus aircraft at first were placed on the market their capacity was soon outstripped by the tremendous traffic upsurge. BREWER states in *Air Cargo — The Big Breakthrough*, Seattle 1959 p 3: "There has been a world shortage of aircraft during the past fifteen years . . ."

[86] Such policy met with governmental favour. French independent operators who had ordered new DC-6 aircraft about 1953 had to dispose of their old equipment before the Government would allow them to take delivery of the new equipment: 1953 Avi C Mark Rep 301 (Dec 11), confirmed by SGACC. The regularly

for a new type of aircraft operator, who maintained the reserve fleet that could be used for additional services on the lines of the airlines systems. The existence of such a reserve fleet was appreciated by the military establishments as a valuable asset in times of political crisis and they therefore were willing to promote the affairs of such operators by governmental contracts relating to military needs of transportation (MATS charters, trooping contracts, etc.). Secondly, while not wishing to be underequipped, many European airlines during the first post-war years were so by necessity. This phenomenon was due mainly to the British-American wartime understanding to the effect that the British should cease to produce transport aircraft and concentrate on fighters and light bombers, while the Americans were to proceed with heavy bombers and big transports.[87] The repercussions of this cutting of production were not overcome for many years and the early failures of the European post-war production programmes — technical in the case of the Comet aircraft, economic in the case of the Armagnac aircraft — prolonged the situation which for a long time prompted European operators to queue for new equipment in the United States and to engage temporary carrying capacity wherever available, pending deliveries, or suffer the risks attendant on neglecting the traffic demands.

A special case of aircraft shortage was found in Germany where the victorious Allies prohibited the defeated Germans from possessing or operating aircraft.[88] This ban was not lifted until 1950 and then only to the very limited extent of permitting the Germans considerable to charter aircraft from foreign owners.[89] Under these conditions a number of German firms engaged in air commerce by chartering foreign aircraft on a time basis and then subchartering their capacity to German customers.[90] Some twenty

authorized transatlantic carriers were requested by the CAB in 1951 to engage more actively in transatlantic charters: "The Board does not expect these carriers to invest in new equipment to handle this peak traffic, but believes that they should make equitable arrangements to use the equipment and personnel of other air carriers when additional capacity is needed". CAB release 51—28.

[87] WHEATCROFT, *L'aviation de transport britannique pendant la guerre (1939—1945)*, 1946 9 RGA 405; COOPER, *The Right to Fly* 171—172 and note 7.

[88] Proklamation Nr 2 of 20 Sep 1945 nr 30: ". . . der Besitz . . . oder der Betrieb durch deutsche von Flugzeugen . . . sind verboten."

[89] Durchführungsverordnung Nr 12 (Luftfahrt) zu dem Gesetz Nr 24, Art 6.

[90] It appears that the use of the term "Chartern" in the Allied legislation involved the German activity being confined to so-called non-scheduled services. See 1956 ITA Bull 40 (Oct 29) 636 ND. See further *infra* page 197 note 308.

German undertakings were thus active until May 4, 1955, when the Treaty of Paris was ratified, lifting all bans and permitting these undertakings to acquire their own aircraft.[91]

Once the general feature of underequipment was overcome, the phenomenon of aircraft obsolescence opened up new perspectives. By keeping out-moded and written-off aircraft which were nevertheless fully airworthy and capable of operating for several more years, instead of selling these at discount prices to help finance the purchase of the necessary ultramodern equipment, an operator was able to maintain a sizeable reserve fleet at a limited cost.[92] Such an operator established himself half-way between the airline system trimming its capacity for maintenance reasons and the operator who ran no regular services of his own. While this operator might be unwilling to employ the aircraft of other operators on lease terms himself, he would, of course, not be unwilling to seek similar terms of employment for his reserve fleet when idle. The enormous investments in the jet equipment, furthermore, forced airlines to establish, for reasons of economy, new ways of cooperation permitting optimum deployment of each of these expensive aircraft among the companies.[93]

## § 4. *Crews*

Supply of aircraft and crew commensurate — diversity of aircraft types adds to the convenience of using of crews going with the aircraft — route-flying requires crews familiar with the route

While the disparity between the demand for and the supply of air transport thus opened a broad field for aircraft lease contracts, other factors operated to make crews go with aircraft under such arrangements and to overcome the labour union hostility which, at least in the United States, seems originally to have worked against the transfer of crews from one airline to another. Firstly — apart from the case of aircraft grounding — an airline short of carrying capacity would generally be short of crews

[91] 1956 ITA Bull 40 (Oct 29) 636 ND; and KRÜGER, *Der Begriff der "Charter" im Luftverkehr*, 1954 Flugwelt Jan p 9.
[92] SHENTON, 15 IATA Bull 59; Dreissen (of KLM) as reported in 1953 AviC Mark Rep (Dec 4). 300
[93] See *e. g.* the notes on recent commercial collaboration in 1959 JBL 353—354 and 1960 15 ICAO Bull 64—66.

too. Secondly, the concentration of airlines on as few aircraft types as was technically possible added to the convenience of making use of the services of the aircraft owner's crews — who were already familiar with the plane leased — rather than engaging in training programmes relative to equipment that would only be used for a short period of time anyway. Differences of instrument scaling and placing may have rendered such a policy favourable even in cases where the aircraft leased were of the same type as those of the lessee's fleet generally.[94] On the other hand, however, the safety aspect may make it desirable to have onroute flight manned by crews belonging to the company usually operating the route.

## SECTION 2. ENTRY OF THE IRREGULARS

### § 1. *Rise of the irregular industry*

The windfall of the surplus equipment — effect of fuel rationing — traffic carried — transatlantic services — equipment of irregulars — ship's crew traffic — return freight problem — expanding the powers of the aircraft commander — creation of air flights exchanges

One of the most remarkable changes in aviation conditions which were brought about by the second world war, was the rise of a completely new carrier category — the irregulars.[94a] Their operations were made possible by the surplus equipment available for purchase after the armistice. With this equipment at hand, and the existence of an enormous traffic demand while most surface transport equipment was destroyed in Europe and worn out in the United States, it was inevitable that great numbers of veterans, returning to civil life with the accumulated experience of the wartime air transport operations, should go into aviation with the surplus equipment to provide any type of service that could lawfully be offered. Since up to that time only regular services were regulated[95] their field was restricted to such services as were not regular — *i.e.* irregular. The development could only

[94] NETTERVILLE, *The Regulation of Irregular Air Carriers*, 1949 16 JALC 430.
[94a] The term "irregulars" was the one generally used in the United States. The British showed an early preference for the term "charter companies." Another much used term was "non-scheds". At a later stage the term "independents" gained more acceptance in European aviation.
[95] See further *infra* pages 63—75.

temporarily be delayed by the fuel restrictions imposed in Europe.[96] In the United States such restrictions were actually instrumental in promoting the success of the new industry since they hampered surface transport but did not extend to aviation.[97]

In 1947 the new industry was booming. The irregulars benefited from the peak demand and experienced almost no competition from other means of transportation. Already one year after the European Armistice there were about thirty different French irregulars flying mainly between North Africa, France and Great Britain. In the United States it was estimated at one time that some two thousand irregulars were active.[98] The traffic consisted to a large extent of airfreight, mainly emergency and high-cost goods and perishable agricultural produce. Besides this, a great variety of passenger traffic was taken care of, the carriers being able to benefit from the natural desire of people to travel after the compulsory isolation of the war. Much of the traffic was of a directly military nature or, at least, owed its origin to military dispositions as in the case of the flying of furlough personnel and dependants of the members of the armies of occupation. Another traffic offered in war-stricken Europe was the lift of emigrants to overseas destinations. It was found by officials in charge of emigration affairs to be more advantageous to fly certain categories of emigrants to their destination than to send them by ship.[99]

The transatlantic services were in a peculiar situation. While there existed a great demand because people on both sides of the ocean were connected since the war with close military, political and economic alliances, service could only be operated by means of certain equipment. European irregulars whose mainstay as to equipment in the early years had been the Dragon Rapide, German Ju 52's and DC-3's, could not make the transatlantic voyage without intermediary landings even with their biggest aircraft, the Liberators and Halifaxes. Very few of them had the DC-4's needed for such trips.[100] Such equipment was available

[96] In 1946 British flying was limited to 60 hours per month per aircraft. 1946 Air Transport and Airport Engineering No 3.
[97] KNAUTH, 1945 ASAL 885—886.
[98] Estimates varied widely. See further FREDERICK, *Commercial Air Transportation*, 2d Chicago 1946 p 224.
[99] HOLBORN, *The International Refugee Organization* 466—467.
[100] 1948 AC Bull-Annual Review for 1948 (Dec 30); 1949 AC Bull (Nov 1).

only to the scheduled airlines and some American irregulars and most of the traffic therefore went to these.

From some time around the summer of 1948, the repatriation and exchange of ships' crews came to be a cornerstone in the passenger traffic of the irregulars. The many ex-American vessels which at that time were delivered to European buyers provided ample opportunity for such operations over the Atlantic, and the service turned out to be useful also when English and other shipyards started to deliver new tonnage not only to owners in India, the Far East and West Africa, but also in Scandinavia and Continental Europe. The revival of Japanese shipbuilding contributed to the same end. Repatriation by air was equally useful in the case of old vessels being delivered to shipyards for scrapping and when the mere exchange of crews was involved.[101]

The main problem of the irregulars seeking to establish a profitable operation was to find return freight. Two solutions were introduced which, while active in opposite directions, came to characterize the era of the irregulars. One was to expand the powers of the captain of the aircraft, a development which was also promoted by the operational features of the time. Since the company administration could and need do no more than book the aircraft for its destination, undertake to carry the specific load and calculate the charge on the air distance from stop to stop in the straightest possible line, subject only to topographical features and a few political boundaries, the operation depended mainly on the captain of the aircraft who had to be, it was said, "something of a diplomat and business man, as well as being the commander of his aircraft and crew".[102] Some irregulars then empowered their captains to make direct deals with customers over freight charges[103] apparently confident that return freight thus might be found at reduced overhead cost. The other solution was the forming of "air freight exchanges" to

[101] The movement of ships' crews by sea was a normal practice of British shipowners before the war. Particularly to those using Chinese or Lascar crews this involved sending them well in advance of their expected requirements, and accordingly, too, keeping them on pay for a longer time than required. Very often they deserted. Air transportation meant that the crews could be taken on pay and flown to destinations with the minimum notice and the minimum waiting period at a destination — hence a considerable saving in time and money in spite of possible higher transportation costs. LEVI-TILLEY letter 16 may 1960.

[102] SAUVAGE, *Planning the Eagle's Flight*, Travel Topics, Eagle Supplement, p 4.

[103] LAMS. See 1947 51 Flight (5 Jun) p 532; also 3 *Instilling fra Kommisjonen til revisjon av Luftfartsloven*, Trondheim 1957 p 253.

attract traffic demand and enable the companies to combine contracts into profitable operations. Such exchanges were created in a rapid sequence although only two of them remain today.[104]

## § 2. *Decline of irregular industry*

Collapse of agricultural produce market — flag carrier airfreight competition — commodity rates — the struggle for passengers — irregulars encroach upon flag carrier traffic — coach traffic — tourist class response — flag carriers invoke regulation — British Labour Government — CAB 1947—1951 — French development — factors flattening difficult points: economic, political — the ATAF agreement — diversionary effects of political crises — the Berlin airlift — economic benefit as well as burden — political afterthought — the Pacific airlift — direct impact — indirect impact

After a few years the golden period for the irregulars drew to a close. The difficulties mounted[105] The revival of surface transport and the use of refrigerated cars took away most of the traffic with agricultural produce.[106] The flag carriers started to expand into the airfreight market generally, diverting to their lines most freight that could be accommodated on scheduled services. By 1947, airfreight competition over the Atlantic had increased

[104] The Baltic Exchange Air Market was created in London 20 Aug 1947. It was already mooted by 1938 but the plans were temporarily stopped by the war. This Exchange has survived the decline of the irregular era, possibly due to the fact that the British were the largest European owners of aircraft available for operations outside the scheduled traffic: see BEESON, Introduction to IABA Amsterdam Conference, 1954, under No 13 of Agenda. BIFAP, *i. e.* Bourse internationale de fret aérien de Paris, was established in Oct 1948. It has survived but only as an institution for collecting air freight statistics. The Antwerpen Air Freight Exchange, inaugurated 18 Jan 1949, has had no activity since 1956. The Air Flights Exchange of America in New York after prolonged preparations was created on 1 Jul, 1949 and was probably active at least to a limited extent until the spring of 1950. The last entry in the CAB files relating to this organization was in July 1950. ROSENTHAL letter 13 Feb 1961. The failure of this project was in all likelihood due to the existence of the ready-made domestic opportunities for air freight commerce on the American market. On 15 Nov 1955 the CAB approved the establishment by two carrier associations of the ACTA-IMATA Commercial Charter Exchange (E-9745, 22 CAB 765.): its activity, however, was confined to domestic operations. On 12 Nov 1959 the status of this exchange was regularized as the Independent Airlines Association Commercial Charter Exchange, IMATA having changed its name to that given in the title and ACTA having discontinued operations. The ban on international operations was lifted at the same time. E-14 638. Two shortlived exchanges opened in Rome and Milan, respectively, in 1950.

[105] The irregulars were always at a competitive disadvantage, being unable to master the currency difficulties in the way offered to the flag lines by the IATA clearing house. ZAHN, *Stand und Entwicklungsfragen des Luftgüterverkehrs, 1948*, Berne diss 1950 p 34.

[106] See 1949 AC Bull (Aug 4); and 1953 IFTA Refléxions (Jun 1) p 2—3.

substantially.[107] In November 1947, KLM established a Special Flights Department.[108] Commodity rates[109] established through the IATA machinery in 1949 were instrumental in the conquest of the market. Having raised airfreight tariffs generally by 10 per cent in 1951[110] the IATA airlines, after some hesitation,[111] came to the conclusion that rates must be reduced in order to attract more freight and adopted at the Honolulu Conference, November 1953,[112] a commodity rate system designed to attract bulk freight. The success of these tariffs duplicated a development which had already taken place within the United States.[113] The defeat of the irregulars on the airfreight market, however, necessitated a more intensive cultivation of their share of the passenger market.[114] They were able to provide low-cost travel by using methods inspired by the emigrant-carrying operations and generated a new type of service, sometimes called coach-class (aircoach, colonial coach). The IATA carriers, however, became aware of this new market for air transportation and attempted to conquer some of it by the introduction of the

[107] BOAC and Air France showed substantial cargo increases, KLM started all freight flights and Sabena started cargo services over the Atlantic, all in 1947: 15 CAB 587.

[108] 1951 Transport (Basel) (Aug 10) p 5540.

[109] As to the IATA rates systems, the following information is supplied by RÖSSGER, *Luftverkehr und Spedition, Forschungsberichte des Landes Nordrhein-Westfalen* Nr. 882, (Westdeutscher Verlag) Köln und Opladen 1960 p 37: "In direktem Gegensatz zueinander stehen die zwei Ratensysteme der IATA, das "flat rate"-System und das "differential rate"-System. Das "flat rate"-System, das in Nordamerika für die sogenannten "domestic carriers" angewandt wird, kennt keine Anpassung der Tarife an den Wert und die Art der Beförderung. Das "differential rate"-System der IATA stützt sich auf drei Ratengruppen: die Allgemeinen Raten (General Cargo Rates), die Warenklassen-Raten (Classification Rates) und die Spezialraten (Specific Commodity Rates). Vielfach wird noch eine vierte Gruppe genannt, der Werttarif (Valuation Charge). —.—.— Die Spezialfrachtraten wurden geschaffen, um den Verladern weitere Anreize zum Versand von Waren auf dem Luftwege zu geben. Diese Raten betragen im Durchschnitt 50 % der Normalrate. Sie können für bestimmte Warengattungen auf bestimmten Flugstrecken angewandt werden." See further *infra* page 43.

[110] 1951 Flight (19 Oct) p 520; 1952 Avi C Mark Rep (Feb 22) 208.

[111] 1953 AviC Mark Rep (Oct 23) 294. KLM lowered rates 55—60 % in 1953.

[112] Effective 31 Mar 1955.

[113] See TORGERSON, *History of Air Freight Tariffs*, 1948 15 JALC 47—63.

[114] 1950 Air Fr Mark Rep (Oct 27) 139: "At the present time the movement of passengers comprises the major part of charter companies' traffic. The lack of freight enquiries is an indication of the increased freight capacity of the regular airlines and the widening scope of commodity freight rates . . ." 1953 AC Bull (Aug 21) 31: "Once again the main enquiry has been centred round passenger movements . . . The decline of freight has been one of the most significant pointers of the market this year, and can probably be attributed to the increased services which the IATA lines are now offering and to the general tendency of IATA carriers to reduce freight rates."

transatlantic tourist class in 1952. While thus attempting to make their services so attractive to the air traveller that the irregulars could not hope to compete, the IATA group extended their campaign to force the latter out of the air transport picture by calling upon the regulatory bodies of the various nations to tighten up the rules under which the irregular carriers were able to operate.[115] Some quarters responded eagerly to such request for new restrictions or at least — as the irregulars felt — an adverse interpretation of the existing regulations. The British Labour Government's conception of control over the irregulars and their activities was praised by the IATA Traffic Committee in 1949[116] and the ambitions of the CAB through the years 1947—1951 were revealed by a series of enactments implying a drastic curtailment of the operations of the irregulars — indeed the final expression of this policy, the so-called 3 and 8 rule of 1951,[117] involved restrictions which would have left the irregulars' equipment semi-idle.[118]

The French situation here may be considered separately, for although the explanatory comments on the 1953 legislation speak of "une concurrence qui menace de devenir anarchique", the situation at that time had already been stabilized under the influence of mainly economic factors. Throughout the years 1949—1952 the number of irregulars was constantly decreasing while their size increased.[119] The almost permanent political crisis of the French Union ensured an abundance of traffic demand from which the irregulars were able to profit under governmental contracts[120] and their operation of scheduled services came to be a recognized fact. In 1950, a preliminary agreement of cooperation (ATAF) was entered into by Air France and the private companies, which eventually led to the assignment of geographical sectors of operations to each carrier, within which he was free to carry any traffic he could generate.[120a]

[115] See note by GRAHAM in New York Times of 20 Oct 1950, as quoted in 2 *Antitrust Hearings* 1124.
[116] 10 IATA Bull 92.
[117] Amendment to Economic Regulations Part 291, adopted 2 Mar 1951.
[118] KNAUTH, 1951 ASAL 524.
[119] In 1949 they were 30, in 1950 20 and in 1952 but 5.
[120] 1950 IFTA Réflexions (Dec 4); 217 IFTA NT 4.
[120a] ATAF Agreement, *i. e.* "Accord de Coopération entre Transporteurs Aériens de l'Union Française", signed 9 jan 1950; see generally 217 IFTA NT — *Un effort indispensable d'organisation coopérative nationale — l'accord de coopération entre transporteurs aériens de l'Union Française (A.T.A.F.).* Mar 1952.

Parallel with the economic and regulatory development, however, the impact of another factor made itself increasingly felt. On June 21, 1948, a Russian edict barred all surface traffic between Berlin and the Western occupation sectors of Germany. The resultant staging of the "Luftbrücke" — the Allied airlift to Berlin — meant the employment of British and American irregulars in great numbers on the airlift until the Russians, on May 12, 1949, lifted their blockade.[121] While aircraft were at times released from this service and a minor airlift continued even after the blockade was terminated, the airlift had most important repercussions on the development of the irregular industry generally. On the one hand, the airlift was a benefit to the industry since it meant full-time employment of its aircraft at profitable rates. On the other hand, the irregulars left the airfreight market unattended during their service on the airlift and this may have contributed to their ultimate defeat on that market. The very fact, however, that the great flocks of aircraft having served so successfully on the airlift failed to find employment after its termination and were therefore facing extermination, led to political afterthoughts. One year later, just before dawn on June 25, 1950, the North Korean Communists crossed the boundary in an assault on South Korea. The intervention of the United Nations' forces in that conflict was supported by an aerial supply bridge which came to be known as the Pacific Airlift or the Korean Airlift. While this operation directly affected only four-engined aircraft which could make the long hops across the Pacific and which were mainly available to the scheduled airlines and a few large irregulars operating over the Atlantic,[122] all irregulars were affected indirectly because the Korean crisis came to mean a general expansion of the demand for air transportation services. The crisis generated a greater military need for air transportation within the United States, a need which to a great extent was filled by contracts with

[121] See generally RODRIGO, *Berlin Airlift*, London 1960. A list of airlines working on the civil lift is found at p 226—227, a chronology of the development of this lift at p 223 sq.

[122] HOLBORN, *The International Refugee Organization* 467: "By August 1950 . . . The three non-scheduled carriers formerly used for compassionate air lifts from Europe to the U. S. were taken back by the U. S. defence forces for the Korean lift after providing a few flights only . . ."

the irregulars.[123] It increased sale and lease prices relating to aircraft to such an extent that many irregulars, having experienced the increasing hostility in regulatory quarters, preferred to sell out without great losses at the new prices, while others were able to divert their equipment from freight services and find a more profitable use for it under lease contracts with scheduled airlines.[124] The Korean Armistice was signed at Panmunjon on July 27th, 1953 and the airlift continued until May 1st, 1954. But the political impact of the airlift remained, bringing about a new policy which aimed at encouragement rather than suppression of the irregulars.

## § 3. *Conversion of industry structure*

Political afterthoughts — admission to regular services — France: geographical distribution — Britain: operation of new routes — United States: regular services within frequency limits — appreciation

By a change of governmental policy — due to afterthoughts following the Berlin and Korean crises as well as a realization that strict imposition of the irregularity requirement meant economic death — a new era was inaugurated in which carriers were more generally permitted to operate regular services subject to various restrictions. The French took the lead but were soon followed by the British after their change of government in 1951. The Americans took similar steps in 1955. The French system meant that each operator received a geographical sector within which he was free to carry out such flights as he saw fit. The British change was governed by a desire to enlarge the field of operations open to the private companies only within the framework of the existing legislation:[125] it meant that selected companies were allowed to operate regular services over certain new routes in the capacity of associates of the nationalized airlines and that any all-freight service was favoured.[126] The American system, finally, meant that operators were licensed to conduct domestic regular services within certain frequency limits. All in all, the previous division of air carriers into the scheduled airlines and

[123] *Large Irregular Air Carrier Investigation*, 1955 USAvR 563—564.
[124] BREWER, *Vision in Air Cargo*, Seattle 1957 p 12. Compare *US Overseas v CAVE*, *infra* pages 77—78.
[125] Cf HILDRED, 16 IATA Bull 30.
[126] Cf 1952 Avi C Mark Rep (Jun 6) 223.

the irregulars came to be abandoned more or less completely and the latter category was in many respects assimilated to the former. A reflection of this change was the joining of the IATA by many of the former irregulars.[127] Even the name "irregulars" fell into disuse, irregularity no longer being characteristic of their operations.

Parallel to this evolution was another one, on the financial side. The new operators of regular services were now caught in the maelstrom of aircraft obsolescence and equipment financing and had to attract ever greater amounts of investment capital. Shipping lines, realizing the potentialities of air transportation or merely desirous to secure control of airline competitors generally, were now anxious to engage in the airline business. As a result, when the period drew to a close a number of British and French shipping lines had secured control of the bigger independents, as the former irregulars came to be called.[128]

## § 4. *Air taxis*

Early meaning of "air taxi traffic" — increase in size of aircraft — small aircraft carriers classed separately in the United States — introduction of "air taxi operator" as a term — lifting all regularity and frequency restrictions — French adoption of scheme — 1956 Paris Multilateral Agreement — note on German and Swedish use of term

At one time, when most planes were of small size, "air taxi" traffic as a term was loosely applied to all transport operations for hire that could not be classified as regular line traffic and were not private flying.[129] When the size of aircraft grew, the concept of air taxi traffic did not grow commensurately: in the minds of most people the air taxi concept continued to be linked with to the small aircraft. As a result, while it was admitted that the air taxi operation was a mere variation of the type of service performed by the irregulars and generally referred to as "charter

[127] *E. g.*, TAI and UAT joined in 1952, Hunting Clan Air Transport in 1953, Airwork in 1955, Eagle Airways in 1957.

[128] In France Chargeurs Réunis secured control of UAT and Cie Générale Transatlantique, similarly, secured control of Cie Air Transport. This was followed in Great Britain by the P & O company taking a substantial interest in the Silver City group and the Furness Withy group securing control successively of Airwork Ltd, Transair Ltd, Air Charter Ltd. Lately the development is reflected in Eagle Aviation changing its name to Cunard Eagle Airways. LEVI-TILLEY letter 16 May 1960. The participation of Cie Messageries Maritimes in TAI was approved by decree 5 Jul 1955.

[129] Cf MEYER, 1954 3 ZfL 249.

operation",[130] the air taxi operators were singled out under certain regulatory schemes to form a category of their own.

By a CAB revision of the so-called Non-Scheduled Exemption Order in 1947, preferential treatment was given to such American aircraft operators as were classed as "small irregular air carriers" (Part 292.1). Qualified for such classification were operators of mainly such aircraft as had an allowable gross take-off weight not in excess of 10,000 pounds — 4,5 tons. The regulation was motivated by a finding that, of the total revenue passenger miles performed by irregulars, only some ten per cent were imputable on the operations of aircraft of about this size, and that, hence, such operations were "limited in scope" and did "not represent a serious threat to certificated operations".[131] Some years later the name of this regulatory class was changed to "air taxi operators" and its members were permitted also to operate without regard to the frequency and regularity of operations; it appears that even scheduled operations were permitted whether in competition with the certificated air carriers' operations or not.[132]

The distinction thus established between operators, based on their economic and technical conditions, spread into French aviation and a class of small-aircraft operators selected for more liberal regulation appeared in the legislative projects from 1949 on[133] and was eventually created by a decree of 1953.[134] From French aviation the pattern spread into the international field by adoption in the 1956 Paris Multilateral Agreement[135] of the so-called "taxi-class passenger flights", meaning such flights as were to be carried out by aircraft not capable of accommodating more than six passengers.[136]

[130] Cf SAINTON, *Lecture* 1957 p 5; GURNEY in *Hearings on S 2647* p 688.
[131] 1947 USAvR 197 sq.
[132] TABOR, 3 *Antitrust Hearings* 2113. Part 298 — Classification and exemption of air taxi operators, 11 Jan 1952.
[133] Projet gouvernemental, 1949 3 RFDA 80. Projet de la Commission des moyens de communication et du tourisme de l'Assemblée Nationale, art 21: 1950 4 RFDA 64.
[134] Art 4 - 7: "Ne sont pas soumis aux obligations du présent article, les transports de plus de six passagers effectués à l'aide d'aéronefs dont le poids est inférieur à un maximum fixé par arrêté du Ministre chargé de l'aviation civile." See 1953 16 RGA 418. The provision is re-enacted in C Avi art 129. In 1958 the maximum weight was fixed at 5,700 kilograms.
[135] Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, signed in Paris 30 Apr 1956, ICAO doc 7695.
[136] Art 2. The flight must be of "occasional character", performed "on request", the destination must be chosen by the hirer and no so-called resale of transportation was to be tolerated.

In German and Swedish regulatory language, however, the original meaning of the term "Taxi" has been preserved. It designates any call-and-demand service ("Anforderungsverkehr") relative to passengers in which the ordering party demands the aircraft for the carriage and selects the destination.[137] As a result a Swedish operator in 1958 felt free to advertise a "taxi" service with DC-3's between Malmö and Lübeck.

## SECTION 3. ROLE OF THE MIDDLEMAN

### § 1. *The travel agency*

Travel agency money — travel agency combinations — overpassing international boundaries — emasculating frequency and regularity restrictions — travel agencies as independent intermediaries for reasons of profit only — ticket and charter sales — outward appearance of carrier — IATA reactions — no-resale rule — CAB reactions — 1951 order and policy — inclusive tours — definition — features — European boom in inclusive-tour-traffic — IATA reaction — producers split into groups

In the period of abundant demand for and limited supply of air transportation following the second world war,[138] resourceful travel agencies commenced to engage more actively in air transportation, at times by way of direct financing of aircraft operators.[139]

The conditions of the time made the interposition of a travel agency between an irregular and its passengers a particularly attractive device because the restrictions imposed on the irregular's operations did not apply to the travel agency. Charter con-

[137] Germany: see 1956 5 ZfL 143. Sweden: see BCL D 3.2.1: "Med taxiflyg förstås . . . tillfällig sträckflygning, som mot beställning utföres för befordran av passagerare mot ersättning."

[138] Before the war travel agencies' activities in an independent position appear to have been very limited. Thos. Cook & Son, Ltd is claimed to have arranged the first escorted tour by air in 1927 (PUDNEY, *op cit* 148), DE VOS was in 1932 prepared to discuss the case of individuals relying on the services of a commercial firm to organize for them a tourist voyage by air (1932 1 RGDA 586), and KNAUTH in 1936 hinted that the "transporteur" of the French air legislation, being described as the party who contracted with the passenger, might turn out to be the American Express Company or Thos. Cook & Son (1936 7 ALR 267) — perhaps a reflection of IATA's adopting a decision the same year relative to inclusive tours to the effect *i. a.* that such tour tickets could only be sold by travel agencies, not by air traffic companies. 25 IATA Inf Bull 16. No further interest in the case has been found in the aviation literature.

[139] Cf BRICE, *The Charter Business*, 1948 The Aeroplane 139 col 1: "a number of travel agencies . . . are most anxious to get into the aviation business . . ." Also PARDINEL interview (Michelson & Cie and Cie Languedoc-Rousillon); PELADAN, *op cit* 61—62 (Aeropa and Aerotour, Tigges Fahrten and Trans-Avia Flug); *Svenska Aero v Westlund* 1961 USAvR 218, 1 Ark f L 256 (Skandinavisk Resebureau and Svenska Aero).

tracts between travel agencies and irregulars permitted a combination of solicitation and operation of traffic into a service that would have been reserved for the regular airlines if what was combined had been integrated. Charters with travel agencies made overpassing international boundaries easy. A travel agency could, by chartering an aircraft, provide for the carriage of passengers from a foreign point into the country, and, having selected the terminal of a foreign airline as the foreign point, extend that line into the country without bothering about any right for such extension.[140] The travel agency could provide a regular traffic clientele for an airline service operated by an irregular between foreign points by chartering its aircraft and filling it with passengers solicited domestically and flown to the nearest foreign point of the line by some other regular carrier.[141] The services of a travel agency which was organized as a multi-carrier ticket agent could free the irregulars from the imposed frequency and regularity restrictions. In the actions against the so-called North American Combine it was revealed that all carriers operating in the combine relied on the services of one single sales and ticket agency which so combined their flights that, although none of those carriers taken by itself could be said to have operated regularly, in combination they presented a frequent and regular service.[142]

But the greater activity of travel agencies was not necessarily due to a policy of evading restrictions as to traffic rights. Certain American agencies adopted the practice of selling a planeload of tickets for a certain flight and then inviting bids from carriers to operate the flight. In one case the travel agency sold its tickets for sixty dollars each and contracted for the flight with an operator charging eleven dollars per head, the difference being the agent's profit.[143] Unsatisfactory airline financing could result in nothing but the mere technical operation remaining in the hands of the operator while the travel agency, having contracted for the operation, held itself out to the public as being the actual carrier. The possible reason for this was that the travel

[140] *Ackroyds Air Travel Ltd v Director of Public Prosecutions*, 1950 1 All England Law Reports 933.
[141] 3 *Antitrust Hearings* 1806. *Air America, Inc. Enforcement Proceeding*, 18 CAB 393.
[142] *Hearings on S 2647* p 1060 sq.
[143] 3 *Antitrust Hearings* 1805.

agency wanted to retain for itself the benefit of the expenditure on the operation's good-will.[144]

The appearance of travel agencies as independent intermediaries between carriers and their passengers created adverse reactions among the IATA carriers. Holding that the travel agency's only function as a charterer could be the retailing of the charter transportation by sale of individual seats to the travelling public and that such retailing must mean wholesale diversion from scheduled to charter services,[145] the IATA carriers excluded him by the *no-resale rule*[146] from entering into charters with themselves. The rule, as inserted in the first edition of the 045 Charter Resolution,[147] provided for the stipulation in every charter contract that "the party to whom such space [*i.e.* space in chartered aircraft] is sold will not resell or offer to resell it to the general public at less than IATA fares and rates." When this formulation of the rule proved not to be adequate[148] the travel agencies were fought with a new version to the effect that no charter should be made with "a person engaged in the business of providing or soliciting passenger transportation"[149] and later, "with persons engaged in . . . soliciting carriage".[150]

Also the CAB reacted adversely to the new activities of the travel agencies. After some hesitation[151] the Board took the road of excluding ticket agents from chartering aircraft by means of directing the air carriers not to enter into charter agreements with such agents. An Order to this effect was issued in 1951

[144] See *e. g.* the findings of the Court of Appeals in *Jeantelot v Michelson & Cie* 1953 7 RFDA 99, 1953 16 RGA 176, and of the CAB in *Southeast Airlines Agency Compliance*, E-11 412 p 5 sq.

[145] *Off-Route Inv ExD* 25.

[146] See further *infra* pages 103—105.

[147] On the IATA Resolutions, see *infra* pages 100—108. On the 045 in particular, see *infra* pages 101 sq.

[148] BRANCKER, 14 IATA Bull 83.

[149] 1951 issue for the Americas, clause 6: "no charter of an aircraft shall be made for the carriage of members of the general public", and clause 1-e: "a charter for the carriage of passengers shall be presumed to involve 'members of the general public' in any case where . . . the charterer is a person engaged in the business of providing or soliciting passenger transportation."

[150] Issue 19 Sep 1952 clause 2-b.

[151] In 1949 the CAB circulated for comment throughout the industry a proposed plan of control whereby, in effect, no ticket agent could represent more than one irregular carrier at a time without prior Board approval. Ultimately, however, this proposal was rejected. Se NETTERVILLE, 1949 16 JALC 425. By amendment to the Civil Aeronautics Act, in 1952, the Board acquired certain direct powers over ticket agents. See further *infra* page 94.

relating to the certificated airlines,[152] and the same year the Board publicly advised all travel agencies that they would not receive authority to enter into charter contracts relating to transatlantic flights touching an American point.[153] The Board has continuously adhered to this policy.[154]

Notwithstanding these hostile reactions the travel agencies moved further to exploit the potentialities of activity as independent middlemen by engaging in the inclusive tours business. The inclusive tour is a tour where the passengers pay an inclusive sum for their travel, hotel accommodations and other facilities.[155] The travel agency organizes the tour, which is sold as a ready-made product. The tour is so impressed by the result of this organization that the various ingredients in the tour, such as carriers, hotels and restaurants, fade almost into insignificance as compared with the qualities of the complete tour.[156] The organizing activity is of course time-consuming. As a result the interval between the time when the agency contracts for the transportation with a carrier and the time of starting the operation may be considerable.[157] Selling the tour to the public, on the other hand, does not take place until fairly late; sometimes the last participants are booked only a few weeks before the operation is scheduled to start. The identity of those travelling on the tour

[152] Under Part 207. 1-a-2 certificated carriers could not lawfully enter into a *charter* contract with a travel agency. Such a contract might, however, fall into the category of "special service" but the Board, which required advance notice of any such service, then could suppress it at any time as not being in the public interest: Part 207.9.

[153] 1951 Transatlantic Charter Policy, rule 4: "No exemption will be issued to indirect carriers of passengers."

[154] In the *Acta-Imata Charter Exchange Investigation*, 1955, travel and ticket agents and tour conductors were precluded from any part in arranging charters on behalf of passenger groups: ExD 95, 22 CAB 827; E-9745 p 13, 22 CAB 774. In the *Large Irregular Air Carrier Investigation* the CAB announced its intent to "effectively exclude charters generated by ticket agents for the purpose of selling individual tickets": 1955 USAvR 566. See also *Foreign Off-Route Charter Service Investigation*, 1956—58, E-12 945/6 p 13.

[155] See 5 ATAC Rep 10, 31. For American terminology, see 1947 USAvR 210, and 3 *Antitrust Hearings* 1793.

[156] A practice sometimes adopted which fully reflects this character of the tour is that a travel agency issues a ticket for the tour which only indicates the name of the agency but no others. Such tickets were used for instance in *Lövgren v Riksåklagarämbetet*, 1953 NJA 688, by Scandinavian Touring: LÖVGREN interview.

[157] In aviation the time lapse may extend to half a year or more. Cf 1957 Avi C Mark Rep (May 10) 518: "Each year brokers are finding it necessary to arrange their clients' summer tour programmes more and more in advance to combat the comparative shortage of equipment available for this type of work . . ."

therefore cannot be known at the time the travel agency contracts with the carriers.[158]

Excursions and tours had long been an ordinary feature of surface transport[159] and indeed arrangements for this type of commerce are found even in pre-war aviation.[160] The rise of the irregular industry after the war meant quite new possibilities, however, inasmuch as prices and destinations could now be arranged freely without regard to the routes and rates of the regular air carriers. New organizations not associated with the IATA group started to operate tours selecting as destinations new holiday resorts which were not served by scheduled air services.[161] Vacation flights formed a good source of revenue to aircraft operators in the early post-war years in both the United States and in Europe, although the European currency restrictions sometimes interfered.[162] As the airfreight volume offered to the irregulars shrank they took a livelier interest in developing the passenger trade and some time about 1955 this trade started to boom. Instrumental thereto were, it would seem, the end of the Korean crisis and the generalization of the paid holiday, bringing vacation travel into the reach of the many.[163]

Travel agencies and aircraft operators were both prepared to reap the harvest. As early as 1950 the IATA operators took precautions to be able to compete for the new market by making an exception for inclusive tours from the no-resale rule and the

[158] 7 ATAC Rep 12.

[159] Good information about this industry is found in PUDNEY, *The Thomas Cook Story*. For the difference between "excursion" and "tour", see that work p 108. The account of Thomas Cook's early experiences, p 72—111, brings out the travel agent's vacillation between being active as an independent middleman and serving as a mere dependent auxiliary to the carriers. PUDNEY submits (p 110): "As the railways merged into larger amalgamations, their business was becoming more stereotyped. There was less latitude for outside individual enterprise than in the more informal days of the numerous smaller lines." Se also p 135. A History of the German Travel Agencies is under preparation by the German Reisebüro-Verband, see KLATT & FISCHER, *Die Gesellschaftsreise*, Köln etc 1961 p 21.

[160] See *supra* page 34 note 138

[161] Mr. LEVI-TILLEY advises me by letter 16 May 1960: "The first real inclusive air tour was launched to Calvi (Corsica) in 1950 by an enterprising promoter who subsequently opened up Alghero (Sardinia), Oporto (Portugal) etc. Following these pioneering efforts scheduled air services were subsequently operated into most of these places, but had it not been for the foresight of such pioneers it is doubtful that the European network of inclusive air tours that we know today would have come into existence at all, or at least on such a vast scale."

[162] After the 1949 devaluation the traffic declined temporarily, see 1950 AC Bull — Annual Review 1949 p 5.

[163] PELADAN, *Inclusive tours in Western Europe* 8, 42, 53, 85.

general fare system.[164] Subsequent action sought to confine the position of the travel agencies operating inclusive tours to that of a mere agent of the carrier.[165] Tour operators therefore were split into two factions, one cooperating with the IATA carriers on their terms, the other contracting with non-IATA air carriers under charterparties.[166] The former faction contained, it would seem, great and well-established houses such as Cooks to whom inclusive tours were but a sideactivity, and smaller IATA approved agents who cooperated with the big IATA airlines for the sake of convenience. The other faction mainly attracted travel agencies specializing in inclusive tours.[167]

## § 2. *The air freight forwarder and the air cargo consolidator*

American freight forwarding — expansion into aviation — the *Universal Case* — CAB temporary authority — domestic air freight forwarders and irregulars — international air freight forwarders — need for international air freightforwarding operations — experimental period — international air freight forwarders and irregulars — regard to IATA — IATA response — reversal of CAB policy — European groupage — early appearance in aviation — 1953 start — IATA reaction — the Honolulu consolidator — air carriers' auxiliary — growing too powerful — IATA attack by way of the Mixed-Consignment Rule

In the American air cargo field a deliberate policy was adopted to foster a class of independent middlemen — the freight forwarders. Such middlemen had already existed in some types of surface transport. The freight forwarder was characterized by his offer of transportation services to the general public without himself engaging in the haulage operations. He owed his existence to the fact that the rates per unit weight were differentiated according to the size of the shipment. This rate pattern enabled him to solicit small shipments, consolidate them into big ones, contract with the carrier for the transportation of the big shipment at a rate which was smaller than the aggregate of the rates he was able to charge each shipper, and make a living out of the "spread" between these two rate figures.[168]

[164] 045 Charter Resolution, issue 22 Mar 1950, clause 3.

[165] The system means that the airline states the fare to be paid by the traveller and that the travel agency's profit only may extend to a commission on the aggregate of such fares. The agency form is imposed by Resolution 810e, the fares are governed by Resolutions 084b and 084h. A minimum fare is set, providing that the total price should never be less than equal to the lowest applicable fare for the type of service available to the public on the same route.

[166] PELADAN, *op cit* 13—14; DEWEZ interview.

[167] PELADAN, *op cit* 13—14. As to the more recent developments, see COCOLI/3—WP/4, 6/3/61.

[168] WESTMEYER, *Economics of Transportation*, New York 1952 p 650.

The United States boom in air cargo traffic following the second world war matured freight forwarding for expansion into aviation. Under the existing legislation, however, air freight forwarding could not be undertaken lawfully unless licensed and in 1942 this requirement was enforced by the CAB in the *Universal Case.*[169] Six years later, in 1948, the Board granted to applicants a number of licences in the form of letters of registration; in view of the experimental conditions of the new industry, however, authority was limited to domestic operations and to a five-year period.[170] However, notwithstanding the attacks from the certificated carriers, arguing that the new intermediary could organize regular services not subject to control — as could the travel agents — the air freight forwarders were not prohibited from contracting with the irregulars.[171] In 1955 the organization of the air freight forwarders was normalized and integrated into the general CAB system of regulation.[172]

The Universal decision moved a number of applications for authority to engage in international air freight forwarding operations touching the United States. Applicants were, it appears, mainly ocean forwarders desirous to expand into the new field.[173] The Board's belief in the need for international air freight forwarding operations was reflected in the decision by which it granted a number of these applications; it was indicated that the complexities of export and customs procedures, and the transfer and warehousing delays at the international gateways were all arguments in favour of creating an air transportation expert to whom all the intricacies of transocean shipments could be relegated and who could serve as a shipment expediter, particularly since the need for such services could not be met by "the direct air carriers nor by freight forwarders operating in other than a common carrier capacity"[174] — *i.e.* as mere

[169] 3 CAB 698.
[170] 9 CAB 473.
[171] The attack provoked a Board notice for rule-making in June 1949, the rule was that the air freight forwarders must not use the services of the irregulars: WESTMEYER, *op cit* 599. Ultimately, however, it was rejected: cf E-9532 p 21, 21 CAB 559—560.
[172] Part 296 as amended, effective 12 Jun 1956. The whole scheme to develop this independent freight intermediary has not been above criticism. Cf FREDERICK 4th 192—194, 474—478.
[173] See E-13 121/2 dissent p 2.
[174] 11 CAB 193, at 199.

carriers' agents.[175] Consideration of the IATA rate structure, however, put limits to the Board's promotive policy: the authority to operate as an international air freight forwarder was limited to an experimental period and did not involve the right to use the services of the irregular air carriers.[176] As to the irregulars which were not IATA members another policy might well, it was said, upset the "international comity" imbedded in rate understandings "and lead to disturbances which would have a serious effect upon our international air commitments".[177] The response of the IATA, however, was not what had been anticipated. The extremely careful if not hostile policy of the Association as to the independent freight intermediaries (apart from a short period of promotion) was brought into focus when the Board regulation came up for reconsideration after the lapse of the experimental period. The Board then introduced almost complete freedom as to what services the international freight forwarder was permitted to engage in.[178]

The trend towards the establishment of a class of independent middlemen in the air cargo field was not solely an American phenomenon. In Europe,[179] consolidation of small parcels into bulk shipments whereby the individual units could benefit from the quantity rebates (so-called groupage) became a growing practice around the early fifties. Already in 1947 an English firm (Airagents Ltd.) was formed to engage in such consolidation as a means of providing loads for the charter services of the irregulars.[180] This scheme attracted these carriers because it

[175] As to the implications of common carrier status, see *infra* pages 162 sq, 207 sq

[176] 11 CAB 193, at 199. The latter restriction contrasted to the freedom enjoyed by the domestic air freight forwarders. International air freight forwarders were only entitled to use the scheduled services of certificated, or permit-holding airlines. As to the concepts of certificate and permit, see pages 69 Sq and 91 Sq. The regulation meant that these forwarders could not rely on the irregulars, nor on special flights by American regular airlines or foreign air carriers permitted to operate into the United States, nor on any service of any other foreign air carrier. Cf E-13 141/2 p 18.

[177] 11 CAB 193. See also Part 297.11, as adopted 8 Sep 1949.

[178] E-13 141/2 p 18 sq. The Examiner's argument for this stand was that the restriction, rather than eliminating the possibility of undermining the IATA rate structure, had "resulted in so insulating IATA from competition that the public interest in expanded low-rate international airfreight transportation is being seriously endangered": *Internat'l Fr Forw Inv ExD* 78.

[179] As to the early German situation, see generally Edgar RÖSSGER, *Luftverkehr und Spedition, Forschungsberichte des Landes Nordrhein-Westfalen*, herausgegeben durch das Kultusministerium Nr. 882 (Westdeutscher Verlag) Köln & Opladen 1960 p 11—12.

[180] 1947 Modern Transport (Dec 12) 203. In view of this indication I cannot lend

was far simpler for them, without a big sales organization, to deal with one particular company than have to depend on a vast sales network all over the world. Furthermore, they felt that the homogeneous freight charters which formerly had helped to keep them flying were disappearing from the market.[181] In 1953 another two companies[182] started grouping and consolidating air cargoes, taking advantage of the fact the IATA rates tariffs also provided for a volume discount.[183] Since the practice of bulking shipments could not be undertaken by IATA Approved Agents under the IATA Sales Agency Resolution as it was then drafted, it suddenly became evident that non-IATA freight agents as consolidators of cargo could ship at lower rates than the IATA agents. This caused some nervousness among the latter who feared that consignors would not like to use different agents for different parts of their air business, but rather leave all of it to the consolidator. Pressure brought upon IATA by these agents made the Association adopt at the Honolulu Conferences 1953 a new policy towards groupage permitting IATA Sales Agents to register as International Cargo Consolidators. At the same time new freight tariffs were introduced providing for freight rebates of thirty per cent on consignments of more than 200 kilograms, which pattern of course benefited the consolidator.

The Honolulu Resolutions were followed by a number of freight agents applying for registration as consolidators. In order to work groupage successfully, however, a very large amount of traffic had to be handled. Smaller agents, therefore, could operate a groupage service only by putting all their freight together. As a result the new registered consolidators came to be of two types, either joint organizations of smaller agents, or big companies specializing in groupage.[184] At first air carriers were very positive

full support to RÖSSGER when he states: "Der Luftfracht-Sammelverkehr wurde zuerst in Deutschland verwirklicht. Der Ausgangspunkt war Hamburg, wo im Jahre 1951 das erste Luftfrachtkontor eröffnet wurde. Es folgten bald Kontore in Frankfurt/Main, Stuttgart, Düsseldorf, Hannover, München und Berlin." *Op cit* 25.

[181] As to the development of groupage Mr. LEVI-TILLEY advises me by letter 16 may 1960 that "It has coincided . . . with the virtual disappearance of pure 'freight' charters which now very seldom occur."

[182] Lep Transport Ltd and Meadows Air Groupage Ltd, both opening service in October 1953.

[183] 1954 Transport (Basel) (Apr 9) 814; 1953 Avi C Mark Rep (Oct 23) 294.

[184] British IATA freight agents formed for instance the joint organization which was called Groupair (Cargo) Ltd and which was not to deal directly with the public but only with its own members or agents: 1954 IFTA (Apr 12) IS 249. In France service was commenced by Air Groupage, which was a cooperative association

about the new services and viewed the consolidators as powerful auxiliaries which might help to achieve the best possible commercial and technical result of operations.[185] After a few years, however, enthusiasm was less marked, possibly — as has been suggested — because these auxiliaries seemed to grow too powerful,[186] and the change was reflected in rearrangements of the IATA tariffs, in particular by the elimination of the so-called Mixed Consignment Rule on the Atlantic.

The Mixed Consignment Rule was very important to the consolidators. Groupage means that a large number of consignments from various shippers are presented to the air carrier as one single shipment. Such a shipment, of course, is mixed as to its contents. On the other hand, the IATA freight rates system was based on commodity rates so that different rates applied to different commodities. The mixed consignment therefore posed a problem as to the computation of charges. Certain specific commodities could better afford to pay the heavy air transportation costs than others (*e.g.* high-priced items such as precision instruments): in order to attract volume of such traffic it was given a special low rate. Specific commodity rates therefore were lower than the general commodity rates. At the time when the promotion of consolidation started, the Mixed Consignment Rule enabled consolidators to pay the 100 pounds specific commodity rate for the highest rated commodity in a mixed consignment weighing in excess of 100 pounds.[187] On January 1st, 1957, this rule was eliminated with respect to transatlantic traffic.[188] As a result consolidators were charged the general commodity rate for each separate commodity in a mixed commodity shipment. To the consolidators this was a raising of tariffs and a reduction of the spread on which they must live. Despite aggressive reaction,[189] however, the Mixed Consignment Rule was not reintroduced.

consisting of a number of airfreight agents: JONEMAN's *exposé* 2. The equivalent German organization was the Luftfrachtkontor, an association of German freight agents frequently operating in combination: RÖSSGER *op cit* 25—26, also *Internat'l Fr Forw Inv ExD* 98 and IABA London General Conference 1957 p 7. In the Netherlands, similarly, was formed the Nederlandse Luchtvrachtcooperatie U S (NCL): *loc cit* in the latter document.

[185] JONEMAN's *exposé*, IABA 1955, Annex A p 2.

[186] JONEMAN, *op cit* 3.

[187] IATA Resolution 513.

[188] *Internat'l Fr Forw Inv ExD* 47.

[189] FIATA protested 1 Jul 1957, see 1957 Transport (Basel) (12 Jul) 1752. CAB

SECTION 4. SCHEDULED AIRLINE AD HOC CHARTERS

## § 1. *Operational factors*

Characterization of special flight charter — assignment of aircraft — European underequipment — economic considerations — utilization and depreciation — maintenance reserve fleet and ferry mileage — turn-around equipment — blocked-of charters — excluding ferry and return flight problems — fill-up services to scheduled operations — off-route charters

Even when the economic factors hostile to special flights by the regular airlines were overcome,[190] charters for such flights could not develop among these airlines on a general level during the post-war years because of operational factors. The main obstacle concerned equipment.

The special flight operations presented the scheduled airlines with particular problems unless they were prepared to assign aircraft exclusively to operations of this type, which now came to be known as *ad hoc charters*.[191] For various reasons such assignment was not possible for most scheduled airlines. The European airlines for a long time were not able to commit themselves to such a scheme because of their general underequipment.[192] The American airlines, while better equipped, did not want to do so for economic reasons. High utilization means low depreciation charges; the scheduled airline fleet should therefore be sized to maintain the highest possible degree of utilization. Few scheduled carriers, however, can expect to have a high degree of utilization in charter services.[193] Owing to such considerations the charter activity of the scheduled airlines long tended

reacted by permitting the international air freight forwarder to engage with supplemental air carriers (a successor category to the irregulars), see *Internat'l Fr Forw Inv ExD* 46—47, 78, and E-13 141/2 p 18 sq.

[190] *Supra* pages 11—12.

[191] In British commercial language this term has a rather broad connotation, meaning "charter flights of a non-recurrent nature" (LEVI-TILLEY letter 28 May 1960).

[192] *Supra* page 22.

[193] It has been testified that a medium-sized American carrier would not assign specific aircraft exclusively to charter service unless it could expect a utilization of ten hours a day: *Acta-Imata Exch Inv ExD* 33, 22 CAB 796. A corollary to the utilization requirements is the near suppression of charter fixtures on a time basis outside inter-carrier contracts. Such large pressurized aircraft as the DC-6 and the Britannia require a utilization of upwards of 2,500 flying hours per year, but such utilization can only be achieved on either long-term contract or scheduled service work. As this work only yields sufficient revenue per time unit, there is little room for those fixtures which are generally associated with the term "time charter": cf 1960 AC Bull (Oct 21) 20.

to remain only occasional. Their special flight charters were operated by the maintenance reserve fleet or turn-around equipment. Use of the former kind of aircraft introduced a serious ferry mileage problem. The practice of concentrating at one base all maintenance of aircraft belonging to one or several particular types made ferry flying almost inevitable, since few charters will originate at the base in question.[194] Use of turn-around equipment, on the other hand, developed into the so-called *blocked off charter.* Operation on a blocked off basis means that a scheduled[195] flight is cancelled in so far as the individual passenger seats on the flight are withdrawn from the offer of scheduled services to the general public and sold on charter terms. Charter loads thus could be accommodated on aircraft operating in scheduled services when they flew in the direction opposite to the main traffic flow. Perhaps the operator would use a large plane for an outbound charter the return flight of which could be used to absorb a backlog in the scheduled services. He would then have the advantage of being able to use the traffic rights attached to his line services without having to apply for special permission, and at the same time he would consider himself free of the rate regulations attached to the line services. In the fifties, as a result of an IATA Resolution, it became possible also for ship's crews constituting of only a part load to travel on a blocked off charter basis.[196] Most of the leading IATA carriers are believed to be interested in the "blocking off" a scheduled flight and operate it on a charter basis if the arrangement is economically attractive.[197] But the use of the blocked off charters, of course, confined the charter activity to function as an on-route fill-up service to the scheduled operations, a service which must remain within narrow limits in spite of the advantages offered by the absence of ferry flight and return load problems.

Even operational factors attached to the route pattern tended to limit the scope of ad hoc charters by the scheduled airlines. The lack of local service personnel at off-route points made any

[194] TWA's DC-4's were all based at LaGuardia Airport. Charters originating even at Idlewild therefore would involve ferry mileage; if a charter originated in San Francisco, ferry mileage would have to be charged from New York City. See *Acta-Imata Exch Inv ExD* 51—52, 22 CAB 805.

[195] As to the expression "scheduled". See pages 71, 76.

[196] 1954 AC Bull (Nov 26) 46. Cf 1954 AC Bull (Sep 17) 36 and 1955 AC Bull (Sep 30) 37.

[197] LEVI-TILLEY letter 16 May 1960.

charter deviating from the route pattern look unattractive, since it would mean the interruption of technical service routines.[198]

The sudden aircraft surplus of the scheduled airlines which followed upon the switch to jet aircraft, in a few years' time threw these lines into a policy of almost aggressively cultivating charter traffic. As a result of this change in atmosphere the flag carriers have set up a number of subsidiary airlines mainly devoted to charter operations. At times, these subsidiaries even operate with aircraft and crews held under charter from the mother company.

## § 2. *Pricing factors*

Costs which may be disregarded in computing scheduled airline charter rates — depreciation — overhead — charter price fixing — CAB tariffs — IATA consideration of charter rates — fixing rates to be paid by passengers and shippers — trades excluded from scope of price agreements

In contrast to the irregulars the scheduled airlines could consider computing their charter rates in disregard of such important items as depreciation and overhead. When the charter activity developed as a fill-up service to the scheduled traffic all calculation could be done on the assumption that the aircraft would be written off when operated in the regular services. Similar considerations could be applied to overhead charges, because those costs which cover ground installations, sales promotion, reservation and ticket counter services, baggage handling, office salaries and the like are indirect costs which do not rise or fall proportionately to the amount of flying.[199] The overhead must be organized and sized according to the needs of the regular traffic and will contain many facilities from which the charter service cannot profit. It is therefore not unnatural that a scheduled airline feels free to disregard this type of cost when computing its charter prices.[200] The charter rate policy, as a result, may be highly flexible.

[198] At times the irregulars considered it to be useful to move their bases for some months to points suitably located to take care of a temporary traffic demand: see 1953 AC Bull (Jan 23) 3.

[199] SAUNDERS, 3 *Antitrust Hearings* 2123.

[200] How to divide these costs between the operators' regular line services and the services under contract to the War and the Navy Departments was a matter of dispute during the war between the CAB and the airlines. The position of the Board was that the airlines now allocated to the contract services indirect expenses which otherwise would have been charged to the airlines' scheduled air transport

On the other hand, charter prices have been fixed in certain areas and trades by governmental regulation or by inter-carrier agreement.[201] In the United States the CAB appears to have required ever since 1947 that the domestic airlines file and adhere to "tariffs providing rates and charges for charter trips and special services",[202] and, if not expressly subjecting foreign air carriers to the same requirement, the Board has at least paved the way to make them file and adhere to charter rates tariffs.[203]

The establishment of charter rates was considered by IATA for the first time, it would appear, at the San Francisco Conference in 1950[204] and later in London in February 1957 — with the securing of CAB protection in mind.[205] Charter rates in this sense have not materialized, however. The protection of the general IATA rate structure, on the other hand, has resulted in fixing the prices to be paid by passengers and shippers to the charterer.[206] The controlling Resolution, however, originally drafted to prevent intra-IATA rate competition, came to be regarded as too restrictive when meeting non-IATA competition was at issue.[207] As a result one trade after the other was taken

services: retaining the fares at the same level as before the contract services started must then mean that they had become excessive, since part of the expenses to be met by the fare money thus had been taken away. See NEAL, 1943 31 Georgetown LJ 363, 365.

[201] In 1941 the Air Traffic Conference of America agreed upon resolutions fixing uniform charges to be made by all airlines of the Conference for charter and other special flights. See NEAL, *op cit* 379, and *supra* note 47 at page 12.

[202] TORGERSON, 1948 15 JALC 53 note 24 citing American Aviation Daily, 24 Oct 1947 p 126. The same rule appeared as Part 207.4 in the 1951 Charter Regulation.

[203] About 1950 the CAB suggested the formulation of rates and rules for all charter operations. SAS, KLM and BOAC then pointed out in common *i. a.* that "a serious question exists as to whether the publication of charter tariffs would not be in violation of the commitments of the IATA members embodied in the IATA articles of Association and Resolutions", and that "insufficient experience has been gained thus far by the carriers, particularly in trans-Atlantic operations, to permit of the present formulation of a universally acceptable set of rates and rules for all charter operations." Letter to CAB signed New York 16 Feb 1950. — In the course of the 1958 investigation which resulted in the foreign air carrier permits being amended so as to permit off-route charter flights, it was intimated that the tariff filing requirement of the Civil Aeronautics Act became applicable by such amendment: see *Off-Route Inv ExD* 49.

[204] 14 IATA Bull 83. See also note 203 *supra*. The Bermuda Traffic Conferences created a special committee under the chairmanship of Mr Barch, to explore the possibility of establishing minimum charter rates. In 1952, the chairman received directions to continue the work and prepare a draft resolution for submission to the Traffic Conferences. No worldwide rates have so far materialized.

[205] 25 IATA Bull 79.

[206] See further *infra* pages 102—103.

[207] During the years after 1951 several air carriers whose business was made up predominantly of charters joined the IATA. Among those carriers as well as among

out of the scope of application of the Resolution and left to free competition — seamen charters, pilgrim traffic, military personnel and their families etc.

the smaller airlines who earned a substantial addition to their revenues by charter operations it was felt that the existing charter resolution was unduly restrictive: see 20 IATA Bull 79; 21 IATA Bull 96.

*CHAPTER TWO*

# AIR CHARTER: A PROBLEM OF ADMINISTRATIVE REGULATION

SUB-CHAPTER 1.

# THE TERM "CHARTER"

## SECTION 1. WHERE IS IT FOUND?

Administrative regulations, a mirror of air commerce — appearance of the term — American language — British language — IATA language — avoidance of the term — German language — Annex 6 and its French regulatory language

While it has thus far been possible to couch the broad and vague views of air charter prevailing in air commerce in a general exposition which included all principal types of the charter phenomenon, one must proceed with greater caution when seeking to find the meaning of the term "charter" in that mirror of air commerce which is formed by the administrative regulations.

A first glance at the use of the term "charter" in administrative regulations reveals its appearance in a surprisingly large number of enactments, predominantly American and English. While its origin in American regulatory language would seem to have been the mention made in the Air Commerce Regulations of 1934 (section 3) that authority to perform "special charter trips" was an incidental right of such airlines as had secured an airline certificate for "conducting scheduled operation of passenger air transportation" (the innovation of these Regulations),[1] it is now found in the broad mandates of powers to the Civil Aeronautics Board in the Federal Aviation Act, 1958, and its predecessor, the Civil Aeronautics Act, 1938.[2] Furthermore, it is found in a number of the American regulations promulgated pursuant to those Acts,[3] as well as some European decrees bearing on licensing questions. Thus "Charter Companies" were referred to in the former directives to the British Air Transport Advisory Council.[4] "Charter service" was introduced as one of the notions of the British Civil Aviation (Licensing) Regulations, 1960 (sec. no. 2-2).[5] The Ordinances of the Western Allies for occupied Ger-

[1] 1934 USAvR 350.
[2] Sec 401-e: "Any air carrier may make charter trips . . . under regulations prescribed by the Board."
[3] Part 207, 19 Mar 1951; Part 212, 12 Aug 1958; Part 295, 26 May 1959.
[4] Directive of 26 Sep 1950, part II.4: ". . . applications by independent operators (Charter Companies)": also in part III.5.
[5] Statutory Instruments 1960 No 2137.

many spoke about "Das Chartern von Luftfahrzeugen."[6] In the IATA Resolutions which are approved by the governments and become in that way part of the administrative regulations, the term "charter" is in ample evidence, one Resolution being exclusively devoted to charter matters.[7]

Even in areas where administrative agencies have purposefully avoided using the term "charter", it has nevertheless entered the legal language through some backdoor. In the 1955 public statement of the German Bundesminister für Verkehr concerning the policy which would be carried out in awarding authorizations of air transport undertakings, it was expressly indicated that the term "Charterflüge" was not sufficiently descriptive for the purposes of the statement and was therefore not to be used in applications for authorization.[8] Yet, in the conditions of carriage which were approved by the German government the same year and which reflected the IATA 030 Resolution, the term "charter" reappeared in the form of "Charter-Vereinbarungen".[9] Furthermore, the term was resorted to in fiscal and economic legislation.[10]

In the Report of the Scandinavian Little Committee, the Committee, while accepting the term "charter" as having a certain meaning,[11] declined in 1956, as well as in 1959, to use it for regulatory purposes.[12] Yet, a reservation taken by the Scandinavian States forming the SAS had[13] led to the introduction of the term "charter" into Annex 6 to the Chicago Convention,[14]

[6] Art 6 of the Durchführungsverordnung Nr 12 (Luftfahrt) zu dem Gesetz Nr 24 der Alliierten Hohen Kommission von 30. März 1950, promulgated 31 Aug 1950, and Art 5 of its Neufassung 23 Jan 1951.

[7] The 045 Resolution. See also 030 Resolution (not in force but of considerable interest) arts 2-3 passengers, 2-3 cargo.

[8] 1956 5 ZfL 142 sq, see part I-II.

[9] See *infra* page 111 note 277.

[10] The Vermögenssteuergesetz, as amended 10 Jun 1954 (1954 BGBl I p 137), § 2-3 refers to the "Betrieb von . . . gecharterten . . . Luftfahrzeugen". The Einkommensteuergesetz, as amended 11 Oct 1960 (1960 BGBl I p 789), § 49—2 similarly refers to the "Betrieb . . . gecharterter . . . Luftfahrzeuge". The Aussenwirtschaftsgesetz of 28 Apr 1961 (1961 BGBl I p 481) § 19 refers to "das Chartern solcher Flugzeuge durch Gebietsansässige".

[11] The Committee held it to mean the hiring of an aircraft by an individual or an organization etc. exclusively for his own use. See 1956 Report 2.

[12] 1956 Report 2, 1959 Report 6.

[13] ICAO doc 6922—1, C/803 (minutes).

[14] As indicated by the Government of Sweden in its reply to the ICAO questionnaire of 29 Aug 1956 concerning the hire, charter and interchange of aircraft (in ICAO LC/SC/CHA WD No 4 7/2/57), a charter and hire arrangement was embodied in the consortium agreement forming the SAS. This form of cooperation meant difficulty in relation to Annex 6 which specified in a number of respects the re-

and eventually led to its introduction into some of the Scandinavian implementations of this Annex.[15]

In French regulatory language the term never made entry.

## SECTION 2. WHAT DOES IT MEAN?

American regulatory language — Air Commerce Regulations, 1934 — Federal Aviation Act, 1958 — Part 207 — Part 295 — contrast between charter and lease — confusion — not clarified by CAB — definition of charter, important to IATA — two aspects detached — assumption made in Annex 6

The term "charter" has been given an individual shape and distinct features most attentively by the regulatory language of the United States. Possibly in the beginning it may have even been distinguished from the very notion of "commercial air transport",[16] but eventually it became moulded into the general evolution of air commerce. When charter carriage, through the operations of the nonscheds and the irregulars[17] developed into an important industry of its own, the term "charter" underwent a parallel development. It was detached from its origin in the general — or maritime — law and acquired a sense of its own, "those cases in which the exclusive use of the plane is contracted for usually at an hourly rate, which is the normal procedure where air transportation is desired for pleasure, sightseeing, hunting, fishing or other purposes."[18] Ever since 1951, charters

sponsibility of a State of registry in relation to aircraft there registered. SAS aircraft were registered in any one of the three states concerned only, but that state could hardly carry out the continuous inspection required when the aircraft mainly operated outside that country. The ICAO Council then, in 1950, in order to get around the provisions of the Annex, found a loophole by adding note a to the headline of Chapter 3 - General. The note resolved that no provision of the Annex prevented "in the case of an aircraft being chartered and operated by an operator having the nationality of a Contracting State other than the State of Registry, the latter State delegating to the former State, in whole or in part, the exercise of the functions imposed by this Annex; . . ."

[15] Norway: Driftsforeskrifter for luftrutetrafikk, 20 Nov 1958, part 2.1: "utenlandske luftfartøyer som er chartret for luftrutetrafikk av norske luftfartsforetagender", "bortchartring av norske luftfartøyer til et utenlandsk luftfartsforetagende"; Driftsforskrifter for ikke-regelbundet ervervsmessig lufttrafikk, 20 Nov 1958, part 2.1. containing equivalent use of the term. Denmark: Bekendtgørelse om udfaerdigelse af reglement verdrørende driftsforskrifter for regelmaessig offentlig lufttrafik, 10 Jun 1953, part 2. 1. 1. " I tilfælde af chartring til udenlandske luftfartsforetagender". — In Sweden as at 1 February 1961, there is no equivalent legislation.

[16] Cf KINGSLEY, 1935 6 JAL 177. The Report of the Federal Aviation Commission, submitted 31 Jan 1935 — extracts in 1935 6 JAL 163—176 — refers to "charter services" of the fixed-base operators, at p 168 no 35.

[17] Cf *supra* pages 24 sq.

have been subject to regulatory construction. Part 207 of the Economic Regulations, enacted that year by the Civil Aeronautics Board, pursuant to the Civil Aeronautics Act, restricts the meaning of the term "charter trip" to a very narrow area: Roughly, it is made to mean common carriage[19] by air "where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis", but by the rest of the definition contracts negotiated in certain ways of solicitation or with certain classes of merchants are excluded.[20] The meaning of charter trip, as it thus developed, spread into the parallel regulations which were later adopted.[21] In Part 295, adopted in 1959, it was further elaborated by the drawing of the distinction between "pro rata charter", meaning a charter in which the cost thereof was divided among the passengers transported, and "single entity charter", which existed when the cost was borne by the charterer and not by the individual passengers.[22]

Charter service, as defined in the 1960 British Regulations, means an air transport service "which is provided under a contract of hire". However for the purposes of the Regulations the scope of the notion was substantially restricted by the added requirement that the service would not be recognized as a charter service unless the contract either was with "a single hirer" and related to "the exclusive right to use the carrying capacity", or concerned the carriage of ships' crews, in which case several hirers were allowed to exist on condition that the contract gave them "the right to use together the total carrying capacity."[23]

Most of the other enactments dealt with in this subchapter, however, use the term "charter", or a derivative of it, without an explanation of its meaning.

One particular feature of the notion of charter as it emerges in this area of administrative law is the stress placed upon contracts by *planeload:* "where the entire capacity ... has been engaged", "the right to use ... the total carrying capacity."

[18] *Alaska Air Transport Inc v Alaska Airplane Charter Co*, 1947 USAvR 548 2, Avi 14.448, (see further Netterville, 1949 16 JALC 436).
[19] See *infra* pages 163 sq.
[20] Part 207.1. See further pages 122 sq *infra*.
[21] Parts 212 and 295.
[22] § 295.2.-b and c.
[23] Civil Aviation (Licensing) Regulations, 1960, no 2-2.

On the IATA side, there are provisions to the same effect although these are not in the nature of definitions. The backbone of the planeload principle was laid down in the very first issue of the 045 Resolution[24] by the provision that "the charter price shall be on a planeload basis."[25] In 1952, the subject was developed by the prescriptions that "charter agreements shall be made with only one person"[26] and that "the charterer shall be charged for the entire capacity of the aircraft."[27]

The clearcut parallelism of these separate enunciations of the planeload principle in direct governmental regulation and in government approved IATA regulation, however, suggests the narrowness of the bases for the principle. The dominating reason for the present drafting of the 045[28] has been the scheduled airlines' concern over the dangerous impact which the permission of split or multiple charters would have had on the rentability of their scheduled services. The attachment to the planeload principle is therefore a tool with which air chartering is tempered, not something inherent in air chartering itself. These definitions must therefore be used with great caution, keeping in mind the service they are intended to render.

Apart from the planeload principle, there is a conspicuous lack of substance in the definitions now discussed. This is brought out by their reliance, expressly or impliedly, on contract notions more familiar to lawyers in general. Thus, in the United States, Ballard explained the notion of "charter operation" in terms of lease.[29] The British definition of the "charter service" notion explains it in terms of a contract of hire. If this notion of charter can just as well be replaced by terms of lease or hire, it would seem to follow that it does not have any original or exclusive meaning.

This lack of clarity may be illustrated by IATA's failure to find a formula for a distinction between charter and lease. In the

[24] This Resolution will be further discussed in a later section.
[25] Issue 7 Apr 1949 clause 2.
[26] Issue 19 Sep 1952 clause 1-b. Extracts of this issue may be found in GRÖNFORS, *Air Charter*, Appx B.
[27] Same issue clause 1-a. In the issue 15 Nov 1960 clauses to the same effect were numbered 3 and 4.
[28] An account of the considerations leading to the adoption and development of the 045 Resolution will be found in a later section.
[29] 1947 60 Harv LRev 1271 note 183. BALLARD defines "charter operation" as referring "to the leasing for one or more flights of the entire plane, normally with crew."

regulatory system built by IATA, the operator was subject to rate restrictions if he engaged in regular ticket carriage. He avoided the rate restrictions but subjected himself to a number of other restrictions contained in the 045 Resolution, if he engaged in charter carriage. Eventually, there was common agreement that he avoided any kind of restrictions if he leased his aircraft to somebody else. Accordingly, the distinction between charter and lease was most important. Yet there was no definition of charter to be found which covered this aspect. While the demand had been raised within the IATA that language be found which would preclude members from using the device of leasing aircraft for the purpose of evading the terms of the 045,[30] no solutions were found. Only two broad aspects were even discernible: restrictions which upheld the general rate structure could be accepted; while those which affected the commercial value of the fleet could not.[31]

Even the CAB appears to have failed to find a distinction between charter and lease. "Lease" is a term used at several places in the Federal Aviation Act, 1958, and its predecessor, the Civil Aeronautics Act, 1938. "Lease" contracts are referred to in the definition of "air carrier" ("'Air carrier' means any citizen ... who undertakes ... by a lease ... to engage in air transportation." Section 1-3) and furthermore in section 408-a-2 which makes it unlawful for a carrier to "lease" the properties of another air carrier except with the approval of the Board. The term "charter", on the other hand, appears in the same Acts in relation to the permissible operations of a certificated air carrier.[32] The reliance on two different terms suggests that these terms are contrasted rather than overlapping. What distinction there may be in their meaning, however, is not spelled out in the enactments. In 1949, the Board was criticized for not having elaborated the terms

[30] It may be proper to note here that charters between air carriers while in principle outside the scope of the Resolution, were yet subject to it in so far as an IATA member chartering aircraft was not released from compliance with the Resolution when rechartering the aircraft.

[31] Special Charter Study Group Report to 1957 Composite Conference, nos 21—22.

[32] The Anonymous Note on *Transporting Goods by Air*, 1959-60 69 Yale LJ 993-1016, at 1014 and note 150, construes the Federal Aviation Act as using the term "lease" to connote plane hire without a crew, and suggests a distinction between the transaction of "hire" which occurs when a plane belonging to one airline is engaged by another, and the transaction of "lease" meaning that in such a case the plane comes without a crew.

which were proper for aircraft leases with crews.[33] At about the same time, however, a distinction between "charters" and the new notion of "wet leases"[34] was being developed in the American aviation industry.[35] The new terminology was closely related to regulatory enactments and procedures. "Charter", as the notion developed in Part 207 and subsequent Board enactments, had implications as to operational authority: to operate charter trips, as already mentioned, was a incidental right for the holder of a certificate of public convenience and necessity. Where the charterer was another air carrier, however, the operation did not fall under the regulatory definition of "charter trip." This meant that such an operation was not authorized as incidental to the aircraft owner's operational authority. Special exemption had to be sought. As the term "charter" thus decreased in meaning, the new term "wet lease" developed as a reference to the situation under an inter-carrier charter agreement.

But the Board refused to go along with the proposition that wet leases were essentially different from charters. As stated in the *ONA Enforcement Proceeding,*[36] "Other carriers are to be viewed no differently from other charterers insofar as their being members of the chartering public is concerned." "(T)here is no meaningful difference between respondent's other operations as a common carrier and its operations under wet leases in 1958 and 1959 . . . In case of both the direct charters and the wet leases, the passengers are carried on respondent's aircraft, subject to its operational direction and control, and pursuant to ONA's own safety authority."[37] The ONA opinion concluded a long series of opinions in the matter, starting with a wet lease between Transocean and SAS in 1952 under which, as reproduced without oppo-

[33] NETTERVILLE, 1949 16 JALC 430.

[34] "Wet" appears to relate to the aircraft fuel which is supplied by the lessor. By contrast, "dry lease" signifies a lease without maintenance and crew services added.

[35] The *1956 Annual Report of Seaboard & Western Airlines* states at p 3 that "Wet leases are a comparatively recent air transport development. Generally speaking they involve contracts with other air carriers in which we provide airrcaft, flight crews and maintenance services." A note at p 7 in the Reply brief on behalf of appellants in *US Overseas v CAVE* (cf page 77 *infra*) advises that "wet lease" is "a term used in the aviation industry to mean a lease of aircraft with personnel to fly and maintain the same for a stated rental payment per mile or period of time".

[36] *Overseas National Airways, Inc. Enforcement Prooceding,* E-16895, decided 5 Jun 1961.

[37] E-16895 p 8, 7.

sition in the opinion, "the operational control of the aircraft is at the direction of SAS", the charterer.[38] These opinions were all to the effect that operations under wet leases comprehended the engaging in air transportation as much as did operations under charter, and hence were in principle subject to the requirement of a prior certificate of public convenience and necessity.

Whatever the soundness of the CAB regulation[39] it cannot be considered as any great contribution to clarity as far as the distinction between charters and leases is concerned.[40]

[38] E-7012, 4 Dec 1952. Also E-7515, 26 Jun 1953; E-10162, 4 Apr 1956; E-10307, 22 May 1956; E-12328, 4 Apr 1958; E-13718, 8 Apr 1959; E-16042, 28 Oct 1960.

[39] It may be recalled that the Interstate Commerce Commission undertook to regulate leasing practices in the motor carrier industry but never went to the extent of declaring the owner-operator, *i. e.* the motor carrier equivalent to the lessor under a wet lease, to be a common carrier. On the contrary, the Commission's regulation of the owner-operators in spite of their status outside the Act was one of the issues in *American Trucking Association v United States*, 344 US 298, in which the validity of the regulation was upheld. Within the Board's staff, it has been proposed to mitigate, by general exemptions in the nature of Economic Regulations, the rigour of the Board's holdings on the issue. Thus Examiner PFEIFFER proposed, in the course of the drafting of Part 212, the following provision: "chartering or leasing planes for use in the charterer's normal air transport business may be effected only so long as the operating authority of either the charterer or the airplane owner is not thereby enlarged". This provision was struck out by the Board, which concluded "that charters to direct air . . . carriers for the movement of commercial traffic should be permitted only in emergencies", seeing "no need for including in the regulation the proviso recommended by the Examiner . . ." See Clause 1-c-ii-a, in *Off Route Inv ExD*, served 13 Apr 1956, Appx A p 2—3. and CAB E-12 945/6, 12 Aug 1958 p 17 note 10.

[40] "Short term leases" of aircraft with crew between airlines have been processed under Section 408-a-2: CAB E-13 124, 31 Oct 1958.

SUB-CHAPTER 2

# OPERATOR STATUS

## SECTION 1. THE PROBLEM OF COMPOSITE SERVICES

Hypothetical example — operator status — basic principle — point of shifting operator status — problem of operator status arises in the wake of restricting entry into the field — operational authority — standards of performance — operational standard — multiple authorizations system — equalizing standards of performance — international conflicts of competence between supervising governmental agencies — principles judicially verifiable — principles as matter of intra-agency policy — registration of status — registered status and factual status — violations of operator status regulations — registration as a presumption of fact — *Ackroyd's Case* — *Lövgren Case* — operator status in the legal-historical context

Let us hypothesize the following example. One airline is franchised to run a service between two nearby cities. For economic reasons, it prefers at times to employ a smaller airline to run the service on its behalf during certain periods when the smaller airline's equipment is better suited to the prevailing traffic conditions. Suppose that the franchise contains the typical clause limiting transferability.[41] In this situation, the supervising governmental agency, when notified about the arrangement between the airlines, may find either that the franchised operator has transferred its franchise, so far as it affects the intercity line, to the smaller operator, or that no transfer has taken place. Which of these views is taken would depend upon whether the operation is ascribed to one or the other of the involved airlines; *viz*, which one has the *operator status* within the context of the composite service.

This problem is an off-shoot of the tendency to regard an operation as pertaining to one party *only*. When two operators together provide a composite service, this tendency involves an oversimplification of fact. However, if we retain the proposition that the operation belongs to only one of the parties involved, there must be a point in the intermingling of services where it

[41] *E. g.* "The contractor may transfer and assign the rights and obligations appearing in this contract after prior approval of the Ministry of Communications, only to a Venezuelan corporation, the directors, capital and stockholders of which are Venezuelan in their majority of at least 55 %." See CAVE's franchise in *US Overseas v CAVE*, at pages 77 sq *infra*.

must be said that the resulting service is no longer to be ascribed to the one party but must be considered to have shifted to the other party. This point may be described as the point of shifting operator status between the parties. This point, evidently, is an important one in inter-carrier air chartering.

In administrative regulation, the notion of operator status attains its importance because of the imposition of restrictions on the right to enter the field of air commerce. Not until persons engaging in air commerce were required to hold licences did this problem arise: In the composite service, which one of the parties to the underlying contract was the operator of the service and had to account for the flying? If the flying was found to be of such a kind that no licence was required, no problems arose, but if it was found to be subject to licensing requirements, it was unlawful unless ascribed to, and accounted for, by the party holding the proper licence. This aspect of the problem will hereinafter be referred to as the question of *operational authority.* The notion of operator status in the administrative area, however, not only relates to the national and international licensing requirements, but it also enters the regulation of standards of performance. Since different operator categories are required to maintain different standards of performance, the composite service will encounter the problem, whose standard shall govern the service. This aspect of the main problem will hereinafter be referred to as the question of *operational standard.*

Being dependent upon the tendency to regard a composite operation as belonging only to one of the parties concerned, the introduction of systems of multiple authorizations for one and the same composite service means splitting the notion of operator so that each participant in the service must seek special authorization for his particular participation. Such a development removes the problem of operator status more or less completely from the area of interest. Since the standards of performance, as regulated pursuant to Annex 6, had delevoped out of the regulation of aircraft airworthiness, the problem of operator status could not be approached by way of multiple standards of operation. Such multiplicity could not overcome the unity of the aircraft. However, as the standards of performance are equalized between the different categories of operators, there is a corresponding diminishing of the problem of operator status. The

equalizing, nevertheless, cannot neutralize the difficulties in international chartering which stem from the conflicts of competence between governmental supervising agencies of different nationalities.

The problem of operator status arrives at its fullest importance in administrative law when one airline participating in the composite service is subject to licensing requirements but the other one is not. In this situation, it is likely that the problem of operator status will be placed before the courts in licence enforcement actions and the like. Principles as to operator status thus may become judicially verifiable. The more the licensing problems turn into matters of intra-agency policy, however, the less likely it is that the problem will be brought before the courts. Even if, occasionally, a court of justice will have to pronounce upon the principles applied by the agency, parties seeking guidance will feel more secure with correct forecasts of the agency's views than with predictions of the courts' decisions. The only limitation in principle upon the agency's discretion, will be that, in the public interest, the administrative agencies should be consistent in carrying out their policies. The problem of varying standards of performance, however, more directly affects the general public than licensing questions, and thus is not as easily converted into a matter of mere intra-agency policy.

The notions of operator status are some of the most important notions affecting air chartering which have been brought forth by the administrative regulations. It is apparent, however, that they are not notions which owe their life only to administrative law. In particular they recur in the private law of the air carrier's liability. As developed in the administrative area, however, the notions have one feature which is less often found in the private law. In administrative regulation, operator status is generally subject to some sort of registration.

To be registered as the operator of the service is evidently an important consideration for the parties to an air charter contract. To be registered as the operator, or to be incapable of being registered as operator under administrative law — *e.g.* the travel agencies in certain systems — would seem to form a very safe basis for further elaborations of the contract terms. The operator status conferred by the registration scheme, however, cannot exhaust the problem. As a general proposition, this notion, like

other legal notions, involves a legal classification of a set of facts. The notion of operator represents the complete identification of registered status and factual status. Since, however, violations of the regulations bearing on operator status can be envisaged, it is also clear that factual and registered status need not necessarily coincide. The violation means that they did not so coincide. If one's participation in a composite service is found to exceed one's licence and involve a violation, this means that oneself rather than some other participant in the service was the operator of this service. The registration supplied by the award of the licence thus may reinforce an already existing status but it does not suppress the existence of this status outside of the registration. Since an operation can be carried out illegally both by being operated outside of the scope of authority and by being operated below standard, this factual operator status can exist in both areas where regulatory operator status gets to be of immediate importance in air chartering.

Even though the conferral of operator status upon one of the parties to a composite service contract by registration thus does not mean that legal observers will, as a matter of course, ignore factual operator status outside of the registration, the registration nevertheless remains a factor of great importance in deciding operator status. This is so because of the accompanying presumption that registrations correctly reflect the facts. How strong this presumption is, is difficult to appreciate. In the *Ackroyd's Case,*[42] which concerned the composite service offered by a travel agency and an irregular airline, the court conspicuously avoided branding the travel agency as operator of the unlicensed service. While the agency had aided and abetted the illegal service, it was the airline which was its operator, notwithstanding the extensive participation of the agency. Humphreys, J. even doubted that the legislature had envisaged a case being brought against travel agents.[43] However, there are cases holding to the opposite effect as well, where the travel agency has been held to be the operator of the illegal service, *e.g.* the Swedish *Lövgren Case.*[44]

The notion of operator status in the administrative law is not

[42] *Ackroyds Air Travel Ltd v Director of Public Prosecutions,* 1950 1 AER 933.
[43] At 935.
[44] *Lövgren v Riksåklagarämbetet,* 1953 NJA p 688. It is notable, however, that in this case the Swedish Supreme Court found both participants to have operated the illegal service.

altogether homogeneous nor has its prevalence been the same all the time and in all countries with which we are here concerned. The subsequent text of this sub-chapter will show, first, that the era preceding the Chicago Convention offered grounds for appreciating the notion of operator status only in certain areas; next, that the era immediately following upon the Chicago Conference provided a situation which frequently led to disputes about operator status and furthermore deposited certain relevant court cases; and, third, that the present era is now being converted into one characterized by multiple authorizations for the same service, thus tending to remove operator status from the purview of courts and jurists.

## SECTION 2. THE PRE-WAR ERA

### § 1. *The Paris Convention*

Need for governmental control over aviation — liberal principles of Convention — right of innocent passage — restrictions viewed as discrimination against nationals — right of innocent passage modified by 1929 Protocol — impact of liberal principles in Convention — Great Britain — Scandinavia — original Scandinavian system — changes due to adherence to the Convention — Sweden: traffic safety aspects motivate insistence on licensing of passenger carriers — Norway: franchise or authorization required for all air transportation commerce — Denmark: franchise required only from international air line traffic and all cabotage air commerce — France — the 1920 decree — problem of its duration — line traffic singled out for special treatment — impact of 1929 Protocol — Scandinavia — France — Great Britain — requirement that operator have certain nationality — French diversion — Scandinavia — disintegration of the system of the Convention — problem of taxi operation emerges from distinction between line traffic and traffic other than line traffic — operators of charter flights subject to requirements of licence

During the two first decades which followed upon the inauguration of air commerce after the first world war, the need of governmental control over aviation was quite differently felt in the different countries. Of course, all governments, from the start, sought to excercise the same sort of control over aviation as they did over motor car operations. Aircraft were required to pass tests so that they could be found airworthy and pilots had to apply for licences which would evidence their ability to fly the aircraft. But certain features of the Paris Convention of 1919[45] militated against further extension of control. The Convention recognized the right of every aircraft of a contracting state

[45] *Supra* page 8 note 22

to cross the airspace of other contracting states (Articles 2 and 15) — the so-called "passage inoffensif" — and this principle was thought to mean that no government could object to flights into its national airspace by foreigners having the status of a citizen of a contracting state. Accordingly, any regulation would mean discrimination against the nationals.[46] While the adoption of the Additional Paris Protocol of 1929 meant a modification of this fundamental idea of the Paris Convention by the introduction of restrictive rules relative to line traffic — "l'exploitation de lignes internationales régulières de navigation aérienne" — these modifications appeared exceptional and meant that the Conventional principles remained fundamentally liberal.

The impact of the Convention delayed the adoption of licensing systems generally.[47] No restrictions on engaging in air commerce were adopted in Great Britain. In Scandinavia the adherence to the Paris Convention had a liberalizing effect on the licensing system originally imposed. This system was retained without change only as to line traffic, in which area the Additional Paris Protocol meant restrictions on international flying as well. When the adherence of the Scandinavian states to the Paris Convention was discussed it was not entirely clear what changes in the previous legislation would be necessary. In Sweden[48] it

[46] RIPERT, *La navigation aérienne*, 1921 17 Bull Sté d'Et Legisl 273: "La loi interne est bien obligée d'admettre la libre circulation des aéronefs (art. 19) car on ne saurait refuser à des Français un droit reconnu à des étrangers. " In particular, see THOMAS, *L'aviation commerciale en France*, thèse Lyon 1928 p 158—159, 162.

[47] I disagree with OPPIKOFER, *Internationale Handelsluftfahrt und einzelstaatliche Verwaltung*, 1930 58 Arch d öfftl R 383, and BALOGH, *Die deutsche Rechtsprechung auf dem Gebiet des Luftrechts* in *Actorum Academiae Universalis Jurisprudentiae Comparativae*, vol II, pars IV, Paris 1935 p 230-315, at p 243, both of whom seem to hold that extended control over aviation was a universal phenomenon. Cf WEGERDT, *Die Rechtstellung der Luftverkehrsgesellschaften*, 1931 1 AfL 234, who only excepts England from the same rule.

[48] The most informative document on the Swedish development is Kgl. Kommunikationsdepartementet D.-nr. L 143/1927. UD med vissa upplysningar ang. luftfartskonventionen och Sveriges tillträde till densamma. Since it appears never to have been published, extracts are here reprinted. ". . . Med anledning av bestämmelsen i artikel 16 i konventionen kan ifrågasättas att icke fordra tillstånd av Kungl. Maj:t för annan yrkesmässig trafik [än linjetrafik]. Härigenom skulle emellertid kunna uppstå olägenheter, enär alltså icke skulle erfordras tillstånd för rundflygningar. Det har visat sig att mindre solida företag igångsätta sådana flygningar . . . Bestämmelsen skulle kunna enklare så formuleras att för yrkesmässig luftfart erfordras tillstånd av luftfartsmyndigheten dock icke för sådan luftfart av utländskt luftfartyg mellan utländsk och svensk ort. Det är emellertid mindre tilltalande att giva utländska luftfartyg en fördelaktigare ställning än svenska. . . på luftfartens nuvarande stadium [torde] enbart godsbefordran med luftfartyg icke komma att äga rum . . ."

was at first suggested to free all traffic except the operation of air lines from the requirement of licence, including the engaging in irregular air traffic for the purpose of carrying passengers or goods for reward. Finally, however, the view was taken that some licensing system might be necessary as to round-trip passenger flying, for reasons of flight safety, and the revision came to leave "tramping" with cargo as the only field of air commerce free from the requirement of prior licence.[49] But carriage of cargo alone was not any practical alternative at this time.[50] Therefore, as a practical matter the difference between the Swedish and the Norwegian revisions of the Air Traffic Act was negligible although the Norwegian revising Act provided that no *franchise* thereafter was required for commercial air traffic other than line traffic, yet such other air traffic required prior authorization by the Department in charge of such affairs.[51] Most effectively the principles of the Paris Convention influenced the Danish revision. The Danish Act[52] subjected to franchise requirements the establishment and operation of international airlines and carriage by air for reward of persons or goods between two points within Danish territory, leaving all other traffic unregulated (§ 2). It was expressly indicated when this regulation was prepared that occasional carriage of persons or goods for reward between Denmark and foreign countries — "Taxiflyvning" — should be subject to no restriction.[53]

As to France, it is difficult to tell whether air commerce was subjected to any licensing system at all, and thus whether there existed any basis for the appreciation of the notion of operator status as an implication of the regulatory scheme. The matter depends on the relationship between the original regimentation decree of 1920 and the 1924 Air Navigation Act. The 1920 decree was an emergency decree taken in order to make French legislation conform to the Paris Convention and pending the passing of the proposed Air Navigation Act.[54] The decree subjected all com-

[49] Decree of Apr 20, 1928, 1928 SFS no 83. The expression "trampfart" is used in 1926 KProp 172 p 5: "Något särskilt tillstånd behöves alltså enligt konventionen icke för att driva oregelbunden luftfart för befordran mot avgift av passagerare eller gods mellan två fördragsslutande stater, s. k. trampfart."

[50] PM, Kgl Kommunikationsdepartementet D-Nr L 143/1927, in note 48 *Supra.*

[51] Revising Act of 17 Jun 1932: see also Ot prp 39-1932 p 3 col 2.

[52] Revising Act of 7 May 1937 no 124.

[53] 1936-37 89 Rigsdagstidenden, Tillægg A II col 5471.

[54] See THOMAS, *L'aviation commerciale en France*, thèse Lyon 1928 p 158 sq, and CONSTANTINOFF 28. 1920 JO 9912—9914.

mercial flying to the requirement of licence.[55] The Air Navigation Act of 1924 did not mention any licensing system: on the contrary it is evident that its drafters considered that anybody could engage in aircraft operations.[56] Yet it is uncertain whether the Act in fact abrogated the former licensing system. Its purpose, undoubtedly, was to replace the prior plethora of decrees.[57] But Art. 81 of the Act only abrogated "toutes dispositions contraires à celles de la présente loi". Now, in form the 1920 decree was not contrary to any article of the Act. There is moreover plenty of evidence of a common belief that the 1920 decree remained in force as late as in 1934.[58] It may therefore theoretically have remained effective until the advent of the 1941 Act relative to the status of commercial aviation,[59] a piece of legislation which required special authorization for engaging in any regular air transport service (Art. 2), and with respect to irregular services it may indeed be doubted whether it was abrogated until the 1953 decree relating to the coordination of air transport.[60] The obscurity of the regimentation aspect at least cannot have furthered any French appreciation of operator status as an implication of the regulatory scheme.

Separate treatment of line traffic in the Paris Convention as amended by the 1929 Protocol, however, also affected the views of the national legislators. In France as well as in the Scandinavian States the establishment of regular air lines was subjected to the requirement of franchise in prior or subsequent conformity to the 1929 Protocol. In the Scandinavian States, this was a mere matter of continuing the legislation already in effect. In France, the result was achieved by a 1930 Amendment to the Air Navi-

[55] Art 5: "Les entreprises qui veulent exploiter commercialement la circulation aérienne sur le territoire français que leurs lignes soient tout entières sur ce territoire ou qu'elles y aient seulement leur terminus."

[56] RIPERT, 1921 17 Bull Sté d'Et Legisl 273.

[57] See the statement of M. Léon Jacob at the session of the Commission de législation aérienne on 25 Feb 1921, 1921 17 Bull Sté d'Et Legisl 324. Also THOMAS, *L'aviation commerciale en France* 162.

[58] LE GOFF, *Traité théorique et pratique de droit aerien*, Paris 1934 p 567 no 1126; JOSSERAND, *Les transports en service interieur et en service international*, 2d Paris 1926 p 78 no 58 bis; KROELL, 1 *Traité de droit international public aérien*, Paris 1934 p 185; WEGERDT, 1931 1 AfL 234.

[59] 1941 JO 4062—4064.

[60] 1953 JO 3584—3585. The true meaning of the 1920 decree relative to traffic other than air line traffic may be affected by the reference to "leurs lignes" in art 5. The legal effect of the 1945 nationalization ordinance — no 45-1403, 1945 JO 3890—3891 — may be another controversial issue affecting the holding.

gation Act[61] affecting international air lines, and by a decree of 1935[62] — moved primarily by subsidy considerations — which, as a practical matter, extended the former scheme to domestic line traffic. Only England remained relatively unaffected by the development. However, the Air Navigation Act of 1936[63] gave power to the Secretary of State for Air to make provision for the licensing of air commerce and an order for such licensing was made in 1938,[64] but the order was revoked in 1939.[65]

The building of a notion of operator status, however, was favoured by the additional requirement at times for authorization of traffic, *i.e.* that the operator licenced to carry the traffic should have a certain nationality. While this feature did not enter French law owing to French insistence that only the nationality of the aircraft need be considered, it was adopted in all the Scandinavian legal systems.[66] On the other hand, aviation in these countries affected so few that no real problem was felt although foreign aircraft fairly often were chartered for operations on Scandinavian lines in the service of the franchised Scandinavian operator.[67]

During the thirties the liberal principles of the Paris Convention distintegrated almost completely. As a result of the new distinction between line traffic and other traffic the so-called "taxi"-flights were thought to present a problem.[68] This problem was further aggravated by the fact that such taxi flights — later to be known in the United States as off-route charters — were operated by the franchised airlines.[69] While an assertion that no further authorization than the original line franchise was required could be based on Art. 15 of the Paris Convention,[70] the

[61] Act 16 May 1930.
[62] Act 16 Jul 1935, 1935 JO 7715.
[63] Sec 5-1-a.
[64] Air Navigation (Licensing of Public Transport) Order, 1938, SR & O 1938 no 613.
[65] SR & O 1939 no 1588.
[66] Air Traffic Acts §§ 34 or 35.
[67] Particularly DDL.
[68] In 1931 the International Chamber of Commerce expressly recognized that it was doubtful "whether commercial traffic of this kind requires a special authorization in the country of destination", 1931 2 JAL 376. Possibly, however, taxi flying was less a problem under the Paris Convention than in a situation devoid of international agreements; so WEGERDT, *Die Rechtstellung der Luftverkehrsgesellschaften*, 1931 1 AfL 239.
[69] WEGERDT uses the example of Cidna making a taxi flight from Paris to Prague, 1931 1 AfL 239.
[70] 1 KROELL 186. From the abundant literature bearing on the right of innocent passage and the privilege bestowed by Art 15 of the Paris Convention (and its

situation grew particularly uncomfortable because of the increasing awareness of the vulnerability of the heavily subsidized national airlines as to diversion of traffic from regular to taxi flying. In due course it was found that the liberal principles of the Convention altogether were untenable. It became a normal practice not to let chartered flights enjoy the privilege under Article 2 but under one pretext or another to subject them to the requirement of prior authorization.[71] In the course of an enquiry conducted by CINA in 1945 the majority of States opposed application to charter flights of the right to overfly provided for in Article 2, preferring this right to be applied only to non-commercial flights.[72]

## § 2. *The Non-Adherents to the Paris Convention: Germany*

Air Traffic Act, 1922 — air transport undertakings and flying displays — extent of licensing system — air lines and air transport undertakings other than airlines — three operator categories — governmental policy against use of aircraft not owned by operator

Germany never adhered to the Paris Convention and was on the whole unaffected by the liberal ideas about the right to fly to be found in some of its articles. Extended control over commercial aviation had been established by the Air Traffic Act of 1922. Under § 11 of the Act the requirement of prior authorization was imposed on "air transport undertakings"[73] and "flying displays".[74] By the latter term was meant "any public affair for competition or display in which aircraft take part".[75] Only non-commercial

equivalent, Art 21 of the Havana Convention) may be cited ROPER, *La Convention internationale du 13 octobre 1919 portant réglementation de la navigation aérienne*, Paris 1930 p 143—148, 194—197; GOEDHUIS, *Air law in the Making*, The Hague 1938; OPPIKOFER, *Die aktuellen Probleme des Luftrechts*, in 1945 Actes de la Société suisse des juristes No 2 p 145a—232a, at 192a—194a; and MACBRAYNE, *The Right of Innocent Passage*, 1954— 55 1 McGill LJ 271—276, which is an extract from her unpublished thesis at IIAL on the same subject.

[71] PLESMAN reports in *Les entraves à la navigation aérienne*, 1935 15 RAI 44 col 2 that customs difficulties often forced airlines to demand special permits for such flights. This article is the publication of the author's Report to the 8th Congress of the ICC, held in Paris in June 1935. ROUSSEL advises in *Le transport à la demande*, 1947 10 RGA 144, that special flights ("les vols spéciaux") were often assimilated to the creation of an exceptional air line.

[72] ROUSSEL, 1947 10 RGA 144.

[73] The German term is "Luftfahrtunternehmen". There exist various translations of this term, such as "air navigation enterprise", "aviation enterprise" etc. The one used in the text is preferred as the most literal one conveying the same meaning.

[74] "Luftfahrtveranstaltung". The translation used is the one preferred by the German Ministry of Transportation.

[75] Cf LORENZ, 1940 11 JALC 148.

aviation escaped the licensing system, provided that it did not take place within the framework of an operation, subject *per se* to the requirement of a licence.

The air transport undertaking group, however, was fairly soon split into two sub-categories as a result of German administrative practice. Since the licence — "Genehmigung" — was an act of the governmental supervision of commerce[76] it could be given subject to special conditions relative *e.g.* to routes to be flown, rates and conditions of carriage, and the practice soon developed of authorizing air transport undertakings subject to the conditions that they should not engage in any systematic operation of an air traffic line unless the undertaking had secured an additional licence relative to such operations.[77] The distinction between air traffic lines and air transport undertakings other than air traffic lines was construed by the Kammergericht in the *Nordbayrische Verkehrflug Case*[78] and received legislative recognition by the 1930 Air Traffic Ordinance.[79] The resulting grouping of operators into three areas of restrictions, *air traffic lines, air transport undertakings other than air traffic lines* and *flying displays* ought to have made these operators mindful of the problem of operator status. This effect, however, was obstructed by a governmental policy working against the intermingling of operator categories.[80]

## § 3. *The Non-Adherents to the Paris Convention: United States*

Air Commerce Act, 1926 — no discrimination aspect — Havana Convention — delay of development of a licensing system — obstacles — American, aviation passes into its common carrier phase — Air Commerce Regulations 1930—1934 Amendment to Air Commerce Act — Civil Aeronautics Act, 1938 — common carriage aspect — same aspect generates the non-scheduled operator category — "air carrier" status — lessees, not lessors enjoy grandfather rights — "air carrier" defined in the Act — one "who undertakes . . . by a lease . . . to transport . . . for the general public" — the person holding the equipment under lease is the statutory carrier —

The United States, although a signatory to the Paris Convention, never ratified it and the American development was affected

[76] BASARKE, 1927 1 ZLR 101.
[77] WEGERDT, 1932 2 AfL 132.
[78] 1931 1 AfL 64, 1931 2 JAL 581.
[79] The Air Traffic Act of 1922 had provided that certain problems were to be ruled by ordinance which was expected to be issued in a short time. The reasons why it was not adopted until 19 July 1930, are explained by WEGERDT in 1932 2 AfL 122. The regulation of the new category was originally found in § 54 but after the 1936 reformation, 1936 RGBI I p 659, it moved to § 42,
[80] See *supra* page 9.

even less than the German one by the liberal principles contained in the Paris Convention. After the passage of the Air Commerce Act of 1926, the attitude of the United States towards foreign aviators was most restrictive and did not even recognize a right of *passage inoffensif*.[81] The flying of foreign aircraft over the United States was legal only if made under a special permit by the Secretary of Commerce[82] and such a permit in principle subjected the foreign aircraft to all American national regulations.[83] Since foreign aircraft were treated so harshly, the idea of discrimination against nationals by excessive regulation could hardly have entered the mind of the American legislator. The picture might have been expected to change following the adoption of the Havana Convention under which the United States affirmed "the principle that the aircraft of each contracting State shall have the liberty of engaging in air commerce with the other contracting States without being subjected to the licensing system of any State with which such commerce is carried on."[84] The Havana Convention did not even require authorization for international air lines, probably on the theory that this liberty was a mere corollary to the right of free passage contained in Article 4 of the Convention.[85] But the picture of American restrictions was not affected. The impact of the liberal principles of the Havana Convention was indeed slight. In practice, these principles were rendered virtually ineffective with respect to both regular services and charter or special flights; prior permits or concessions were almost invariably required.[86] The climate thus was highly favourable to the development of licensing systems. Nevertheless, the introduction of such a system in American domestic operations was surprisingly delayed. The explanation for this need not be discussed here.[87] Suffice it here to say that when,

[81] See *supra* page 64. Also note 70.

[82] Air Commerce Act, 1926, sec 6-c, 1928 USAvR 338.

[83] *Ibidem:* "the Secretary of Commerce . . . may by regulation exempt such aircraft [*i. e.* as was navigating in the United States with a special permit from the Secretary] . . . from the requirements of section 3, other than the air traffic rules . . .": 1928 USAvR 338.

[84] Art 12.

[85] WARNER, 1932 3 ALR 267.

[86] LATCHFORD, *The Right of Innocent Passage in International Civil Air-Navigation Agreements*, 1944 11 Department of State Bulletin (No 262) 23; GRANT, *Latin American Air Transport Legislation*, 1945 31 Virginia LRev 327.

[87] It appears that as long as flying was classified as so-called private carriage (this notion will be dealt with further in Chapter 3) — and when the Air Commerce Act of 1926 was passed by Congress there was almost no flying which could not be

in 1930, American aviation entered its common carriage phase,[88] the obstacles to regulation were removed. The 1930 Air Commerce Regulations took a first step towards economic control of the field. In these Regulations it was provided that "for the purpose of conducting the scheduled operation of passenger air transport services in interstate air commerce ... it shall be necessary ... to obtain ... a Certificate of Authority to operate such a service."[89] The measure of restriction thus introduced is difficult to appreciate, however, particularly in view of the fact that the supreme concern of all the airlines was the mail payments.[90] In 1934, the Air Commerce Act itself was amended so as to recognize the control which had been developed by the Secretary of Commerce of entry into air commerce, but at the same time to force his powers back to the original limits determined by the safety aspect.[91] The Air Commerce Regulations of 1934, used the powers thus bestowed upon the Secretary to attach the requirement of a certificate to "scheduled operation of passenger air transportation"[92] adding the faculty, however, that the certificated airline could be permitted to operate "added schedules, special charter trips, etc." provided that it obtained an extra authorization.[93]

so classified (DAVID, *Federal Regulation of Airplane Common Carriers*, 6 Journal of Land & Public Utility Economics 360) — attempts towards regulation had to overcome the prevailing judicial philosophy which since late in the 19th century had worked towards the invalidation of legislation thought to be restrictive towards free enterprise. See *e. g.* MATTHEWS & THOMPSON, *Public Service Company Rates and the Fourteenth Amendment*, 1901, 15 Harv LRev 249 sq. When flying came to be classified as common carriage it could benefit from the fact that regulation of common carriers had been practised in England from time immemorial and in the United States from its first colonization. As far as the United States Supreme Court was concerned, it was not until 1937 that there was a real change in the philosophy on the Court towards social and economic legislation (see *e. g.* MCKAY, *An American Constitutional Law Reader*, New York (Oceana) 1958 p 172).

[88] See further Chapter 3 pages 207 sq.

[89] 1930 USAvR 325, No 2. A sample of one of the Letters of Authority is published in 1932 3 JAL 233 note 12.

[90] FAGG & FISHMAN indicate that the Secretary of Commerce's supervision of operations amounted to a "considerable control": 1932 3 JAL 231. SMITH states that "a bureau of the Department of Commerce had regulated commercial aviation almost as though it were a public utility"; *Airways* 283.

[91] Sec 3-f was amended, empowering the Secretary to provide for airline certificates as a condition for operations: but he was not entitled to "deny any application for an airline certificate or revoke or suspend any airline certificate, except for failure of the airline to comply with safety standards applicable to the operation thereof prescribed by the Secretary." 1934 USAvR 334. It was furthermore made unlawful "to operate any airline in interstate or foreign air commerce without an airline certificate." 1934 USAvR 328.

[92] Sec 2, 1934 USAvR 348.

[93] Sec 3, 1934 USAvR 350.

To a great extent this picture of restrictive regulation was continued under the Civil Air Regulations of 1937.[94]

The advent of the Civil Aeronautics Act in 1938 was a turning point in the appreciation of operator status in so far as the American administrative air law was concerned. Stable bases were now established for a system of air commerce regulation: and all subsequent change developed from these bases. The Act, it is true, was replaced by the Federal Aviation Act of 1958;[95] yet title IV of the Civil Aeronautics Act, referring to air carrier economic regulation was re-enacted without substantial change as Title IV of the Federal Aviation Act.[96]

The Civil Aeronautics Act applies only to common carriage.[97] An important corollary to this limitation is that all carriage deemed to be private carriage cannot be regulated under the Act.[98] This limitation was instrumental in creating the first regulatory category of operators under the Act. The Act itself knew but two operator categories, the certificated airlines and the foreign air carriers. In 1938, however, there existed a number of operators who had engaged in transporting passengers on a charter basis, not over fixed routes but usually from a fixed base. There was some doubt at that time whether these operators were common carriers. The Board avoided the issue at that time by exempting persons engaged exclusively in non-scheduled operations from the economic regulating provisions.[99] The operators so exempted were considered to form a new category of operators. The main creation of the Civil Aeronautics Act itself was the certificated operator category. The Act provided that "no air carrier shall engage in any air transportation unless

[94] 1937 USAvR 462.

[95] 72 Stat 731.

[96] Cf PIRIE, *The Federal Aviation Act of 1958*, 1958 JAG Journal 3; GELDER, 1959 Mich LRev 1215.

[97] The controlling provision is the definition of "air transportation", see sec 1-10 and 21. Compare note 88 *supra*.

[98] RHYNE, *Federal, State and Local Jurisdiction over Civil Aviation*, 1946 11 L & C P 465 and note 25; BALLARD, 1946-47 60 Harv LRev 1271; PORTER, *Federal Regulation of Private Carriers*, 1950—51 64 Harv LRev 910; FREDERICK 2d 224. When preparing the Act, Congress was faced with three alternatives in defining the scope of the regulation proposed: it could be made to apply to (1) scheduled airlines only, (2) all common carriers by air, and (3) all air carriers for hire. The story why Congress decided to take the common carrier alternative and how the decision was brought about is told by CRAIG, *A New Look at Section 416 (b) of the Civil Aeronautics Act* in 1954 21 JALC 131—147.

[99] FREDERICK 4th 185. Part 292. 1 of CAB Economic Regulations. For text, see 1946 USAvR 387 note 13.

there is in force a certificate ... authorizing such air carrier to engage in such transportation".[100]

As soon as the operator categories were formed, the problem of operator status was encountered. Most carriers struggled for entry into the certificated carrier category. Existing air carriers were favoured in that, with certain reservations, all they were required to prove in order to secure a certificate was continuous operation — not including interruptions of service over which the applicant had no control — during a specified period.[101] The privilege thus bestowed upon the existing carriers was termed their "grandfather rights".[102] In two cases, operations during the grandfather period[103] — May 14 to August 22, 1938 — had been conducted by the applicants for a certificate only by means of aircraft and crews leased from other airlines. Interested parties denied that these applicants could avail themselves of these operations for the purpose of grandfather rights. In the *Marquette Case,*[104] the applicants had leased three planes from American Airlines, who had performed many mechanical and ticket sales services during the period. In the *Canadian Colonial Case,*[105] the applicant's schedules during the period were flown by aircraft furnished by American Airlines under lease-purchase agreements, and maintenance and overhaul of these planes, as well as the service of the dispatchers and of a flight superintendent, were also provided by American. In both cases, the administrative agency awarding certificates — the Civil Aeronautics Authority[106] — held that the fact that the applicant's operations were conducted with leased aircraft and personnel had not affected its

[100] Sec 401-a.
[101] Sec 401-e-1.
[102] This expression "grandfather rights" is used in American legal language, in connection with the subjecting of an industry to regulatory control, to connote that undertakings active before the entry into force of the regulation are to be granted necessary authorization to continue their operations. It was so used during the change over from free enterprise to regulated industry occurring with the motor carriers under the Motor Carrier Act, 1935, 49 Stat 543. It appears that the term originated in the Southern States after the Civil War when they attempted to neutralize the right of vote which they were forced to extend to negroes by the promotion of the latter from slaves to citizens. One of the arrangements used was the Grandfather Clause in the Elections Acts: if your grandfather could vote, you could vote; otherwise not. Hence, grandfather rights.
[103] RHYNE, 1941 12 ALR 246.
[104] 1 CAA 301.
[105] 1 CAA 520.
[106] Compare note 289 *infra.*

status as air carrier within the meaning of section 401-e-1 of the Civil Aeronautics Act.[107]

The views of operator status thus taken as to grandfather operations would seem equally applicable when construing the meaning of the term "air carrier" in the Civil Aeronautics Act. As therein defined, "air carrier" meant one "who undertakes, whether directly or indirectly, or by a lease or any other arrangement, to engage in air transportation."[109] The selection of the statutory carrier in the case of composite services in the early period seems to have followed the views of operator identity held in the grandfather cases. In the early literature argument will be found to the effect "that the owner-operator of an aircraft is not the statutory carrier where he makes his aircraft available for use by another person who is dealing with the shipping public".[110] Such argument furthermore finds support in the legal history and the judicial construction of the parallel definition in the Motor Carrier Act of 1935[111] concerning the "common carrier by motor vehicle." Prior to 1940, section 203-a-14 of the Interstate Commerce Act defined this term to include one "who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public . . . for compensation". The original bills which became the Motor Carrier Act did not contain these words: they were added by the Senate Committee in an attempt to check feared evasions of the law by brokers who undertook to transport for the public but made arrangements with small and irresponsible owner-operators for the latter to engage in the actual conveying.[112] As far as Congressional intent was concerned, the teeth of the regulation were set for the middlemen rather than the vehicle owners. The judicial construction was to the same effect. In *United States v. Rosenblum*,[113] the United States Supreme Court found that Congress had not intended to grant multiple grandfather rights on the basis of a single transportation service; and, thus faced with

[107] RHYNE, 1941 12 ALR 258—269, also 246 note 7.
[109] Sec 1-2.
[110] WESTWOOD & ELPERN, *Owner-Operators of Motor Vehicles: Implications for Air Carrier Problems*, 1945 31 Va LRev 410 note 100.
[111] 49 Stat 543.
[112] For the history of the adding of these words and their ultimate deletion, see generally WESTWOOD & ELPERN, *op cit* 408—420.
[113] 315 US 50. Prior decisions, see 24 MCC 121; 36 F Supp 467.

the operator status problem, the Court selected the lessees as the statutory carrier on the argument that the lessors' operations were an integral part of a single common-carrier service offered to the public by the lessee-common carriers for whom the lessors hauled.

## SECTION 3. THE CHICAGO CONVENTION ERA: FIRST PHASE

### § 1. *The Chicago Convention*

System of fifth freedom traffic limitations — "regulations, conditions, or limitations" in Article 5 — disappearance of discrimination aspect — nationality requirements — operations performed by aircraft and crews leased from airlines of another nationality—*US Overseas v CAVE*—dichotomy of scheduled and nonscheduled services — services and operators — importance of distinction under the Paris Multilateral Agreement, 1956 — standards of performance — Annex 6 — Amendment No 10 — operational authority and operational standard

A second epoch of administrative regulation of aviation was inaugurated by the adoption of the Chicago Convention. Under its aegis, throughout the whole aviation field, patterns of restrictive regulations were established. First, the Chicago Conference adopted and extended the restrictions relating to the "creation and operation of regular air navigation lines" which had been fostered under the auspices of the Paris Convention as amended by the 1929 Protocol.[114] The Conference deliberations as to the five freedoms[115] left scheduled operators to face an intrinsic system of fifth-freedom traffic limitations. Secondly, the Convention authorized the imposition upon air carriers other than scheduled operators transporting passengers, cargo or mail for remuneration or hire, of "regulations, conditions or limitations" relative to what services such carriers were entitled to operate.[116] As a result, governments felt that they could regulate the entry of foreign air carriers almost at will. This, of course, made the discrimination aspect of regulating domestic operators completely disappear.[117] Most states generated a mass of governmental

[114] Art 15.

[115] As to meaning of the *five freedoms*, see the International Air Transport Agreement, 1945 USAvR 284, art 1-1. See further *infra* page 117.

[116] Art 5.

[117] Of course, the aspect might have revived, had the negotiations for a multilateral agreement on commercial rights succeeded and the agreement been placed on such a footing as to exclude any need for additional bilateral agreements. Whether this aspect and its imminent threat to the powers of the national administrative agencies in fact contributed to the failure of the multilateral project is not known.

regulations conforming to the basic distinction between "scheduled" and "non-scheduled" aviation which was introduced by the Convention itself.[118]

With all areas of international air commerce being subjected to the requirement of prior licence, the classification of operators into different categories raised the problem of operator status in the case of inter-carrier contracts. The first apparent problem resulted from *nationality* requirements. The system of bilateral agreements for the exchange of scheduled air transport privileges was drafted to apply only to scheduled operators of the nationality of the parties to the agreement. Could then an operator who had been designated to avail himself of such a privilege avail himself of the services of a foreign aircraft operator? The case was by no means uncommon. It was a recurrent feature of post-war contracting that the operations of air lines created in countries without air commerce traditions were to no small extent conducted by the use of foreign (mainly American) personnel and equipment.[119] The problem was of some concern since the combined service might result in privileges being bestowed upon it which no other single foreign airline would possess. The approach of the bilateral agreement, therefore, was flexible on the issue. The state privileged under the agreement designated the airline and the state burdened by the agreement approved of the designation; thus a double tutelage was

[118] While having many equivalents in the administrative law of a number of countries relative to various forms of transportation, this distinction between scheduled and non-scheduled until this time had not made entry into international air law. As indicated, *supra* page 71, it originated in the administrative regulations of the United States. — The powers conferred upon the governments of Contracting States were taken care of by the British Air Navigation Order, 1949, art 46, the British being — in the absence of any general licensing system — otherwise unable to exclude foreign aircraft. Art 46, read: "An aircraft registered in a Contracting State other than the United Kingdom or in any foreign country, if engaged in the carriage of passengers or goods for hire or reward, shall not take on board or discharge passengers or goods at any place within the United Kingdom except in accordance with the terms of any agreement for the time being in force between His Majesty's Government in the United Kingdom and the Government of the country in which the aircraft is registered or in accordance with the special permission of the Minister and subject to any conditions or limitations which he may specify." Art 46 was later replaced by art 49 of the Air Navigation Order 1954, and that, in turn, was replaced by art 68 of the Air Navigation Order, 1960.

[119] Transocean AL and Phillippine AL, Seaboard & Western AL and Luxemburg AL and Air Lingus Teoranta, US Overseas AL and CAVE, BEA and Lufthansa, SAS and Olympic AL etc. An account of the co-operation between airlines will be found in WAGER, *International Airline Collaboration in Traffic Pools, Rate-Fixing and Joint Management Agreements*, 1951 18 JALC 192—199, 299—319.

created.[120] But in many cases the state burdened reserved the right to scrutinize the nationality of the designated airline, therein following the example of the International Air Services Transit Agreement,[121] (section 5), under which each contracting state reserved the right to revoke its certificate or permit "in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State." Such a scrutiny, of course, is possible not only *a priori* but also *a posteriori*.[122] It is submitted that such inter-carrier contracts, while permissible under Article 79 of the Chicago Convention,[123] should not be permitted to circumvent the principles of Article 6 of the same Convention.[124] Indeed, where two interpretations of a treaty are possible the one least in derogation of sovereignty is likely to prevail.[125]

The very extensive measures to hammer out divergencies of opinion as to the identity of the operator in these areas of nationality regulation make litigation of such matters unlikely. The point appears to have been raised only once. In the *U.S. Overseas v. CAVE*[126] case one of the issues was whether the engaging of the services of an American airline under a wet lease contract in order to carry out the operations of a Venezuelan air carrier according to a Venezuelan franchise did amount to the transfer of the franchise from Venezuelan to American hands. Such

[120] Cf CARTOU, 1957 11 RFDA 91. See also GAZDIK, 1958 25 JALC 1—7; 108 IFTA NT *Contrôle des exploitations étrangères.*

[121] 1945 USAvR 278.

[122] CARTOU, 1957 11 RFDA 92. At the third session of ECAC, March 1959, the Conference approved a standard clause for bilateral agreements, art 2—4, of same contents, see 1959 26 JALC 193.

[123] Art 79: "A State may participate in joint operating organizations . . . through an airline company or companies designated by its government . . ." The Norwegian Motives (*i. e.* the explantory comments affixed to the bill in the course of its preparation to the Civil Aviation Bill of 1957 argue that the Transit Agreement provisions "cannot be considered to obstruct an air transport undertaking from engaging *leased* ["leide"] aircraft on the service to which the [bilateral] agreements relate." See 3 *Instilling* 156. This argument, however, must be understood to refer to less extensive contracts than those wet leases under which the charterer's complete operation is run by the other airline. This interpretation receives support from the text of footnote 3 in the Motives, *loc cit.*

[124] Art 6: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

[125] Compare *Guaranty Trust Co of New York v United States* 304 US 126 at 143, 58 SCt 783.

[126] *US Overseas Airlines v CAVE*, 1956 USAvR 452; 1957 USAvR 282; 1958 USAvR 312, 690.

transfer was illegal under Venezuelan law and thus would have involved the termination of the franchise and permitted the American contractor to justify his previous repudiation of the wet lease contract, a repudiation which he had made, it appears, for quite other reasons. The American Court of Appeals seized with the dispute held that the wet lease contract was equivalent to an agency contract and involved no transfer.[127]

Similar problems, however, resulted from the introduction on the level of an international convention of the dichotomy of two operator categories, operators of *scheduled* services and operators of *non-scheduled* services. The Convention, it is true, in terms only creates the dichotomy of scheduled and non-scheduled services which would seem not to affect operator status, an operator, theoretically, being free to perform both kinds of services. As a practical matter, however, being faced with a system of licensed operators the Conventional system is converted into a splitting of *operators* into two groups, those which are licensed to conduct a scheduled service and those which may conduct non-scheduled services. While originally the freedom of each government to impose "regulations, conditions or limitations" at will under Article 5 of the Convention made it unimportant whether the airline restricted belonged to one or the other category, the issue achieved greater importance under the European Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services of 1956. This Agreement — herein referred to as the 1956 Paris Agreement — meant the waiver by the contracting states of their right to impose such "regulations, conditions or limitations". The definition of the categories and the view taken of intermingling of services could thereafter mean the success or failure of a secured contract.

Intermingling of services between the operators of scheduled and operators of non-scheduled services also involved problems because of the establishment of different *standards of performance* for the two categories.[128] Airline combinations over the

[127] 1957 USAvR 283.

[128] At the Chicago Conference twelve Draft Technical Annexes were accepted as a basis for further study, one of them, Annex 6, being Airworthiness Requirements for Civil Aircraft engaging in International Air Navigation, see SHAWCROSS & BEAUMONT 2d 662 no 1297. This study eventually resulted in the adoption on 10 Dec 1948, by the ICAO Council, pursuant to art 37 of the Chicago Convention, of Annex 6 containing Standards and Recommended Practices carrying the name "Operation of Aircraft – Scheduled International Air Services." The Annex

categories therefore were likely to create confusion as to which standard should govern: could one operator lower his standard of performance by engaging the services of an operator belonging to the other category? If the airlines involved use different Operations Manuals,[129] which manual is to guide the personnel in service? Whose Flight Operations Officer is to be in charge of the service? On the international level, however, few problems of this kind are likely to be disputed. They are, in the main, projected into proceedings before or within the national agencies charged with the supervision and enforcement of the standard of performance of the national aircraft. Nevertheless ICAO has not been unmindful of the problems. By adopting in 1950 a note to the chapter on Applicability, in Annex 6, the Council indicated that in a case where an aircraft was operated by a company not having the nationality of the State in which the aircraft was registered the State of registry could delegate its function under the Annex to the State to which the operator belonged.[130] While this solution could not relieve the State of registry of its basic responsibility for the aircraft, it at least showed a way to make the chartered aircraft subject to the "operational control"[131] of the chartering company. The operator, furthermore, was free to designate a representative to have responsibility for this "operational control".[132] Possibly, he could, if he so chose, designate the lessor to have it.

became effective on 15 Jul 1949, see Annex 6, issue Sep 1949 p 8. By Amendment No 1 which was adopted by the ICAO Council on 5 Dec 1950, the Annex title was changed into "International Standards and Recommended Practices for Operation of Aircraft — International Commercial Air Transport". It has appeared in five editions. The Annex now relates to both scheduled and non-scheduled services but the standards vary between these two categories.

[129] The establishment by each operator of an Operations Manual is prescribed in Annex 6, no 4.2.1; its contents are outlined in no 11.1. These manuals are compiled by the airlines. They are the pilot's guide and lay down such limitations as relate to flight altitudes, fuel loads to be carried for each individual sector of the routes flown, minimum weather conditions required for each flight, and any other restrictions calculated to provide adequate safety margins. The manuals of different airlines vary considerably. It appears to involve great difficulties to require pilots on chartered planes to fly in accordance with a new Operations Manual.

[130] Amendment No 10, adopted by the ICAO Council on 5 Dec 1950. Compare note 13 page 52 *supra*.

[131] This term was adopted at the same time. Amendment No 5. As defined, the concept meant "The exercise of authority over initiation, continuation, diversion or termination of a flight."

[132] Amendment No 12 adopted at the same time.

## § 2. *The French development*

Nationalization Ordinance — *ad interim* authorizations for private operators — 1953 decree-law — commercial operators and operators in passenger transportation — exemption of air taxi operators — travel agents and freight forwarders excluded from operatorship — regulation to control standard of performance—territory overflown and nationality of aircraft controlling, not operatorship

After the 1945 armistice, the nationalization wind swept France, and as a result, an Ordinance of June 26, 1945,[133] vested the government with the property of the three then existing French air carriers. It said nothing, however, about any monopoly for the governmental airline to be created. When eventually Air France revived as a "compagnie nationale",[134] a relative freedom of action existed and besides the national flag carrier a great number of "compagnies à la demande" were active which had secured, subject to the discretion of the Minister, a special authorization. The compatibility of these authorizations with the nationalization ordinance was open to some doubt and as a precaution they were issued merely *ad interim* pending the promulgation of a new law to regularize the status of all French commercial aviation. Due to the political weakness of the French governments of the time the anticipated legislation failed to appear for many years. In the end, however, the French government felt that it could not await the vote of the National Assembly but had to be vested immediately with powers of regulation in order to cope with a rapidly deteriorating situation and establish an indispensable measure of coordination between the operators. Such powers were therefore usurped by the French government in the decree of September 26, 1953, relative to the coordination of air transport.[135] Under the decree nobody could lawfully engage in commercial air transportation without prior authorization of the government[136] and the transportation of passengers could be performed only by undertakings which had obtained a special

[133] 1945 JO 3890—3891.

[134] Its status was finally established by an Act of 16 Jun 1948, no 48-976, some provisions of which appear as arts 137—144 CAvi.

[135] Décret no 53-916, 1953 JO 3584—3585, 1953 16 RGA 416. Possibly this decree deserves to be called a decree-law. It was enacted pursuant to an Act for the delegation of legislative powers of 11 Jul 1953—"loi portant redressement économique et financier" — which provided in art 7 that decrees enacted under the authority of the Act could validly modify or abrogate prior legislation. Certainly, however, the practice of decree-laws was contrary to art 13 of the 1946 Constitution containing an express provision against the delegation of law-making authority.

[136] Art 2, CAvi art 127.

licence therefor.[137] Exempted from this latter requirement was all carriage of not more than six passengers by means of certain light aircraft, *i.e.* all air taxi operators.[138] Following the 1953 decree another decree of 1954[139] prescribed that only such undertakings were eligible for authorization as air carriers as were "exerçant à titre principal une activité aérienne".[140] This rule apparently operated against brokers, travel agents, and freight forwarders.

The resulting system of French commercial aircraft operators meant their grouping into three categories: first, Air France, being subject to special legislation; secondly, the big non-nationalized passenger carriers subject to special and qualified authorization; and thirdly, the small passenger carriers, cargo carriers and other aircraft operators, this category only being subject to the requirement of a simple authorization. The activities of the passenger carriers were outlined in their operations programmes; these had to be officially approved and deviations from them were not tolerated. The difference between regular and irregular services was not accepted but rather authorizations were attached to operators serving certain geographical areas,[141] in conformity with the pattern of French air commerce which had already developed by private agreements between the companies. Those airlines which were tied to geographical sectors could not fly their aircraft outside of these sectors without special permission. Under such conditions, occasional inter-carrier charters were not likely to lead to disputes about operator status. It was notable, however, that SAGETA, an airline which only operated under charters to other airlines and did not sell tickets itself,[142] was not required to hold any authorization at all.[143] But this, in its turn, meant that the intermingling of

[137] Art 4, CAvi art 129.
[138] By an Arrêté 23 Jan 1956, 1956 19 RGA 203, the maximum weight was fixed at 5,700 kilograms by the Minister.
[139] Décret no 54-1102 of 12 Nov 1954, 1954 17 RGA 424.
[140] Art 2.
[141] The present-day political events are likely to change parts of this system.
[142] SAGETA was formed in 1953 with the participation of Air France, UAT, TAI and Air Algérie in order to maintain, in the interest of the National Defense, the French stock of aircraft of the type Armagnac. Each of these aircraft had to be used 6,000 hours per year if the operation was to be profitable. The French Armed Services undertook to engage 3,000 hours per year per aircraft and the rest was flown under charters to Air France and the other participants in SAGETA. See Les Ailes, 24 Jan 1959, no 1713 p 1 sq.
[143] Information supplied by SGACC during interview 5 Jan 1959.

services between SAGETA and some other carrier could not lead to any dispute about operator status on the administrative plan.

Even the question of the regulations guarding the standard of performance was solved in France as far as possible without raising the problem of operatorship. The French order of 1955,[144] equivalent to Annex 6, applied to every operation by aircraft immatriculated in France although outside of French territory this application only extended in so far as it was not contrary to the regulations of the State overflown. On the other hand, the French regulations did not apply to foreign aircraft flying over French territory except in the case where it was established that the regulations of the State of immatriculation were not up to the ICAO standard.[145] While the 1955 Order had but an ephemeral life and later Orders appear to have rejected the idea of controlling foreign-registered aircraft, the salient feature of the French regulation has been a heavy reliance on immatriculation rather than on consideration of operator status.

As a sequel to this system, French practice meant the avoiding of international charter agreements in favour of drawing up sales contracts with a right of redemption. By way of such a contract the French airline became formal owner of the aircraft but on a condition subsequent and the aircraft could henceforth be registered on the French aircraft roll. When the foreign seller exercised his right of redemption the arrangement came to an end and the aircraft was removed from the French roll.[146]

### § 3. *The German development*

Inheritance of pre-war system — delimitation of the category of air transport undertakings — use of conditions attached to authorizations — composite services — policy against charters of foreign aircraft — special conditions if chartered domestic aircraft are used — devices of protecting the standard of performance

In 1955, by the ratification of the Treaty of Paris, Germany regained sovereign status. Neither the Air Traffic Act of 1922

[144] Arrêté of 22 Apr 1955: Conditions d'émploi des avions de transport public, 1955 JO May 13, correction 1955 JO Jul 27. This order was abrogated by an Arrêté of 8 Aug 1958 which in turn was replaced by the Arrêté of 3 Aug 1960, 1960 JO 24 Aug, the provisions of which, pursuant to its art 1 "sont applicables aux avions immatriculés en France portant sur leur certificat de navigabilité les mentions 'Transport public pour passagers, catégorie 1' ou 'Transport public pour passagers, catégorie 2' ou 'Transport public pour la poste ou les marchandises', lorsqu'ils font du transport public."

[145] Art 1er

[146] DTA/SGACC letter.

nor the Air Traffic Ordinance of 1936 had been affected by any decrees of the Occupation Authorities except for a few details.[147] The task of their enforcement therefore immediatly fell upon the successor to the Reichsminister der Luftfahrt, *viz.* the Bundesminister für Verkehr, in so far as the German licensing system was concerned. In response to this mandate, the Minister on August 13, 1955, issued a public statement of the policy to be followed as to the licensing of air transport undertakings.[148] This statement construed the category of air transport undertakings to include any operator of the following traffic service types: excursion flights, tramp traffic, any call-and-demand air service, circular flights, flights with sick people and photo flights. Contrasted with these service categories was the air line service which required additional authorization: the latter authorization was now qualified as a "Rechtsverleihung (Konzession)" while the permit given to an air transport undertaking was a mere "Polizeierlaubnis" (see 7-iv). If an excursion flight service or a tramp service were operated in an air line manner — "linienmässig" — they thereby would incur the obligation to seek an air line concession. The critical point was indicated as the moment when the aircraft flew between the same points systematically and with a certain degree of regularity (2-i). Conditions always attached to the concession and could attach to the air transport undertaking permit as well.[149]

Special considerations were disclosed relating to the chartering of aircraft. Thus, in a statement of December 29, 1955, the Minister announced that he was not willing to authorize an air transport undertaking unless it was to use aircraft recorded on the German aircraft roll[150] and thus charters of foreign aircraft

[147] DIEHL, *Die rechtliche Gestaltung der Bodenorganisation der Luftfahrt unter Berücksichtigung ihrer Entwicklung und der gegebenen Rechtslage*, in *Probleme des deutschen Luftrechts* 79.

[148] 1956 5 ZfL 146; 1955 NfL B 60; 1955 16 VkBl 425. The statement was issued as a letter to the Traffic Ministers of the German *Länder*.

[149] § 42-2 — Clarification of this rule was added by the 1959 revision of the Air Traffic Act: if the service of such an undertaking continuously encroached upon the public traffic interest, (§ 22: "Soweit durch diesen Luftverkehr die öffentlichen Verkehrsinteressen nachhaltig beeinträchtigt werden") the governmental agencies could add conditions and regulations to the permit as well as prohibit further transportation. The revision was the result of a desire to prevent services not subject to the air line concession from competing with the air line services. DARSOW, 1959 8 ZfL 84.

[150] 1956 5 ZfL 146, 1956 NfL B 1.

were effectively prohibited. Even charters by air transport undertakings of domestic aircraft were the object of suspicion and indication of such intent involved the adding of special conditions to the permit.[151] These two declarations were mere constructions of the principle laid down in the Air Traffic Act § 11-2, although it was framed there merely as a faculty of the dicensing agency and included even flying displays.

## § 4. *The Scandinavian development*

Operator categories — impact of the formation of SAS — SAS having separate identity under the aspect of operational authority — the cabotage test — mother companies, not SAS, have operator status under the aspect of operational standard — delegated governmental supervision — dual contracts scheme — Danish regulation — Norwegian regulation — absence of Swedish regulation — *Westlund Case*

Prior to the recent Civil Aviation Act, the first main feature of the post-war development in Scandinavia with regard to operator status was the continuous development of the number of different operator categories and the widening of the gaps between these categories by the prescription of increasingly elaborate operating conditions.

The second important feature, however, related to the formation of SAS.[152] In respect of operational authority, SAS was considered to have a legal identity separate from its mother companies. SAS was regarded as operator of the traffic for which one or more of the mother companies was the holder of a concession. This scheme thus meant the transfer of the operation from the concessionnaire and, as such it required specific authority. This requirement was satisfied by the addition of special clauses to each of the concessions permitting the delegation of operations to the consortium SAS.[153] This delegation, again, was considered in Norway to be in violation of the reservation of cabotage traffic to Norwegian undertakings, since the delegation included the

[151] 1955 policy statement 1-iv-e.

[152] See generally BURGUET, *Les relations entre les Etats scandinaves et le S. A. S.*, 1956 19 RGA 126—139; WAGER, *Coopération internationale et "Scandinavian Airlines System"*, 1951 14 RGA 31—48, 99—112; NELSON, *Scandinavian Airlines System — Cooperation in the Air*, 1953 20 JALC 178—196. Also DUTOIT, *La collaboration entre compagnies aériennes*, thèse Lausanne 1957; COULET, *L'organisation européenne des transports aériens*, thèse Toulouse 1958.

[153] In writing this paragraph I have relied on information contained in an unpublished lecture delivered at the Institute of Air and Space Law. Montreal, by H. BAHR.

operation of intra-Norwegian traffic. The extensive Danish and Swedish participation in SAS disqualified the consortium as the type of Norwegian undertaking which could lawfully operate in cabotage. The Norwegian interpretation resulted in exemption powers being conferred upon the King of Norway by special legislation in reference to air cabotage.[154]

In respect of operational standard, by contrast, no operator status was conferred upon SAS. The SAS consortium agreement served *i.a.* to transfer the use of the equipment from its registered owners, the mother companies, to SAS. Therefore, as officially explained,[155] it embodied a charter and hire agreement. At the same time, the SAS methods of operation and maintenance sometimes meant that there would be almost no connection between one aircraft and its state of registry.[156] The Scandinavian states therefore devised a scheme to the effect that each state was delegated by the two other states the duty to supervise SAS aircraft conformity with the applicable regulations regardless of their state of registry.[157]

International inter-carrier charters, generally, came to be covered by the same system and developed under a scheme of dual contracts, on the one hand, the charter agreement between the airlines, on the other hand, a companion agreement between the agencies concerned. Each carrier's chief of operations was charged with

[154] Act 6 Jul 1951. See 3 *Instilling* 318 col 2. Incidentally, in order to avoid the most-favoured nation clause in art 7 of the Chicago Convention being applied on the basis of this concession of cabotage rights, an unofficial statement was solicited from the ICAO Secretariat to the effect that SAS had national character in each of the three Scandinavian States concerned, *i. e.* the opposite to the Norwegian interpretation. See 3 *Instilling* 317 col 1.

[155] Swedish Government, in ICAO LC/SC/CHA WD No 4 7/2/57. It is notable that the SAS cooperation prior to the 1951 consortium agreement, *i. e.* in the period when note a) was added to the headline of Chapter 3 of Annex 6 (see *supra* page 52 and note 14), was secured by a general charter agreement — "Chartringsavtal" — between the three mother companies which permitted each of the participants to charter from each other participant equipment and crews to secure the joint operation.

[156] Flights are mainly international. Separate maintenance bases are operated at Copenhagen, Stockholm and Oslo, but maintenance is organized on a type basis and not according to national registry. Thus Caravelles are maintenanced in Copenhagen, Metropolitans in Oslo and DC 8's in Stockholm. A Norwegian registered Caravelle, accordingly, may never touch a Norwegian airfield.

[157] Pursuant to the so-called Government Agreement of 20 Dec 1951 the inspection of each particular type of aircraft is carried out by the Civil Aviation Inspectors of the state where that type is maintenanced. Even this delegation necessitated an amendment of the Norwegian Air Traffic Act of 1923, which amendment was passed 6 Jul 1951. Cf note to Chapter II no 4.1 in Annex 8.

the responsibility of securing compliance with pertinent regulations relating to the company's operations, and thus with upholding the standard of performance of the company. This responsibility was one towards the governmental agency. But in the case of an inter-carrier charter, the charterparty determined the authority of the chief of operations as to the chartered aircraft while his official duties were determined by public law regulations and in principle involved all aircraft for which his company was registered as owner. The aviation agencies felt that the chief of operations could not avoid this responsibility by the charterparty transferring his authority to the other airline. Such effect could only take place by an agreement on the governmental level. As a result charter agreements affecting operator status in the nature of operational standard had to be implemented with contracts between the aviation agencies concerned involving the delegation of supervisory powers. This dual system of contracts in air chartering forms the background of the Scandinavian regulation in point.

The Danes and the Norwegians adopted rules for the case of nationally registered aircraft chartered to foreign operators. The Danish regulation was to the effect that foreign regulations would not apply to the aircraft — and hence the foreign chief of operations had no authority as to it — until the foreign aviation agency had secured the application of those regulations by contract with the Danish aviation agency.[158] The Norwegian regulation of 1959 provided similarly that Norwegian aircraft chartered to foreign airlines remained subject to the Norwegian regulation until the aviation agencies had agreed to the contrary. But the Norwegian regulations provided furthermore, somewhat in excess of the basic principle, that foreign aircraft chartered to Norwegian operators were subject to the Norwegian rules.[159]

No Swedish regulations have been issued so far which bear upon this point. The Swedish approach would seem to be that Swedish authorities should not interfere with the operations of a foreign airline as far as operational standard is concerned, even when that airline is in the service of a Swedish undertaking

[158] Bekendtgørelse 10 Jun 1953 om udfaerdigelse af reglement verdrørende driftsforskrifter for regelmaessig offentlig lufttrafik, part 2.2.1.
[159] Driftsforskrifter 20 Nov 1958, see 1959 Norsk Lovtidend 1049 part 2.1; 1080—1081 part 2.1.

pursuant to a charter agreement, because the lack of knowledge of the foreign circumstances would render almost any interference valueless.[160] The official silence on the point, however, was unexpectedly broken by the Court of Appeals in the *Westlund Case*,[161] in which the Court had to pronounce upon the authority of the charterer's chief of operations in relation to aircraft chartered from foreign owners. In fact, the charterer's interest in the aircraft was so complete that the owner's participation in the service was limited to 20 shillings, the continuing of foreign registration and the supplying of an aircraft commander and a mechanic. The rest of the crew was put on board by the charterer and almost complete ownership was vested in him. The Court of Appeals, whose judgment was supported by the Supreme Court insofar as that it was not received for revision, investigated the limited duties, which the aviation agency had imposed upon the chief of operations as concomitant to the charterer's limited operational authority, and concluded that the "employment as Chief of Operations of Svenska Aero can not be regarded as having included those operations which are here concerned and which undisputedly have been performed by a British aircraft pursuant to a charter agreement between a British air company and a Swedish company . . .[162] without special licence and further regulations by the Board of Civil Aviation".[163]

## § 5. *The British development*

Licensing system established by way of the monopoly of the Air Corporations — scheduled journeys — associate agreements — policy as to the award of associate status — ATAC — Terms of Reference — travel agencies excluded from operatorship — implications of BEA practices — operational authority — BEA or associate—operational standard — associate or charter company

Although the British even before the war had prepared a general licensing system patterned upon the one prevailing in road carrier

[160] Information supplied by Luftfartsstyrelsen (NYLUND letter).
[161] *Svenska Aero v Westlund*, 1961 USAvR 218, 1 Ark f L 256, 1960 NJA C 126.
[162] The words omitted are: "other than Svenska Aero". They relate to the fact that the owner of Svenska Aero at the same time owned a number of other companies which cooperated with Svenska Aero in the interest of their owner. The party that had paid the purchase price and signed the charter was not Svenska Aero but one of these other companies. However, Svenska Aero had been charged with the operation of the chartered aircraft in so far as it was not retained by the foreign operator. The formal charterer originally joined the complaint against Westlund but withdrew after some time in view of the absence of any direct contractual relationship with him. Whether Westlund was a borrowed servant, or the charter was made for the benefit of Svenska Aero, cannot have been important in

legislation,[164] it was never put into effect.[165] A licensing system, however, was introduced for certain fields of air commerce by closing the entry to it from another angle. In this closing the British Air Corporations were instrumental. As early as 1939 it was decided that the operation of British overseas air transport services from the United Kingdom should be carried out by one single airline as the "chosen instrument" of the British Government. This airline, although it was to be substantially the only recipient of grants and guarantees from public funds in respect of such services, at that time was not to enjoy any monopoly but was rather to operate in competition with other airlines. In pursuance of this policy the BOAC was created by statute the same year.[166] A radical change was brought about by the Civil Aviation Act of 1946 under which a monopoly as to "scheduled journeys" was created for the Corporation[167] and furthermore more corporations were introduced to enjoy the "chosen instrument" character and monopoly.[168] It was not until the adoption of the Civil Aviation (Licensing) Act, 1960, that this monopoly was abolished.[169] During the period of the existence of the scheduled journey monopoly, however, steps were taken by the associate agreements permitting a notion of operator status.

Other airlines could encroach lawfully upon the corporation's monopoly only by soliciting an "associate agreement" from a Corporation and thus acquiring associate status. Under section 15-3 of the Air Corporations Act[170] an "associate" can be "any undertaking which is constituted for the purpose of providing air transport services or of engaging in any other activities of a kind which the corporations have power to carry on."[171] The associate agreement, however, was subject to the approval of the Minister.[172] As a result, the entry into the field of "scheduled

view of the emphasis placed by the Court on the air regulations applicable to Svenska Aero.

[163] 1961 USAvR 228-229, 1 Ark f L 263.

[164] MOLLER 113.

[165] See *supra* page 67.

[166] British Overseas Airways Act, 1939; 32 Halsbury's Statutes 630.

[167] Sec 23.

[168] 9 & 10 Geo 6 c 70.

[169] 8 & 9 Eliz 2 c 38, The pertinent section had been re-enacted as sec 24 in the Air Corporations Act, 1949 — purely a consolidation Act, see SHAWCROSS & BEAUMONT 2d 147 no 166.

[170] Sec 14 of the Civil Aviation Act, 1946.

[171] SHAWCROSS & BEAUMONT 2d 790 no 2497.

[172] Sec 15-b.

journeys" was a matter of British governmental policy, and this policy was revealed by a number of successive governmental declarations. Thus, in 1949, it was announced that until BEA was in a position to provide all the scheduled air services in the United Kingdom for which there was a justifiable demand, charter companies would, under certain conditions, continue to be allowed to operate some classes of scheduled services as associates of the corporation.[173] While the ultimate responsibility for approving associate agreements rested with the Minister, the practice developed of referring applications for associate status first to a special body, the Air Transport Advisory Council, (ATAC). This Council — which originally was set up by the Labour Government to consider the complaints of the travellers — soon came to function as an agency responsible for the planning of British domestic aviation generally.[174] Directives to the ATAC were issued on September 26, 1950, recommending associate agreements as to "services which do not overlap or compete with existing services and planned programmes of services of the Corporations."[175] The change of government in 1951 led to the introduction of a new declaration. On July 30, 1952, the Minister issued "Terms of Reference" to the ATAC.[176] This document broadened the field for associate services to cover "inclusive tours"[177] and the carriage of freight as an exclusive load.[178] These terms remained in force until the whole system was abrogated by the 1960 Act.[179] It is noteworthy that under these declarations of policy associate status could be conferred only upon companies actually working the aircraft. Travel agencies were prevented from being awarded associate status although they were not discriminated against under the actual wording of the Air Corporations Act. On the other hand, the role of travel agencies in operations was perfectly recognized, inasmuch as such agencies were prosecuted for violations of the Corporations' monopoly as to scheduled services.[179a]

[173] See SHAWCROSS & BEAUMONT 2d 156 no 176 note a.
[174] Compare Parliamentary debate 2 Nov 1956, Hansard vol 558 No 217 col 1798.
[175] 4 ATAC Rep 15—18.
[176] For text, see 5 ATAC Rep 29—33; 1955 22 JALC 203.
[177] 3. 2d § vi.
[178] 3. 2d § vii.
[179] *Infra* pages 97 sq.
[179a] *Ackroyds Air Travel Ltd v Director of Public Prosecutions*, 1950 1 AER 933. Since Humphrey J., in this case, doubted that the framers of the monopoly section

It was reported that when facing a shortage of carrying capacity because of accumulation of traffic, BEA sometimes chartered aircraft from individual charter companies for use on the BEA routes, and at other times preferred to grant short-term associate rights to such companies.[179b] These operations have home bearing upon both operational authority and operational standard. It seems clear that associate status meant that operational authority was conferred upon the associate airline; subchartering, by contrast, meant that the charter company received no such authority for the service, that is to say, BEA remained its operator. From the aspect of operational standard, on the other hand, it is well to remember that associate airlines and charter companies (which had no status under the licensing scheme) were subject to different standards of performance. The prevailing system involved that the Minister when granting associate status approved of no new scheduled service unless the Director of Aviation Safety certified that the operator's equipment and organization were safe and satisfactory for the service proposed. The operators of charter services, on the other hand, did not have to go through the same procedure of obtaining the Minister's approval.[179c] This difference was certainly reflected in different cost levels. When evidenced in prices, this difference may well explain the alternation in BEA practices, keeping in mind that, from the aspect of operational standard, either the associate airline or the carrier under charter remained operator.[179d]

In the case of international inter-carrier charters, the British resorted to practices similar to the dual contract schemes of the Scandinavian regulations. When British registered aircraft were chartered by foreign operators, the aircraft could be exempted from the operational requirements of the British Air Navigation

of the Act had envisaged a case being brought against travel agents (at 936), it should be noted that on 16 Jul 1946 there was a discussion in the House of Lords between Lord Winster, introducing the bill, and Viscount Swinton which clearly brings out an anticipation that the section would render travel agencies unable to provide regular prearranged trips for their members.

[179b] 1951 Avi Fr Mark Rep (Jan 12). Further notes about the practice of the Corporations of supplementing their freight services by chartering aircraft, see 1953 AC Bull (Nov 20) 43 and 1954 AC Bull (Dec 10) 48.

[179c] SANDYS in the Parliamentary debate on 2 Mar 1960, see Hansard vol 618 No 68 col 1225.

[179d] It has not been possible to gather authoritative information on this point.

Order against an assurance from the charterer's government that they would ensure that operations met standards.[179e]

## § 6. *The United States development*

Forming and reforming of operator categories — composite service problem — inter-carrier contracts are within the CAB's knowledge — no regulation developed — interchange agreements considered in formal hearings — inter-carrier charter agreements considered on an informal basis

As in other countries, the main feature of the American post-war development has been the continuous and elaborate forming and reforming of operator categories and the regulations attached to these categories. Most categorization has been the result of the Board's use of its exemption powers under section 416-b of the Civil Aeronautics Act.[180] Problems of operator status were created by the establishment of all these new categories and the possibility of services being performed by operators intermingling their activities while they belonged to different categories.[181]

Inter-carrier agreements were subject to section 412-a if they fell within the category of "every contract or agreement ... affecting air transportation ... between such air carrier and any other air carrier for ... traffic, service or equipment ... or for other cooperative working arrangements." Furthermore, approval could be required under section 408-a-2 which provided in part that "It shall be unlawful unless approved by order of the [Board] ... for any air carrier ... to ... lease ... the properties, or any substantial part thereof, of any air carrier" This provision was held to apply even to short-term leases between air carriers.[182] Both parties to the inter-carrier category of charter agreements thus were subject to the supervision of the Board. As a result, the Board had immediate knowledge of such agreements. It was not disputed that all of these agreements were subject to Board approval.[183] Yet the Board has failed formally to issue regulations

[179e] KEAN letter 9 Dec 1960.

[180] Involving the following categories: Nonscheduled air carriers 1938—1947, all-cargo air carriers 1947, large irregular air carriers 1947—1955, small irregular air carriers since 1947 (in 1952 renamed air taxi operators), and supplemental air carriers 1955—1956.

[181] See *e. g.* Jones' dissent in the *Air Freight Case*, 10 CAB 572, at 613: "It is also pertinent to point out that ... Flying Tiger [which was licensed for the carriage of cargo only] is already indirectly engaged in the carriage of passengers for hire through the device of "leasing" its fully manned "cargo" planes to so-called "irregular" passenger carriers."

[182] See *e. g.* the PAA-National agreement in CAB E-13124, adopted 31 Oct 1958.

concerning these inter-carrier agreements, notwithstanding the fact that such agreements might involve great difficulty in determining whether or not the operation is that of the supplier of aircraft and crew, thus incidentally involving an additional operation which might exceed the limits laid down in his certificate or exemption.[184] Instead such matters have been reviewed by the Board on a case-by-case basis to the extent that the carriers concerned have required approval from the Board from an economic point of view to intermingle their operations. Thus, any interchange operations[185] between two authorized route carriers generally were considered in formal hearing proceedings prior to being approved of by the Board. Faced with inter-carrier charter arrangements for a substantial and continuous period of time, however, the Board has been reluctant to grant approval, particularly when third carriers might be adversely affected competitively.[186] However, requests for approval of other types of inter-carrier charters have been handled and approved on a rapid and informal basis without the necessity for a public hearing.[186]

## SECTION 4. THE CHICAGO CONVENTION ERA: SECOND PHASE

### § 1. *General*

General pattern — multiple authorizations scheme in the United States, Scandinavien countries, Germany and Great Britain — transfer of chartered aircraft between national registers

About the latter half of the fifties there was a general development in the regulation of the composite air services which resulted in the requirement of multiple authorizations. The pattern spread from the United States to the new air legislation passed successively in the Scandinavian countries, Germany, and Great Britain.

[183] NETTERVILLE, 1949 16 JALC 430.

[184] Such criticizm by NETTERVILLE, as early as in 1949 16 JALC 430. Note Examiner Pfeiffer's proposal, quoted *supra* in note II-39.

[185] On American interchange services, se WINKELHAKE, *Interchange Service Among the Airlines of the United States*, 1955 22 JALC 1—50, also DUTOIT *op cit* 112—129. As to the international aviation discussion of interchange, see Memorandum regarding interchange of aircraft, presented by the Air Research Bureau, ECAC/1—WP/31. In present-day aviation, the term is used in two ways, interchange of equipment (with or without crews) and interchange of routes. The distinction between interchange of aircraft with crews and interchange of routes, when one manned aircraft flies over two routes on behalf of two companies, is based on the one who assumes the economic risk of the venture.

[186] Information supplied by CAB, (ROSENTHAL/ANDREWS letter 2 Nov 1960).

At the same time, throughout the European area — the one mainly affected by international inter-carrier charters — there appeared a new approach to those charters which sought to replace the dual contracts scheme by one which facilitated transfers of chartered aircraft between the national registers.

## § 2. *The United States regulations*

American regulatory action — indirect air carriers — air freight forwarders — forwarders' status as carriers or shippers — ticket agents — regulation of methods of competition — indirect regulation — development of multiple authorization requirement in wet lease operations — SAS-Transocean agreement

The influential position taken by the United States in this development warrants an account of the American development. This was mainly a story of regulatory action. The legislative bases remained almost unchanged.

The very broad pattern of regulations set by the Civil Aeronautics Act included, in opposition to most other regulatory schemes, powers conferred upon the regulatory agency to regulate not only aircraft operators, but neighbouring categories as well. This extension was achieved by the Civil Aeronautics Act conferring powers upon the CAB to regulate the activity of "any citizen of the United States who undertakes ... indirectly ... to engage in air transportation".[187]

The most important use made by the Board of these powers relates to the creation of the regulatory category of air freight forwarders. The Board, having outlawed all unlicensed air freight forwarding activities by its decision in the *Universal Case* in 1942,[188] created the regulatory air freight forwarder category in 1948 by use of its exemption powers under Section 416-b of the Civil Aeronautics Act and after an experimentary period the category was stabilized in 1955.[189] The true status of the members of this category, however, was a matter of some dispute, since special rate agreements between forwarders and operators could only be authorized by the Board and thus made lawful if ~~Civil Aeronautics~~ Act and after an ~~experimental period the~~ the forwarders were classified as carriers. First, the Board — in

[187] See 1-2 and 401.
[188] *Supra* page 40 note 169.
[189] Adoption of Part 296. *Supra* page 40.

the face of strong dissents—decided that the air freight forwarder was an air carrier only with regard to rate agreements with direct carriers and not a shipper, although the Interstate Commerce Commission when construing the equivalent provisions of the Interstate Commerce Act, had consistently held that freight forwarders were shippers and not carriers.[190] The bold position of the Board, however, could not long withstand the criticism which it had aroused and upon reconsideration in 1957 the Board concluded that rate agreements between forwarders and direct air carriers were not agreements between carriers and therefore could not be authorized by the Board under section 412 of the Act.[191]

Ticket agents, on the other hand, although apparent counterparts in passenger traffic to the freight forwarders in cargo traffic, were never promoted to form any closed regulatory category. Originally they were not mentioned in the Civil Aeronautics Act. But in 1952, by an amendment to the Act the Board secured certain limited powers of supervision over travel agencies as to their methods of competition (unfair and deceptive practices and the like).[192] Of course, ticket agents who were acting not as mere brokers but in an independent intermediary position could be considered to be "indirect" air carriers and subject to regulation just as could freight forwarders.[193] But if legal, such regulation was at least impracticable,[194] and the Board attempted to limit the scope of the activities of the travel agencies by such indirect means as refusing to authorize certain charters solicited by travel agents.

The views originally taken, that freight forwarders were "air carriers", were at one time thought to reinforce the argument that the owner-operator of an aircraft chartered to another carrier was not the statutory carrier.[195] In 1952, however, a change of policy took place within the Board. Having entered into a wet

[190] CAB E-9532 p 17 sq; 21 CAB 556 sq.
[191] CAB E-11137 p 5; 24 CAB 758.
[192] Amendment to secs 1, 411 and 902-d, 14 Jul 1952, 66 Stat 628—629. See also H Rept 2420, 82d Cong, 2d Sess, reprinted in 3 *Antitrust Hearings* 1803.
[193] See *CAB v Major Air Coach System*, 1952 USAvR 106; 3 Avi 17.798. Cf 3 *Antitrust Hearings* 1809. The Board has been able to make a working compromise between these two types of authority: in *Southeast Airlines Agency Compliance*, E-11412, the Board found that an alleged ticket agent was guilty of unfair and deceptive practices in holding himself out as an air carrier!
[194] NETTERVILLE, 1949 16 JALC 425.
[195] WESTWOOD & ELPERN, 1945 31 Va LRev 410 note 100.

lease agreement with SAS under which Transocean was supposed to perform ten scheduled freight flights for SAS, Transocean filed this agreement with the Board under section 412 of the Civil Aeronautics Act.[196] Later, Transocean was made to file, in regard to the same matter, an application for exemption pursuant to section 416-b.[197] On December 4, 1952, the Board exempted Transocean from the enforcement of section 401-a,[198] that is to say, from the section which only applies to the party who engages in air transportation as carrier.[199] From then on the Board elaborated this approach to include that the charterer in a wet lease operation is an indirect carrier and must be licensed as such, while the supplier of aircraft and crew is a direct carrier and must be licensed as such.[200] Thereby — as will be remembered — the Board extended to airlines involved in passenger carriage and engaging extra capacity by wet lease exactly that regulation which it had avoided extending to ticket agents. Yet, in view of the position taken by the Board, both of these performed exactly the same function, *i.e.* ticketing.

## § 3. *European legislation*

Scandinavian Civil Aviation Act of 1957-60 — regulation of leasing conditions — transfers of registration — German air legislation of 1959 — »sonstige Zwecke» — national ownership requirement — safety aspect — domestic chartering — international chartering — non-supervised aircraft — British air legislation of 1960 — equalizing standards of performance — air opertor's certificate — temporary transfers of registration — air service licence — subcontractual carriage — multiple operators of one composite service

During the fifties, the bases of the regulatory systems in the Scandinavian States were reformed by the passage of the new Civil Aviation Act.[201] The Act was passed by Parliament in Sweden in 1957 and in Denmark and Norway in 1960.[202] From the point of view of operator status, two features of the new

[196] *Supra* page 91.
[197] *Supra* page 91.
[198] *Supra* pages 72-73.
[199] CAB E-7012.
[200] *Flying Tiger Line, Inc. Enforcement Proceeding*, E-7515, 26 Jun 1953; *Riddle Airlines — Aerovias Sud Americana*, E-10162, 4 Apr 1956; *Northern Consolidated — Wien Alaska Airlines*, E-10307, 22 May 1956; *Overseas National Airways — KLM Royal Dutch Airlines Agreement*, E-12328, 4 Apr 1958; *Transocean Air Lines — Lufthansa Agreement*, E-13718, 8 Apr 1959; *Balair AG*, E-16042, 28 Oct 1960; *Overseas National Airways, Inc. Enforcement Proceeding*, E-16895, 5 Jun 1961.
[201] As to the preparations of this piece of pan-Scandinavian legislation, see NYLÉN, 1957 24 JALC 36—46; BAHR, 1958, 1 Ark f L 1—54.
[202] The Acts have, as yet, not entered into force, except for minor parts.

legislation are interesting. The Act made possible prescriptions as to the conditions under which, *i.a.*, an aircraft could be leased to another person to be used by that person on his own account.[203] The extensions of control was believed to "prove its primary usefulness when a leased aircraft is used for flights for which an authorization is not required."[204] The scheme, furthermore, armed the aviation authorities against an activity which, while purporting not to involve operation, might in fact be competitive with franchised operations.[205] This revision of the law, then, conferred upon the aviation agencies powers of regulation which extend to the supplier of aircraft and crew under a wet lease operation as such, as well as to the lessee-charterer. With such powers there is little reason for the aviation agency to pronounce upon the identity of the operator from the point of view of operational authority.

The other reform bearing upon operator status, was the facilitation of transfers of registration of aircraft. A right to exempt applicants from the requirements of national ownership for registration of aircraft was conferred upon the Ministry.[206] The reform was mainly inspired by the Swiss Air Traffic Act of 1948 and focused on the case of aircraft owners who were physical persons domiciled outside their state of nationality.[207] However, the Danish preparatory works reveal a clearly formulated view that it would be reasonable to facilitate Danish registration when "a Danish air transport undertaking charters, *i.e.* leases, a foreign aircraft for an extended period".[208]

The German air legislation of 1959[209] proceeded along similar lines. Since it was now prescribed that every "gewerbsmässige Verwendung von Luftfahrzeugen für sonstige Zwecke" must be licensed,[210] every transaction involving the use of aircraft was under the regulatory jurisdiction.

[203] Sweden: 7-7. Denmark: § 81. Norway: § 116.
[204] NYLÉN, *Draft Swedish Civil Aviation Act of 1955*, (mimeogr) p 78; 1955 SOU no 42 p 125.
[205] Denmark: 1959-60 111 Folketingstidende, Tillaegg A col 1482. See *supra* note II-123.
[206] Sweden: 2-2 *i. f.* This reform, however, was introduced already before the Civil Aviation Act by § 2 of an Act 12 May 1955 relative to the registration and salvage of aircraft, 1955 SFS no 228. Denmark: § 7 *i. f.* Norway: § 7.
[207] BAHR, *op cit* 15; 3 *Instilling* 158 col 1 note 2.
[208] 1959-60 111 Folketingstidende, Tillaegg A col 1438.
[209] Air Traffic Act as Amended 10 Jan 1959; 1959 BGBl I p 9; 1959 8 ZfL 109.
[210] § 20-1 second sentence.

The possibility of exemption from the national ownership requirement for registration, once introduced during the thirties,[211] was continued.[212] This should be viewed against the other rules affecting inter-carrier charters. The 1959 revision continued the previous adverse policy only in relation to international chartering. A German undertaking could no longer be refused his licence because he used chartered aircraft, unless it could justifiably be concluded from the facts "dass die öffentliche Sicherheit oder Ordnung gefährdet werden kann."[213] But reliance by way of chartering on foreign registered aircraft *might* involve such refusal.[214] This mitigated continuation of the 1955 policy has been explained by reference to an international usage of protecting the domestic interest in a standard of safety. This interest required protection and could not be ignored. German agencies were not legally capable of supervising the technical standard of foreign aircraft which were chartered to German airlines. But if such charters were made for a longer period and withdrew the aircraft from the supervision of their domestic agencies as well, there was no supervision at all. Such non-supervised aircraft were not to be admitted into Germany.[215]

The varying standards of safety in the British categorization of air commerce under the air legislation of 1949, was one of the apparent reasons for the British reform of the air legislation in 1960. This reform resulted from public attention being focused on the variations between the operator categories because of a charter company aircraft crash at Southall in 1958 in which seven people lost their lives.[216] The reform had broad effects on the British approach to operator status. On the one hand, the standards of performance were equalized between the operator categories. It was decreed that no British registered aircraft[217]

[211] § 5-2 of Air Traffic Act as Amended 29 Jul 1936, 1936 RGBl I p 582.
[212] The provision was transferred to § 3.
[213] § 20-2.
[214] § 20-2 *i. f.*
[215] DARSOW, *Das Luftverkehrsgesetz in der Fassung vom 10. Januar 1959*, 1959 8 ZfL 83. It was added that the solution of the problem could await a multilateral regulation on the international plan.
[216] SANDYS in the parliamentary debate on 2 Mar 1960, see Hansard vol 618 No 68 col 1225.
[217] The Civil Aviation (Licensing) Act, 1960, sec 1-2 says that "No aircraft shalt be used on any flight for reward or in connection with any trade or business excepl under" a certificate. The broad language referring to "aircraft" generally, however, is limited by sec 1-4 which restricts the application of the whole section to British

could be lawfully operated for the purpose of public transport, in any place and by any one in the world, unless an air operator's certificate had been granted.[218] At the same time, the possibility was opened for the Minister of Aviation to modify the provisions for registration of aircraft "as he deems necessary or expedient for the purpose of providing for the temporary transfer of aircraft to or from the United Kingdom register, either generally or in relation to a particular case or class of cases".[219]

The economic regulation was attached to the requirement of an air service licence. Like the certificate, this licence must be held by "the operator of the aircraft" whenever a British registered aircraft was flown anywhere in the world.[220] Such licences were granted[221] on conditions involving *i.a.* that the holder was authorized to engage in "sub-contractual carriage", which would seem to be a British expression for wet lease operations, "under the authority of a licence held by that other operator", under a standing exemption[222] or by special permission.[223] Since an air service licence is required only from "the operator" and the licence authorizes him to operate under the wet lease, the conclusion is that operator status is conferred upon the supplier of aircraft and crew under the wet lease arrangement. On the other hand, it is clear from the fact that the flying is done under the licence of the lessee-charterer that this party remains operator in so far as operational authority is concerned. Apparently the British

registered aircraft, adding the faculty of including thereunder other aircraft on a "flight beginning or ending in the United Kingdom."

[218] Civil Aviation (Licensing) Act, 1960, sec 1-2-a; and Air Navigation Order, 1960, as amended, art 3-A-2.

[219] Air Navigation Order, 1960, art 2-13. CHENG submits that so far no regulations have been made, see *The Legal Regulation of Commercial Aviation in the United Kingdom*, 1961 The Solicitor 134 col 1.

[220] Civil Aviation (Licensing) Act, 1960, sec 1-2-b. See also note 217.

[221] In a number of Civil Aviation (Transitional Licences) Orders, issued in 1961, the Minister has ordered the grant of specific air services licences to various persons indicated therein. See CHENG, *op cit* 132 col 2. The most important of these licences are believed to be the Class E licences granted pursuant to the 6th order in question: CHENG, *op cit* 133 col 1.

[222] As to a number of flights, a *standing exemption* from the licence requirement was introduced at once. No licence was required for flying government charters (No 3-1-d), nor for performing certain inter-carrier services, namely substitution flights in breakdown situations (see further No 3-1-h). The standing exemption, furthermore, extended to flying pursuant to a contract which conferred upon one person the "exclusive right to use the carrying capacity of the aircraft on that flight, provided that the contract concerned, either the cargo of that very person (*i. e.* what normally is referred to as a charter for own use), or passengers "none of whom was carried at a separate fare." (No 3-1-c i and ii).

[223] See CHENG, *op cit* 133.

regulations seek to integrate the operator under the economic regulations, with the operator under the safety regulations.[224] As the wet lease case brings out, this can be done only by a scheme of multiple authorizations for the same service and by disregard of the operator status of the holder of the licence who can lawfully engage the other party to perform the flying on behalf of the licence holder.

## § 4. *Principles*

Principles — licensing and standards of performance produce different operator notions — difference of roots — difference of operator notions as applied to wet lease operations — transfer of operator status as determined by operational standard, but not as determined by operational authority — support for proposition — domestic and international intercarrier charters

The rules for operator status, as developed in the administrative law, would seem to lead to the conclusion that an important difference exists between operator status from the licensing point of view and operator status from the aspect of standards of performance. The two notions of operator status stem from different roots. Except in the case of international air lines, and in certain countries with strong regulatory traditions, licensing in air commerce is a fairly recent development. The setting of standards of performance is a direct development from airworthiness and pilot certificating, adapted to function in a complicated general operation. The difference between the two operator notions comes out in the wet lease operation. The fact that the aircraft is flying under a licence held by some other airline than the one that supplied it with crew for the service does not *per se* transfer operator status to that other airline as far as standards of performance are concerned. Nor does it transfer operator status from the holder of the licence to the supplier of aircraft and crew in so far as operational authority is concerned. The former proposition finds support in the evidence of the dual contracts scheme in international chartering, where operator status can be transferred but generally is not. For the latter proposition, support is found in events which took place in the first phase of the Chicago Convention era. The French requested no licence from SAGETA. The United States Court of Appeals

[224] The Civil Aviation (Licensing) Act, 1960, defines "operator" in sec 10, as meaning "the person for the time being having the business management of that aircraft . . ."

rejected the transfer idea in *U.S. Overseas v. CAVE*. The charterer may well be operator as far as licensing is concerned, this generally involving that he will carry the economic risk of the venture and incur the obligation to operate irrespective of payload, while the supplier of aircraft and crew will be operator as far as the standards of performance are concerned.

Do these principles apply to domestic as well as to international inter-carrier charters? It is difficult to see any basic distinction between the same charterparty when made by two carriers of different nationality, and when made by two carriers of the same nationality. The natural conclusion, then, would be that the national rule shall follow the international one. The international rule, however, may not correctly reflect the basic principle. This seems to follow from the retreat currently taking place from the dual contracts scheme to the idea of facilitating transfer of registry.

SUB-CHAPTER 3

# ADMINISTRATIVE INTERFERENCE WITH THE TERMS OF AIR CHARTER CONTRACTS

## SECTION 1. IATA RESOLUTIONS AFFECTING AIR CHARTERING

Plan of exposition — pre-war IATA work with ticket and air waybill terms — no Resolutions referring to air charters — IATA's relation to governments — post-war IATA — the rate structure — Resolution 045 — its development — its contents — no charter rates — inclusive tour rates — additional commission to tour operators — plane-load and resale principles — patchy realization of principles — group charters — planeload principle — fill-up privilege — technological reasons for fill-up privilege — no-resale rule — origination — broadening of rule — exceptions — inter-carrier charters — seamen charters — cargo charters — Resolution 030 — origination — the charter clauses — solution to what problem

The main source of legal rules affecting air charter contracts in the field of administrative regulation has been the body of IATA Resolutions. The contents of these IATA regulations will first be surveyed. Then, the governments' endorsement of these air commerce regulations will be examined, particularly the legal bases for, the extent of and the reasons for this endorsement.

Ever since its inception as a carrier organization the International Air Traffic Association was active in bringing a semblance of order into the ticket and airwaybill terms used by the member carriers. To a great extent these terms were the controlling factor in fixing the liability of the carrier. Not only had they a natural effect upon the insurance premiums and reserve requirements which the carriers had to meet, but furthermore, when the airline network expanded so as to render normal journeys and shipments under one ticket or air waybill which involved the services of several carriers, it became increasingly urgent that there be as complete an understanding as possible between the carriers as to both the principles and the details of liability.[225] Throughout the twenties and the thirties, therefore, IATA was continuously engaged in drafting and redrafting tickets, baggage checks, passenger manifests, consignment notes

[225] *IATA 3 Decades* 32—33.

and the like. Prior to the second World War, however, there existed no body of IATA Resolutions referring to air charter.[226]

An important objective of the IATA activity was to persuade governments to modify their demands and to accept the IATA proposals in various matters.

When after the war IATA was revived, with certain modifications, under the name International Air Transport Association, matters started to change. About 1948 the IATA rate structure was completed in its fundamentals. Simultaneously, the adverse effects of an increasing competition between the member airlines and between these airlines and the irregulars began to be felt.[227] An end was put to the traffic upsurge which had followed as a natural result of the long isolation of peoples during the war. When competing for the remaining traffic, the IATA members became aware of the vulnerability of the new rate structure under the pressure of charter operations. Consideration of this problem eventually resulted in the problems being put before the Traffic Conference meeting in Bermuda in November 1948, where certain proposals to the Conference were adopted to be issued as Resolution 045 Charters on April 7th, 1949.

Since the inauguration of the Charter Resolution, at that time a simple 17-line document,[228] the resolution has been a difficult and troublesome problem for the Conferences. Almost every Conference has discussed the subject and the majority have made changes in the resolution. Underlying the long period of dissension has been one basic issue: should members be left with freedom to meet non-IATA carrier competition, or should the emphasis be upon the preservation of the rate structure for scheduled operations? To this conflict was added disagreement on method; should the regulation be drafted for liberal or strict construction?[229] The evolution of the resolution has included several stages. The first great revision was the result of the Buenos Aires Conferences in May 1952.[230] At this meeting, the resolution was changed, it would seem, much as a result of inspiration taken from the CAB Transatlantic Charter Policy.

[226] I disregard the fact at this point that the ticket and air waybill law may affect certain charter arrangements.
[227] Cf *supra* pages 27 sq.
[228] 25 IATA Bull 78 col 2.
[229] 25 IATA Bull 78.
[230] 16 IATA Bull 93.

An attempt was made to distinguish a class of passenger groups which could be permitted to charter aircraft. The second great revision was more in the nature of a drafting attempt. At the Miami Traffic Conferences of 1955 the resolution came in for considerable discussion, particularly relating to the composition of groups for charters, and a Special Charter Study Group was created to reconsider its provisions. Views within this group, however, diverged substantially, and when its labours eventually materialized in a new resolution, this proved to be merely a redrafting and clarification of the older texts rather than an adoption of any significant reforms.

What rules, then, have found their way to governmental endorsement by way of the 045 Resolution? With regard to *charter rates* one may first note the almost general absence of regulations.[231] Only group charters incidental to inclusive tours have, since 1950, been subject to special rules in this respect.[232] Since 1956 these have been to the effect that the price for the tour paid by the passenger "shall not be less than the lowest applicable fare for the type of service used available to the public on the same route."[233] This type of charter can be solicited by an IATA approved Sales Agent, but if so, the Resolutions 810 apply too. Considering the wording of the Resolutions 045 and 810 it appears not to be strictly correct to say that the charter rates are controlled. When an aircraft is chartered to a Sales Agent and the space in the aircraft is resold to the general public for inclusive tours, it is the total charge for the inclusive tour that is controlled; neither the charter price, nor the passenger fare is affected except indirectly. The IATA airlines can agree under the terms of Resolution 810e that such an Agent, as producer of inclusive tours, shall receive additional commission for providing the airline with the passengers on the inclusive tour produced by the agent. Such a commission, however, will only be paid if the airline and the producer have concluded in advance

[231] Here some clarification may be necessary. Theoretically, any member of the Association was free to undertake charters of whatever kind so long as he quoted the normal IATA fares and rates or more. The statement in the text is also subject to another exception although of minor character. Minimum charter rates were provided for by the resolution which appeared as the issue of 28 Sep 1951 but which was applicable only within the Americas; see clause 3 and furthermore 14 IATA Bull 83.

[232] Issue 22 Mar 1950 clause 1.

[233] Issue 19 Sep 1956 clause 3; issue 30 Mar 1959 clause 8; issue 15 Nov 1960 clause

an agreement to that effect, and negotiations for such an agreement must be initiated by an application from the producer in which he agrees that in selling the tour the carrier is acting only as the agent of the producer, and that the producer will hold the carrier harmless, etc. Furthermore, the IATA members have reserved the right to establish a separate rate structure relative to inclusive tours: Resolution 084h Special Fares for Inclusive Tours, Resolution 084b Creative Fares, etc. An inclusive tour, of course, can be arranged by an airline with or without the cooperation of independent travel agencies.

Two important principles were established by the 045. On the one hand, charters should be *planeload* contracts; on the other hand, *resale* of the transportation by the charterer, whether by a sub-charter contract or by sale of individual tickets, was not to be permitted. The latter principle is herein referred to as the *no-resale rule*. These principles, of course, were intimately connected with each other. The very day resale by the charterer was permitted, the principle of planeload charters was circumvented.

The realization of these two principles was done in a rather patchy way. Considering the stability of the planeload principle, discount first of all must be made for the existence of group charters, where the prorating of costs among the group members may raise doubts as to whether one or more contracts are involved.[234] Even with reservation for the merits of such questions the basis of the planeload principle in the 045 was rather narrow. As already mentioned,[235] it originated in the first issue of Resolution 045, and remained as one of the backbones of this Resolution through its successive redraftings. The planeload principle to be detached from these consecutive enactments, however, is distorted by the IATA carriers' insistence on so-called *fill-up privileges*. The fill-up privilege first appeared in 1952[236]

8. Recently the level has been raised to 110 % of the fare thus determined. The British Government used to attach a proviso to this clause which said that in approving the paragraph it interpreted it, in conjunction with Resolution 810e, to mean that the Agent must not charge the public for an inclusive tour less than the amount set forth in Resolution 810e, but that the carrier might charge the Agent for the charter anything it pleased.

[234] Cf BODENSCHATZ, *Haftung für den Fluggast in gecharterten Verkehrsflugzeugen* 1957 12 Vw 357, reprint p 2 KLATT & FISCHER, *Die Gesellschaftsreise* 152—153.

[235] *Supra* page 54.

[236] Issue 19 Sep 1952 clause 1-a: "the carrier may stipulate that any space not utilized by the charterer may: (i) in the case of passenger aircraft be used by the

but was somewhat modified in 1954 by the introduction of the requirement that it only be exercised "with the charterer's consent".[237] As a practical matter the fill-up privilege was, it would seem, a close result of the technological development. New constructions combined passenger seating in the cabin with belly lockers for cargo; such aircraft had difficulties finding full loads with one charterer only. This may account for the peculiar feature of the regulation that aircraft chartered for passenger carriage could be used by the operator for the carriage of his line cargo while such a use was not permissible for the operator of cargo aircraft.[238]

The no-resale rule[239] originated in a broad announcement in the first issue of the 045, "that all charter agreements ... shall contain a stipulation that the party to whom such space [*i.e.* in the chartered aircraft] is sold will not resell or offer to resell it to the general public at less than IATA fares and rates."[240] In the course of time the rule broadened so as to affect the duty to carry too, by excluding certain categories of merchants from the right to enter into charter agreements with member carriers (*e.g.* travel agents) except on very restrictive conditions.[241] A crop of exceptions, however, came to surround the no-resale rule. It had never applied to charter agreements between air carriers since such agreements were excluded altogether from the application of the 045.[242] It furthermore came to be "understood that agents of shipping companies shall be entitled to charter aircraft for the movement of crews of more than one vessel or company."[243] Until 1957 the resale of cargo space was permissible

carrier for the carriage of mail or cargo, or the carrier's own personnel and property ... (ii) in the case of cargo aircraft, be used by the carrier for the carriage of mail or the carrier's own personnel and property ..."

[237] Issue 1 Apr 1954 clause 1-a. Issue 31 Mar 1959 clause 3; issue 15 Nov 1960 clause 3.

[238] For another consideration relative to the fill-up privilege, see *infra* note 245.

[239] It may be recalled what venerable ancestors this type of rule has. By the French Ordonnance de la Marine of 1681, underletting at an advanced price was prohibited, see Liv 3, tit 3 Fret, art 27.

[240] Issue 7 Apr 1949 clause 1. Issue 19 Sep 1952 clause 1-a-d. Issue 31 Mar 1959 clauses 4-a, 7 and 12. Issue 15 Nov 1960 clauses 7 and 9.

[241] Issue 19 Sep 1952 clause 2-b.

[242] Issue 7 Apr 1949 clause 4. Issue 19 Sep 1952 clause 5-a. Issue 31 Mar 1959 clause 2-a. Issue 15 Nov 1960 clause 2. Cf SHEEHAN, 1953 7 Sw LJ 160. It is notable, however, that the 045 nevertheless would apply where the charterer was an IATA member and he chose to recharter the aircraft.

[243] Issue 19 Sep 1952 clause 1-a. Issue 31 Mar 1959 clause 7-a. Issue 15 Nov 1960 clause 7-a. — Italian interests were met by the introduction in 1952 of the exception of Haj traffic from the application of the Resolution (Issue 19 Sep 1952 clause

"within a definitely recognizable group . . ."[244] The last exception, however, suffered from the attacks at the Cannes Conference in 1956 on all forms of group cargo charters and was on the recommendation of the Special Charter Study Group deleted the year after.[245]

Charter clauses came to be inserted in the conditions of carriage as well. The history of the drafting of these conditions was an extended one. The Legal Committee of the Association almost from its inception had been busy attempting to work out more detailed Conditions of Carriage on the basis of the pre-war IATA Conditions of Carriage and the tariffs filed with the governmental agencies by carriers operating in the United States and Canada. The committee faced considerable difficulties in bringing about uniformity and it was not until 1953 that the IATA lawyers had succeeded in finding such compromise language as enabled the Traffic Conferences at Honolulu to adopt it in the form of Resolution 030. Although the achievement of the airlines was not entirely successful, inasmuch as the Resolution never became binding as such within the Association, it nevertheless was most important, since the terms of the Resolution appear in the conditions of carriage separately adopted by the leading European carriers.[246]

When the IATA, five years after the inauguration of the 045 regulation, inserted charter clauses into the conditions of carriage, the innovation was all the more remarkable since until then none of the precedecessors of these conditions had contained any equivalent. The explanation for the new feature must be sought in the important development to which air commerce was subject some time before the Honolulu Conferences.

5-c); and Canadian interests simultaneously were supported by excepting carriage of members of the armed forces and their dependants, provided that the government paid for the charter (*ibidem* clause 5-b).

[244] Issue 19 Sep 1952 clause 1-d.

[245] Special Charter Study Group Report 7.— In view of these exceptions to the no-resale rule there was evident merit in the airbrokers' attack in 1953, mainly in reference to seamen charters, upon the IATA attitude towards chartering for not being realistic enough. It was pointed out that while the IATA regulation precluded members from having two charterers on one aircraft, it was quite legal for a charterer to sell the remainder of the space himself and then charge the sub-charterer whatever rate he wished. It was indicated that IATA operators might have felt better had they accepted charterers for part space. 1953 AC Bull (Nov 13) 42.

[246] The Resolution failed to receive governmental approval and was therefore eventually dropped from the list of IATA Resolutions. Its terms, and in particular the charter clauses, recur, however, in the conditions of carriage adopted by *i. a.* ATAF, Lufthansa, SAS, BEA and BOAC.

Section 403 of the Civil Aeronautics Act required generally that certificated air carriers and foreign air carriers file tariffs relative to the air transportation in which they engaged. The "air transportation" evidently included "charter trips" since they had particular status under the Act.[247] Consequently, as early as 1941, the certificated carriers, assembled in the ATA, filed tariffs with the CAB relating to such trips.[248] When it later became clear that even the irregulars engaged in common carriage by their charter operations, section 403 applied to them as well, unless they were specifically exempted. Until August 1, 1947, the irregulars were exempt from the tariff provisions generally.[249] Thereafter, however, the Board started to enforce the tariff filing requirement. It proceeded against the irregulars as well as against certificated carriers and foreign carriers.[250] For some years it remained officially undecided whether the filing of a charter tariff as such was required under the Act,[251] but in 1951 the Board promulgated rules extending the charter tariff requirement to American certificated air carriers generally and similar action against the foreign air carriers was to follow.[252]

Having filed charter tariffs in compliance with the CAB regulations, air carriers faced the problem of the overlapping of the conditions of a tariff on file with the Board and the conditions of the standardized charterparty documents which were generally

[247] See pages 209 sq *infra*.

[248] See page 47 and note 201 *supra*.

[249] TORGERSON, 1948 15 JALC 52.

[250] As to the irregulars, the Board issued an Order to become effective 18 Oct 1947 which automatically suspended the registration of those large irregulars which failed to comply with the requirement of filing tariffs (see 1947 Flight 528 col 1—2. Also TORGERSON *op cit* 53 note 24). On September 30, 1947, the Board suggested to the certificated carriers the filing of charter tariffs but the carriers were reluctant to comply (GATES' letter 30 Sep 1960). In 1950 the Board suggested the formulation of tariffs on rates and rules for all international charter operations. The IATA carriers, however, resisted the suggestion. See page 47 note 203 *supra*. — To some extent, the Board's activity as to charter tariffs may have been a reflection of the fact that it was not until about 1950—1952 that aircraft became available to the scheduled airlines in sufficient numbers to permit their engaging in charter business. So GATES in interview 6 Apr 1961. The Korean Armistice which was signed 27 Jul 1953, of course stimulated these carriers' interest in charter services; see *supra* page 31.

[251] NETTERVILLE, 1949 16 JALC 437.

[252] Part 207.4, applicable to the certificated air carriers. As to the foreign air carriers, the requirement was ultimately imposed by Part 212.3, promulgated in 1958. The matter was there more complicated inasmuch as off-route charters by the foreign air carriers had no status under the Civil Aeronautics Act but were processed under the Air Commerce Act, 1926, as representing private carriage. See further page 125 and note 358 *infra*.

relied upon in the industry, particularly in European air commerce. It was to meet this situation that the charter clauses of the 030 were drafted. The provisions were to the effect that normally the 030 conditions should apply to a charter agreement. In the event of the existence of a charter tariff, the 030 conditions should *not* apply unless that tariff provided for their application. The conflict between the charter agreement and the charter tariff was resolved in favour of the tariff.[253] The clauses continued by regulating the relationship between the 030 conditions and a charter agreement. In a case where no charter tariff existed but the operation was contracted for by a charter agreement, the 030 conditions would apply unless the charter agreement excluded their application or they were contrary to the terms of this agreement. In the latter case, again, a passenger or shipper "by accepting carriage pursuant to a charter agreement", even if he was no party to that agreement, agreed to be bound by the terms of that charter agreement.[254] The last provision represented an attempt to make the ticket and tariff terms that normally control the operator's relations with his passenger/shippers also control in the case where the passenger/shipper accepts carriage pursuant to a charter contract to which he was no party. As a result, the language of the 030 provisions created an independent contract between operator and passenger/shipper which was brought into life by the mere act of accepting to be carried.[255]

[253] As was evidenced in *United States v Associated Air Transport*, 1960 USAvR 444, the principle adopted has far-reaching consequences as to the stability of the charter price in the face of varying ferry mileage. — The 030 only touches upon the jurisdictional aspect by the formula "applicable thereto." Insofar as the international application of American charter tariffs as such is concerned, it is submitted that their effect cannot be greater than the Board's jurisdiction over rates. Cf *Glenn v Cia Cubana de Aviacion*, 1952 USAvR 182. Compare pages 119 sq *infra*.

[254] Art 2-3 (Passengers) "*Charter Agreements:* With respect to carriage of passengers and baggage performed pursuant to a charter agreement with a Carrier, such carriage shall be subject to such Carrier's charter tariff applicable thereto, if any, and this tariff shall not apply except to the extent provided in said charter tariff. Where a Carrier has no charter tariff applicable to such charter agreement, this tariff shall apply to such agreement except that the Carrier reserves the right to exclude the application of all or any part of this tariff, and, in the case of divergence between the applicable provisions of this tariff and the conditions contained or referred to in the charter agreement, the latter shall prevail and the passenger, by accepting carriage pursuant to a charter agreement, whether or not concluded with the passenger, agrees to be bound by the applicable terms thereof."

[255] Cf SCHWEICKHARDT, *Die neuen Beförderungsbedingungen der IATA für den Luft-Personen- und -Gepäckverkehr*, in *Festschrift Meyer* 117-143. Also REEMTS, *Der Chartervertrag nach den neuen IATA-Beförderungsbedingungen*, 1955 Deutsche Ver-

SECTION 2. LEGAL BASES FOR ADMINISTRATIVE INTERFERENCE

## § 1. *National law*

*France: cahiers des charges* — 1941 Act — governmental practice of interference with all tariffs — 1953 decree-law — passenger tariffs only to be endorsed — *Germany:* governmental powers to supervise commerce — the duty to carry — tariff control and the right to refuse to serve — adoption of conditions of carriage — Article 13 § 2 of Lufthansa-Deruluft conditions — statutory bases for the interference — interference with inclusive tour contracts — *Scandinavia:* governmental powers to interfere under the Air Traffic Acts — Swedish doctrine — powers of interference partly withdrawn by the Revising Act in Denmark — Norwegian powers inactive — Swedish assumption of more regulatory control — system of double conditions for authorization — 110 % rule for inclusive tours — opposition to Swedish moves — *Great Britain:* approvals of associate agreements — standard condition of compliance with IATA commercial regulations — 1960 Civil Aviation Regulations — *United States:* air-mail contracts — control of mail rates — CAB control of rates by adjustment of mail pay — CAB powers against discriminatory preferential or prejudicial rates — section 412

In France, originally, governmental interference with contracts in air commerce was based on and limited to the contracts under which the government paid subsidies to operators of airlines. At that time, subsidization was a prerequisite for an economically feasible airline operation; and this continued to be true until about 1939.[256] Subsidy contracts were combined with specifications[257] which as a rule provided that tariffs should be communicated with, and endorsed by the Ministry ("homologation") ten days in advance of their entry into force.[258] The 1932 Act continued this system with only slight modifications,[259] as did the 1941 Act. The latter Act, however, placed the burden of establishing tariffs on the Secretary of State of Aviation (of course, it was anticipated that the operators themselves would suggest the tariffs)[260] although the scope of the scheme was restricted to such regular airlines as operated under a concession. The 1941 Act was never repealed,[261] but was in fact ignored;[262]

kehrs Zeitung Nr 12 p 5. On the Honolulu Conditions of Carriage, see further: LEMOINE, *Vers une uniformation du Contrat de transport aérien international*, 1954 8 RFDA 103—114; *Standardizing the Conditions of Carriage*, 15 IATA Bull 60—62; *The new Conditions of Carriage*, 19 IATA Bull 51—54.

[256] Cf DAURAT 198.

[257] "Cahier des Charges."

[258] CONSTANTINOFF 167; LEGOFF 584 no 1165; LEMOINE, *Traité de droit aérien*, Paris 1947 p 420 no 599.

[259] LEMOINE 420 no 599.

[260] Art 10 of the 1941 Act reads: "Le cahier des charges annexé à la Convention fixe notamment ... les tarifs maximum que le concessionaire est autorisé à perçevoir ..."

[261] Not even by the creation of CAvi and the Act No 58-346 of 1 Apr 1959.

[262] CARTOU, 1957 24 JALC 31.

and, notwithstanding the provisions of the Act government interference with contracts was never restricted to those made with the concessioned airlines, but was extended to contracts with other operators. In fact, the government used to attach to their letters of authorization the condition of adherence to tariffs and the holders of such authorizations are believed to have consented to such conditions despite the ultra vires nature of the government action.[263]

When eventually new legislation appeared in the field with the advent of the 1953 decree-law[264] it was provided that tariffs were to be endorsed by the Minister when they referred to passenger traffic.[265] This sudden turn created some confusion since it was by no means clear exactly what had happened to the 1941 Act. The decree-law contained a repeal at least by implication.[266] As a result, it appears that under the present French system the extra authority that may be derived from the government endorsement is only conferred upon tariffs relating to passenger carriage, and even there cannot extend to air taxi operations.[267]

In *Germany,* govermental interference with contracts in air commerce was initiated by the Reichsverkehrsministerium exercising its powers to supervise commerce. The Ministry controlled the drafting of the conditions of carriage as well as prices in connection with its awarding of franchises to operate as air transport undertakings. The controlling principle was found in German administrative law and meant that no franchised undertaking to serve the public could refuse to serve.[268] Under this principle, it could be argued that by laying down conditions of carriage, the governmental agencies told the airlines in the nega-

[263] 1 RODIÈRE 387 no 322.
[264] No 53-916.
[265] See art 4 para 6 as compared with para 1 *in princ.*
[266] The 1941 Act is mentioned under the second *vu* in the preamble of the decree-law which would seem to indicate that the Act was considered valid until the moment of the promulgation of the decree-law. Articles 18, 19, 21 and part of 17 have survived by being incorporated into CAvi as articles 131, 133, 134, and 135. In connection with the establishment of the various French Codes, the 1941 Act again was abrogated 3 Apr 1958, see loi no 58-346 relative aux conditions d'application de certains codes. Cf 1 RODIÈRE vi no 200; CARTOU, 1957 24 JALC 31.
[267] Art 129 of CAvi.
[268] BIERMANN, *Rechtszwang zum Kontrahieren,* 1893 32 Jh J 267 sq; NIPPERDEY, *Kontrahierungszwang und diktierter Vertrag;* WIMPFHEIMER, *Kontrahierungszwang für Monopole,* 1929; BÜLCK, *Vom Kontrahierungszwang zur Abschlusspflicht,* Abhandlungen zum deutschen Gemeinrecht, Heft 6, 1940; JOHN, *Vertragsfreiheit und Kontrahierungszwang im deutschen Luftverkehr,* 1943 12 AfL 67—86, 84; MAYER, *Deutsches Verwaltungsrecht,* 3rd 1924 p 269 sq.

tive under what conditions they could refuse to serve[269] and this argument evidently also applied to rates.[270] Conditions of carriage were adopted both for passengers[271] and for goods.[272] — These early conditions were fairly simple and the governmental authorizations purported to make them apply to all commercial air traffic in Germany. Their duration appears to have been limited.[273] In 1933 the matter took an unexpected turn when the Reichsminister authorized the IATA Antwerp conditions of carriage — as modified in Budapest in 1931 — to be conditions of carriage for Deutsche Lufthansa and Deruluft.[274] Since article 13 § 2 of these conditions as to passengers said: "Die Luftfahrtsunternehmen behalten sich das Recht vor, den Abschluss eines Beförderungsvertrages ohne Angabe von Gründen abzulehnen",[275] the Ministry had, it would seem, relieved the carriers from the very obligation which formed the basis of the Ministry's exercise of powers. At that time, however, statutory bases for the interference with contracts in air commerce had been created. The Air Traffic Ordinance of 1930 introduced the requirement that a licence was given to air traffic lines subject to certain standing conditions, "Auflagen", which covered their schedules, prices and conditions of carriage,[276] and the authorization of 1933 was given pursuant to these *Auflagen*. It was not until 1955 that the next authorization of conditions of carriage took place.[277]

Standing conditions have been formulated as to the category of operators of inclusive tours, in so far as such operators must

[269] BASARKE 111.
[270] BASARKE 111; BREDOW-MÜLLER 156.
[271] 1924 NfL 361, 1926 NfL 162.
[272] 1926 NfL 163.
[273] The conditions of 1926 were endorsed to apply to the air traffic of 1926 only, see 1926 NfL 162. The "Reichskurshandbücher" of the following years, publishing the conditions, reveal all considerable changes from year to year.
[274] 1933 NfL 94.
[275] The conditions for cargo said similarly in Art 6: "Die Frachtführer behalten sich vor, den Abschluss eines Beförderungsvertrages ohne Abgabe von Gründen abzulehnen." — LUREAU, *La responsabilité du transporteur aérien-lois nationales et Convention de Varsovie*, thèse Bordeaux 1959 p 206, indicates that it was not until the adoption of new passenger conditions of carriage in 1957 that "a été supprimé le droit reconnu au transporteur de refuser la conclusion d'un contrat de transport sans avoir à donner de motifs." However, this right appears to have been abolished already in the Bermuda conditions of 1949.
[276] 1930 Ordinance § 54, 1936 Ordinance §§ 41 and 42. These standing conditions, furthermore needed only to be published in Nachrichten für Luftfahrer, not in the Register of Statutes, see § 119. The text of these *Auflagen* will be found in SCHLEICHER 1st 304—307; SCHLEICHER-REYMANN 2d 298—301; WEGERDT-REUSS 207.
[277] Lufthansa, passengers & baggage, 30 Mar 1955; cargo 19 Aug 1955, again 8 Dec 1958,

have each inclusive tour or at least every series of inclusive tours separately approved.[278]

Government interference in Germany, thus, extended throughout the whole field of commercial air transportation without discrimination.

In *Scandinavia,* the system of licensing adopted by the various states all permitted control of such matters as price and conditions of carriage. Both the Danish and the Norwegian Acts expressly provided for governmental approval of such matters.[279] The Swedish Act, on the other hand, said nothing in the matter, but such control was nevertheless believed to be possible under the principles of the general Swedish administrative law.[280] The subsequent liberation of Danish non-regular international traffic from the requirement of franchise, however, took away the governmental powers in this area.[281] Norway was not affected in the same way, yet there an outspoken aversion against governmental price fixing and other interferences with the contract terms developed. In Sweden, the wind blew in another direction.

Ever since the Swedish Royal Board of Civil Aviation emerged in 1945 as an autonomous governmental agency, it doggedly moved towards greater economic control. Under the 1947 Provisional Regulations,[282] tariffs were already subject to Board approval if established by line traffic operators, operators of other transportation flights than line traffic or operators of circular flights. During the fifties, concern for SAS operations led the Board further along this path. Existing private tariffs were brought within the Board's immediate knowledge by the requirement that every commercial operator applying to be registered in any one of the established operator categories had to enclose information about the rates he was going to adopt.[283] By registering in one of the operator categories an operator subjected himself to the regulations made for that category, and sometimes to special conditions attached to the letter of registration.[284] By generally requiring that commercial flights to and from Swedish

[278] PELADAN 59.
[279] §§ 35 and 36 respectively. Declarative provisions furthermore were included in the franchise instruments themselves, see § 8 of the DDL franchise of 13 Dec 1951.
[280] See 1922 KProp 127 p 24.
[281] Revising Act of 7 May 1937 no 124.
[282] Provisional Regulations for Commercial Aviation adopted 9 Jul 1946.
[283] BCL D 1.1 2d issue of 1 Aug 1958, no 4,1,8.
[284] *Ibidem* no 2.3.

territory be performed solely under a special licence from the Board, the Board was able, in so far as this requirement could be construed as an added condition to the letter of registration, to establish control over the contracts pursuant to which airlines sought to operate. Applications for such extra licences would be considered, stated another set of regulations or declarations of policy, in the light of the asserted purpose of the flight, the identity of the charterer and the price paid for the flight.[285]

These attempts on the part of the Swedish authorities, however, met with much opposition, particularly in Denmark and Norway. Indeed, when the final Report of the Little Committee carefully omitted to recommend anything in the nature of a direct price-fixing this omission was the result of an entrenched opposition to the rule in Danish and Norwegian quarters.[286]

In *Great Britain* the long absence of a general licensing system made the rates tariffs and conditions of carriage of the airlines remain matters of private agreement only. Not until[287] the Ministry subjected approvals of associate agreements to standard conditions were the private contract terms of air commerce interfered with by the government. These conditions stated that "on international services the fares, freight rates and associated commercial regulations will comply with ... [apart

[285] FAL 01.25 Nov 1958. This method, for instance, was used to introduce the so-called 110 % rule relative to inclusive tours which later was dropped in favour of a less overt price-fixing rule. See Letter of 24 Feb 1956 from Luftfartsstyrelsen to the Minister of Communications, Y 92 Us 32. — By 1954, SAS was complaining about the competition offered by charter companies; see letter of 7 Oct 1954 to Norwegian Civil Aviation Directorate. This complaint was considered at the Oslo meeting of the Scandinavian Ministers of Communications on 11 Oct 1954 and it was there decided to remit the case to the national aviation agencies, inviting their recommendations. One deputy from each of the three bodies thereupon formed a joint committee called the "Little Committee" which delivered a final report in February 1956. Meanwhile, however, certain intermediary reports appeared and, basing itself of such an intermediary report, the Swedish Board issued new regulations relative to non-regular traffic, AIP SWEDEN FAL 1.1 (effective 1 Jan 1956) and in the above-mentioned letter announced its intention to grant permission to fly inclusive tours only if confident that, in the case of flights being operated over routes served by SAS' regular schedules, the inclusive price was at least 110 % of the SAS regular return ticket price relative to the same route. — The Board issued a statement of policy relative to inclusive tours taking place 1 Oct 1959 and later, to the effect that applications for permission should be accompanied by a detailed account of the tour made out by the tour-operating travel agency. Failure of the tour operator to comply with this prescription and a number of other prescriptions would mean, said the policy, that the flight permission might be revoked.

[286] Information supplied by Danish aviation directorate (RASMUSSEN letter). The Swedish representative had pleaded the introduction of the 110 % rule, referred to in the preceding note.

[287] Under sec 36-2 of the Civil Aviation Act, 1946, the ATAC (see *supra* page 89)

from the United Kingdom's public international agreements] ... the appropriate fares, freight rates and associated commercial regulations prescribed by the International Air Transport Association for services to which the fare and rate-fixing procedures of IATA should apply".[288]

The 1960 Civil Aviation Regulations empowered the Board to attach conditions to the award of licences. Such conditions could relate to a large variety of matters, including tariffs (rules as well as rates), inter-carrier arrangements, remuneration to travel agents etc. But the introduction of the exemption categories would seem to mean that the Ministry could no longer impose the IATA Resolutions upon operators within these categories although in many cases it must have been able to do so under the prior regulation, particularly in relation to so-called contract service.[288a]

In the *United States,* air transportation had started as a purely postal service, first operated by the Federal Government, then, after 1926, by private operators under contracts with the government. In the early stages of private operations, when mail was generally the only traffic carried, the compensation paid to the contractors represented payments for the mail service rendered. The inauguration of passenger services by air mail contractors placed payment on a new footing. The payments now made not only covered the costs to the carrier of furnishing the mail service, but included substantial additional amounts designed to meet in varying degrees the deficits of the carriers' passenger and express service. This scheme was the inheritance of the Civil Aeronautics Act of 1938.

The Civil Aeronautics Act, as revised, charged the Civil

was charged with the duty "to consider any representation from any person with respect to the adequacy of the facilities provided by any of the Airways Corporations . . .", but in SHAWCROSS & BEAUMONT 2d 168 no 191 note a, it was submitted that this jurisdiction as to "facilities", as re-enacted in sec 12-2 of the Civil Aviation Act, 1949, did not extend to the conditions of carriage. Similarly GRUNFELD, 1954 Mod L Rev 120 note 14. — The powers conferred upon the King to make provision by Order in Council "as to the conditions under which passengers and goods may be carried by air and under which aircraft may be used for other commercial, industrial or gainful purposes . . ." (see Civil Aviation Act, 1949, sec 8-2-f, re-enacting sec 7 of the Civil Aviation Act, 1946) probably did not refer to conditions of carriage in the sense of contract clauses. Anyway, they have not been used.

[288] Condition 4. iv. The scope of the term "associated commercial regulations" was not construed in practice to include all IATA commercial — as contrasted to technical — resolutions. For instance, not the sales agency resolutions.

[288a] As to the meaning of "contract service" see *infra* page 209 note 370 a.

Aeronautics Board with the task of regulating air commerce.[289] According to the Board "Basic responsibility and power with respect to the regulation of the economic aspects of air transportation are conferred upon the Board by Section 205 and the various provisions of Title IV of the Civil Aeronautics Act."[290] The only express authority to regulate rates, however, existed with regard to mail payments. The Act provided for the extension to the airlines of governmental financial aid through the medium of mail pay. The Act empowered the Board to determine fair and reasonable rates of pay for flying the mail[291] and to fix rates for different air carriers and different classes of service (sections 401-m, 406-b).[292] By adjustment of this mail pay the Board could regulate the return on invested capital for the airlines and make them willing to comply with Board directives. But this tool was sometimes productive of dilemmas such as airlines using their high mail and passenger rates to offset their subsidization of cargo services.[293] The direct regulatory attainment of reasonable and non-discriminatory commercial rates was not conceived of as one of the primary tasks of the Board.[294] Authority to fix direct rates, therefore, was contained only by implication in the Board's mandate to disapprove rates tariffs which were discriminatory — unjust and unreasonable or unduly preferential etc. — and his power of disapproval only included American domestic common carriage flying.[295] The same mandate, of course, gave the Board powers to supervise the terms of the airlines' contracts in common carriage as elaborated in the rules

[289] According to GELLMAN, 1957 24 JALC 413 the Act as originally passed, established a Civil Aeronautics Authority which was to administer all the provisions of the Act. In 1940, however, by administrative change, two separate units were set up with responsibilities for administering different parts of the Act. The Civil Aeronautics Board was established as an independent agency and was made responsible for the regulation and control of the air transportation industry. The Civil Aeronautics Administration of the Department of Commerce assumed those duties not vested in the Board.

[290] 1949 CAB Annual Rep 18.

[291] In the Federal Aviation Act the pertinent provision is numbered 401-l.

[292] Cf GAZDIK, *Ratemaking and the IATA Traffic Conferences*, 1949 16 JALC 301.

[293] Cf FREDERICK 4th 267.

[294] SHEPPARD KEYES, *Passenger Fare Policies of the CAB*, 1951 18 JALC 46.

[295] Secs 404 and 1002. Note however, that disapproval involved an obligation on the part of the Board to "determine and prescribe the lawful rate, fare, or charge, (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: . . ." Sec 1002-d. These powers were restricted to interstate and overseas air transportation, and did not apply to international flying. *Ibidem.*

tariffs of these airlines. Broad, although somewhat uncertain, powers as to the airlines' non-common carriage contracts were furthermore conferred upon the Board by section 412 of the Act. This same section has been construed to require prior Board approval in the case of industry agreements reached through rate conferences, such as those of the Air Transport Association and the Air Freight Transport Association.[296] Failing this approval, the antitrust immunity under section 414 cannot be invoked.[297]

## § 2. *International law*

The Bermuda Agreement — the Bermuda Rates Clause — IATA clauses in the bilateral agreements — Scandinavian temporary deviation — governmental approval of IATA Resolutions-constitutional limits to powers conferred by the IATA clauses — Article 6 of the Chicago Convention — scope of the mandate to regulate given to IATA

The post-war development brought one important addition to the legal bases on which the IATA Resolutions could claim importance in administrative regulation. Instrumental in this vitalization of the airlines' private regulations was the so-called Bermuda Agreement.[298] The pertinent provisions were found in the Annex part II which dealt with Rates. It was there provided that rates were subject to the approval of the Contracting Parties (clause a) and that rate agreements concluded through the rate conference machinery of the IATA and involving American air carriers would be subject to approval by the CAB (clause b). While the Agreement can be critized for being both vague and complicated[299] and this characterization seems applicable to the drafting of these provisions if they were meant to contain a mandate to the IATA to fix rates, it has however, become well agreed that this was the actual meaning of the provisions. Indeed, the existence of the then recently created IATA rate-fixing machinery contributed greatly to the success of the Agreement in the face of the failures of the British and American representatives to agree on economic matters during the Chicago Conference late in 1944.[300] In the Franco-British Agreement signed a fortnight

[296] 14 CAB 424.
[297] BEBCHICK, 1958 25 JALC 12.
[298] Air Transport Agreement, signed 11 Feb 1946, 1946 USAvR 108, 1946 9 RGA 308, SHAWCROSS & BEAUMONT 2d 1209 no 8001.
[299] Cf MEYER, 1954 3 ZfL 236.
[300] Attention had been focused on the importance of rate control by the dispute between Pan American and the United Kingdom in November 1945. Pan American suddenly announced a drastic cut in its New York—London rate from $ 375 to

later,[301] the equivalent provision is in a much clearer form: "In fixing these tariffs account shall be taken of the recommendations of the IATA",[302] while the United States-France Agreement of March 27 of the same year[303] meant a return to the peculiar language of the Bermuda Agreement.[304] The matter was again brought into focus when Germany reappeared to take her place in aviation and started to make bilateral agreements. Germany's agreement with Great Britain[305] provided that agreements over tariffs should "where possible, be reached through the rate-fixing machinery of the IATA".[306] Germany's agreement with France[307] by contrast contained the mandate to IATA by implication: tariffs should be fixed by agreement between the designated airlines and the airlines could proceed, either by direct agreement, or "en appliquant les résolutions qui auront pu être adopté par la procédure de fixation des tarifs de l'... I.A.T.A...."[308] The German-American agreement,[309] again, was rather more close to the Bermuda pattern.[310]

The Scandinavian States participated only to a small extent in this development of mandates to the IATA. The Danish, Norwegian and Swedish bilateral agreements with the United States were all concluded prior to the Bermuda Conference.[311] When in 1954, on the motion of the United States, clauses relating to rates were added to those agreements the clauses

$ 275. The British reacted by cutting down Pan American flights to the absolute minimum under the prevailing bilateral agreement of 1935, namely two round flights per week. A picture in bright colours and broad strokes of the importance of the rate control theme at the Bermuda Conference is found in SMITH, *Airways Abroad* 246—265.

[301] Agreement Relating to Air Transport, signed 28 Feb 1946, 1947 1 RFDA 193, 1946 9 RGA 295, ICAO Reg No 326.

[302] Annex I, art vi; revised Annex of 1953, art 6, 1953 7 RFDA 325.

[303] Agreement, Air Transport Services, 1946 USAvR 142, 1950 13 RGA 1272.

[304] Annex, sec V — Rates, B and C.

[305] Agreement for Air Services, signed 22 Jul 1955, 1957 6 ZfL 136.

[306] Art 7-2.

[307] Accord relatif aux transports aériens, signed 5 Oct 1955, 1956 10 RFDA 53, 1955 18 RGA 498, 1957 6 ZfL 147.

[308] Art 18-2-a.

[309] Air Transport Agreement, signed 7 Jul 1955, 1955 USAvR 397, 1956 5 ZfL 220.

[310] Art 11.

[311] Denmark: Agreement Relating to Air Transport Service, signed 16 Dec 1944, 1944 USAvR 126E. Norway: Agreement — Air Transport Services, concluded by exchange of notes dated 6 Oct 1945, 1945 USAvR 360. Sweden: Agreement Relating to Air Transport Services, signed 16 Dec 1944, 1944 USAvR 126. All these agreements followed the pattern of the Standard Form, recommended by the Chicago Conference as part of its Final Act. See 1 *Chicago Conference Proceedings* 128—129.

were drafted to follow closely the Bermuda pattern.[312] As far as Sweden was concerned, the rights in relation to the United States which were granted in the International Air Transport Agreement (Five Freedoms Agreement) with the United States had expired on July 25, 1947.[313] The bilateral agreement concluded between Sweden and France in 1946 and cancelled in 1955[314] contained no IATA clause. Nor did the one concluded in the same year between Sweden and Great Britain.[315] Such a clause did appear, however, in the 1955 agreement between Sweden and Germany.[316]

Common to all these IATA provisions in the bilateral agreements was that the IATA Resolutions were made subject to governmental approval, or, at least, that measures for such approval were envisaged. National constitutional powers to give such approval, however, exist in varying degrees. As to the foreign airlines, such powers definitely arise under Article 6 of the Chicago Convention, and whether or not the governmental aviation agency or some other body is empowered to approve is merely a matter of the delegation of powers. As to domestic airlines, on the other hand, it is difficult to see how any powers relating to their operations exist internationally other than those relating to domestic aviation generally. At times the statutes conferring authority upon the aviation agency even limit the grant of powers so as not to extend to international operations.[317] This limited grant exists in at least one system, *viz.* that of the United States.[318]

The scope of the mandate to IATA which thus was implied in or spelled out in the bilateral agreements varied. First, it was restricted by the scope of application of these very agreements, so that they only applied to the airlines designated to operate the respective international routes. Secondly, super-

[312] Denmark: Art 13. — Rates, 1954 USAvR 466. Norway: Art 13. — Rates, 1954 USAvR 474.

[313] 1945 USAvR 284, signed 7 Dec 1944, accepted by Sweden 19 Nov 1945 and by the United States 8 Feb 1945, with reservation, but denounced 25 Jul 1946, effective 25 Jul 1947, by the latter.

[314] Accord relatif aux transports aériens, signed 2 Aug 1946, 1946 SÖF no 33.

[315] Agreement, signed 27 Nov 1946, 1946 SÖF no 36.

[316] Abkommen über den Luftverkehr, signed 29 Jan 1957, Art 11-2: "Hierbei sollen sich die benannten Unternehmen nach den Beschlüssen richten, die auf Grund des Tariffestsetzungsverfahrens der . . . IATA . . . angewendet werden können, oder . . ." 1958 SÖF no 21 p 250.

[317] Here reference must be made to § 1. National law, *supra* at pages 108—115.

[318] See further *infra* at pages 119—121.

imposed on this restriction was the one that the powers vis-à-vis the domestic airlines might be restricted in themselves — as for instance in France where tariff powers only extended to passenger carriage,[319] and in the United States, where powers over the international transportation by domestic airlines were most uncertain.[320] On the other hand, where the powers were ample, they could be used to endorse the IATA Resolutions for application far beyond the scope of the bilateral agreements themselves — as for instance was done in Great Britain before 1960 when the grant of associate status could be conditioned upon compliance with IATA Resolutions.[321]

## SECTION 3. EXERCISE OF POWERS TO INTERFERE

### § 1. *Approval of IATA Resolutions*

Fixed period for governmental study of Resolutions — conditional approvals — attempts to preserve harmony between IATA and national regulation — British reservations — British all-out endorsement — CAB troubles — no direct powers to approve — indirect powers — differences between IATA and American domestic regulation — the limitations on the duty to carry — air freight forwarders — the fill-up privilege — no CAB difficulty as to the 030 Resolution in so far as it relates to charters — indirect entry of the 045 Resolution into national systems.

One particular problem to be overcome by the IATA Conference machinery was to prevent Resolutions from entering into force in the face of governmental disapproval. This was achieved by resolving that Resolutions come into effect only after a fixed time from their filing date. Governments thereby were provided with a period during which they could study the Resolutions submitted and reach a final decision whether or not to exercise their right to disapprove. Disapproval thus would stay the Resolution before it had become effective.[322] The unfortunate consequences attaching to disapproval have made governments disinclined to use this power. Instead they have preferred to resort to the device of conditional approval. Rather than establishing standards that are to be strictly adhered to, such approval operates as a guide by which subsequent IATA Conferences can gauge their decisions.[323]

[319] *Supra* page 109.
[320] *Supra* page 115.
[321] *Supra* page 113.
[322] SHEEHAN, 1953 7 Sw LJ 148.
[323] The peculiar status of IATA Resolutions in case of conditional governmental approval is discussed by SHEEHAN, *IATA Traffic Conferences*, 1953 7 Sw LJ 149—

The Charter Resolution was the one most often burdened with reservations in the nature of conditional approvals. Such reservations were generally made to preserve harmony between the domestic regulation and the regulation delegated to the IATA. Great Britain was particularly troubled because of the peculiarities of her licensing system prior to 1960; her approvals of the 045 were conditional upon the observance of the requirements of *i.a.* section 24 of the Air Corporations Act.[324] On the other hand, she went further than most other countries by making compliance with the IATA commercial regulations associated with fares and freight rates, including the 045, a standard condition for granting the right to operate "scheduled journeys" to airlines not within the category of the airlines designated under the bilateral agreements.

Trouble also faced the CAB. To be sure, the Board had a number of powers over domestic air transportation,[325] but it had no direct control over the rates of American air carriers operating internationally. It requested amendment of the Civil Aeronautics Act to secure powers over such rates,[326] but no amendment materialized. The Board therefore was forced to work by indirect means under its powers derived from section 1002-f, the section enabling the Board to disallow discriminatory charges, and from section 412, — a concomitant to which is the immunity from antitrust enforcement under section 414 — which requires that all agreements to which any American air carrier is a party must be submitted to the Board for approval. The Board had introduced an extensive regulation of charter matters of its own which did not completely harmonize with the 045. While both regulations were similar inasmuch as they had adopted a no-resale rule, they differed in important respects. First, there were the limitations on the duty to carry. The 045 restricted group charters to such groups as had prior affinity; the Board's domestic policy permitted charters by spontaneous groups and the Board took the position that the nature of the group itself could not be

152. See also BEBCHICK, *The International Air Transport Association and the Civil Aeronautics Board*, 1958 25 JALC 13—15.

[324] Cf *supra* page 88 and note 169.

[325] Cf *supra* pages 91 sq and 114—115.

[326] See HR 2911 and § 12a of S. 237, introduced by Representative Kennedy and Senator Johnson, respectively, at the 81st Congress 1st Sess. Cf GAZDIK, 1949 16 JALC 301 note 11.

sufficient ground to refuse a charter.[327] Secondly, there were the exceptions to the no-resale rule in the field or air freight. The Board sought to foster an independent class of intermediaries called air freight forwarders, while IATA after a brief period of benevolence sought to suppress their international equivalents, the IATA Air Cargo Consolidators.[328] Thirdly, the Board's Order of February 2, 1956, put an end to the IATA carriers' usurpation of the fill-up privileges in so far as United States bound flights and flights originating in the United States were concerned.[329] The order only permitted their continuation with respect to the carrier's own personnel and property provided that the charterer consented to it. The American carriers enjoyed no fill-up rights under Part 207 and the Board held it to be necessary to exclude these rights to prevent discrimination.[330]

The Conditions of Carriage in Resolution 030, in so far as they related to charters, did not create any difficulties similar to the 045 although in other respects they provoked what looked like being a long war between the Board and IATA.[331]

The fact that, strictly speaking, the 045 Resolution, even when approved unconditionally, only applied to IATA members performing such services as fell within the terms of the bilateral agreements did not prevent it from entering further into the national systems without any formal promulgations. The effects of its application were felt also by other airlines when requesting landing rights in other countries.[332]

### § 2. *Interference by national regulation*

British, Swedish and American interference — Why only study the American system? — interference with the contracts of the certificated air carriers — Part 207 — limitative effects of Part 207 — route and frequency restrictions — restrictions established by the very definition of charter trip — special service — tariff requirement — interference with the contracts of the large irregular air carriers and of the supplemental air carriers — era of special exemptions — transatlantic charter policies — incorporation of policy to regulatory form — Part 295 — foreign air carriers — route-bound foreign air carrier permits — persuasive authority behind Part 207 — Part 212

Regulation on the national level of such a character as to

[327] Cf BEBCHICK, 1958 25 JALC 33.
[328] *Supra* pages 39—43.
[329] CAB E-9969.
[330] It should be noted that while the rest of Order E-9969 was stayed by Order E-10017, 20 Feb 1956, the suppression of the fill-up privilege continued. Reservation is retained in E-12307, 31 Mar 1958.
[331] See BEBCHICK, 1958 25 JALC 33—37.
[332] IABA 1958, Information given by Council members, Air Charters — Great Britain.

interfere with air charter terms exists, it would seem, only in the American, the British and the Swedish system. Of these, the British regulation prior to 1960 needs no special comment since it consisted of mere reference to the IATA Resolutions. Nor can much be said of the situation after the 1960 legislation. While the Air Transport Licensing Bord in granting or varying a licence could impose conditions in various respects, listed under no fewer than fifteen counts, no pattern in these conditions can ye be discerned.[333] The Swedish regulation, while inspired by the American system rather than by IATA, never acquired proper regulatory form[334] but instead existed as a measure of intra-Board policy. It therefore has not arrived at such a stability as to warrant a special account.

The American regulation remains to be considered! The main operator category created by the Civil Aeronautics Act itself was that of the *certificated air carriers*.[335] Under section 401-f of the Act — now section 401-e of the Federal Aviation Act, 1958 — such carriers were free to make charter trips and perform any other special service subject to the regulations made by the Board. Apart from some military regimentation during the war the issuance of these regulations was delayed until 1951, when the Board adopted Part 207 of the Economic Regulations.[336] Part 207 governed the charters of certificated airlines generally. It was limiting in a number of respects. Restrictions were imposed in order to preserve the route traffic of other certificated carriers.[337] Certificated carriers were only permitted to operate

[333] See Civil Aviation (Licensing) Regulations, 1960, sec 12.

[334] To the statement in the text there is, however, one exception, namely the General Regulations relative to commercial air traffic other than line traffic, issued 29 Apr 1944 by Väg- och Vattenbyggnadsstyrelsen under powers conferred upon this agency by the 1943 revision of the Swedish Air Traffic Act, § 33 (1943 SFS no 803). These regulations ruled that, in the absence of an aviation accident insurance, there must be a signboard in the aircraft notifying passengers in the aircraft that they themselves "had to assume the risks" connected with passenger status, " unless negligence relative to damage which might arise, could be imputed upon the pilot or some other person". Same notice must appear on the ticket to be delivered to such passenger. See provision no 17, 1944 Meddelanden från Luftfartsmyndigheten No 3.

[335] Sec 401.

[336] It appears that the certificated carriers, when applying for Board action at the instance of international charter trips (as did *e. g.* Pan American when preparing its Holy Year charter arrangement with Felix Roma: see CAB letter 9 Nov 1949, annexed to CAB 49—99), prior to 1951, did so because Board action might be necessary in view of the off-route character of the charter. See Pirie letter.

[337] Part 207.7. In international services the ordinary route operators should consent, or, alternatively, specific authority be granted by the Board upon a finding

charter trips and special services to the extent of 2.5 per cent of the scheduled services of each carrier.[338] Further restrictions were imposed by the device of a regulatory definition of the term "charter trip" appearing in the Act.[339] "Charter trip", as the term was used in Part 207 — "unless the context otherwise requires" — meant air transportation performed by a certificated air carrier "where the entire capacity of one or more aircraft had been engaged for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis." But this definition was too extensive. Plane-load charters could not be charter trips in the sense of the regulation unless they were concluded with a charterer belonging to one of four specified groups, and the effect of this added requirement was to make charter mean planeload charters by an individual or a group for own use but not for resale unless made with a certificated air freight forwarder. Restraint, furthermore, was placed upon solicitation.[340] A flight which was not a charter trip under this definition was not outlawed, however; it fell within the category of "special service". A special service was to be brought to the notice of the Board in advance and the Board could then prohibit its inauguration if the service appeared to be inconsistent with the public interest.[341] Charter trips and special services were subjected to the requirements of rates and rules tariffs.[342]

Furthermore, regulation of the charters in the category of *large irregular air carriers* was introduced. This category was initially set up in 1947 under the Board's powers of exemption

that the public interest so required before a charter could be performed over the routes awarded to other carriers: 207.8.

[338] 207.5.

[339] Sec 401-f.

[340] This exclusion of public solicitation of charters caused hardship to the American air carriers. The Board's approval of the Honolulu edition of the 045 Resolution was conditioned by the holding that the United States certificated carriers still were bound by Part 207. E-8103, 15 Feb 1954. 18 CAB 650. The effect, however, was to put those carriers at a competitive disadvantage to the foreign carriers. The Americans were restricted both as to methods of solicitation — by Part 207 — and as to market — by the 045 — while the foreign carriers were restricted in the latter way only. Of course, this interpretation implies a denial of the persuasive authority of the Board's 1951 warning, see *infra* page 125. Anyway the Board was moved by complaints to change the conditions for approval, and by Order E-8295, 26 Apr 1954, 18 CAB 648, the American carriers were released from the restriction to affinity groups with respect to air transportation between the United States and foreign countries, and at the same time the prohibition of public solicitation was made to apply to foreign carriers in the United States.

[341] Part 207.9.

[342] Part 207.4.

from economic regulation pursuant to section 416-b, and in 1955 it was replaced by the somewhat shaky creation of supplemental air carriers. In the course of the regulation of the large irregulars, the Board initially interfered with the terms of their contracts by prescribing the form of the tickets they were to use.[343] Eventually, however the Board went much further in such interference. Originally, the large irregulars, under the general regulation, were excluded from the international carriage of passengers.[344] but could receive authority to perform such operations by way of Board exemption. In 1949, however, the Board intending a liberalization of the rules for the irregulars, adopted a general and somewhat more favourable policy than before in processing applications for exemptions. This development resulted in a Statement of Policy on Transatlantic Travel in 1950,[345] which contained the general standards to be used in processing and deciding applications for exemptions relative to transatlantic passenger flights. But one year later it changed completely. Early in 1951 the Board issued a new statement of policy, the so-called 1951 Transatlantic Charter Policy. This Policy in fact attempted to channel the charter traffic across the Atlantic into the hands of the regularly authorized transatlantic carriers, American or foreign. These carriers were given a right of first refusal — no exemption would be issued unless these carriers were unable or unwilling to provide reasonably adequate charter service at established charter rates. They were furthermore assured that

[343] Part 291.24, as amended effective 10 Dec 1949, provided as follows: "Each ticket issued by the carrier, or by its authorized ticket agent, shall have printed thereon the name and address of the carrier, and shall provide appropriate spaces for, and shall have entered thereon, at the time of sale, the name and permanent address of the passenger, the date of sale, the date of flight, origin and destination points, and the fare actually paid by the passenger. Such tickets shall also be signed at the time of sale by a duly authorized officer or employee of the carrier or agent. On or after the date of flight, tickets shall be validated by the carrier in some appropriate manner on the face thereof to indicate that either the transportation service covered thereby has been rendered or appropriate refund has been made where no service or only a part of the air transportation service has been rendered. In those cases where the carrier is by law entitled to transport any person at a free or reduced rate a pass shall be issued to such person, with the exception of those persons described in § 223.3 of this chapter, prior to departure of flight and taken up by the carrier at the destination point. Each such pass shall have printed thereon the name and address of the carrier, and shall contain on its face the name and address of the passenger, the date of the flight, origin and destination points, and shall indicate the status of the passenger entitling him to free or reduced rate transportation."

[344] Part 292.1-b-2.

[345] CAB 49—99, release 9 Dec 1949.

they would receive authority when necessary to contract for the aircraft and crews of other air carriers so as to be better able to benefit from this right of first refusal.[346] All charters authorized to be operated by the large irregulars were made subject to the new charter regulation — Part 207.[347] The principles of the 1951 Transatlantic Charter Policy were followed for many years[348] with the addition that the charter should be essential to the success of the movement.[349] The effect of this added requirement was that only refugee charters and seamen charters were permitted with any frequency.[350] While the various provisions of the Policy were subjected to minor liberalizing changes in the subsequent enunciations of the policy (1955, 1957, 1958)[351] the essentials of the regulation remained intact until in 1959 the whole matter was incorporated and given regulatory form by the enactment of Part 295 Transatlantic Charter Trips.[352] Part 295 required, *i.a.* that the carrier should have on file with the Board a tariff showing all its rates, fares and charges for the use of the entire capacity of one or more aircraft and all its rules, regulations, practices and services in connection with the pro rata charter transportation[353] or the single entity charter transportation.[354]

Foreign air carriers received authority to operate into or out of the United States by the issuance of so-called foreign air carrier permits. Such permits were attached to routes.[355] The authority could include right to perform charter flights over these routes.[356] When the Board in 1951 had adopted Part 207 much persuasive authority was used to make the foreign carriers comply with its provisions without being expressly subject to them. The Board announced: "it is obvious that if foreign air carriers do not limit their on-route charter services to the carriage of the same type of

[346] CAB 51—28. The right of first refusal did not disappear until the 1957 promulgation of part 295, see pp 6—7 of enactment.
[347] CAB 51—28.
[348] See CAB 52—15, release 12 Feb 1952.
[349] See CAB E-9221 p 1; 20 CAB 782.
[350] See CAB E-9221 p 2; 20 CAB 783.
[351] CAB E-9221, decided 20 May 1955; 20 CAB 782; Policy Statements — Part 399, adopted 28 Mar 1957; same, adopted 7 Jan 1958.
[352] Adopted 26 May 1959.
[353] Part 295.14.
[354] Part 295.41.
[355] See Part 211.5-c, 1 Jul 1949.
[356] Part 211.5-c: the application for a permit could specify that the services were not only to be rendered in scheduled operations but also on a non-scheduled basis.

traffic that the United States transatlantic carriers may transport under the charter regulation, the Board must reconsider its charter policy."[357] When in 1955, steps were taken to remedy an anomalous situation existing as to charters not over the ordinary routes of these carriers [358] there developed as ancillary to this reform a regulation for the performance by foreign air carriers of such off-route charters. This regulation was promulgated in 1958 as Part 212.[359] Its character as an accessory to a particular reform, however, prevented its application to all charters of the foreign air carriers. On-route charters remained unregulated but for the persuasive authority of the Board's 1951 warning.[360] Part 212 followed the same pattern as Parts 207 and 295.

[357] CAB 51—28, release 22 Mar 1951, p 2.
[358] The Act contained no blanket grant of off-route charter authority to foreign air carriers comparable to that given United States certificated carriers under section 401-f of the Civil Aeronautics Act, then in force. The Board's exemption powers under section 416-b only extend to United States carriers. The only means of conferring off-route charter authority upon foreign air carriers then were either the amendment of the foreign air carrier permit so as not to attach to route, or the issuance of a *foreign aircraft permit* under section 6-b of the Air Commerce Act, 1926, then in force. The latter device was the one generally used but if the charter was in common carriage the scheme was contrary to section 402 of the Civil Aeronautics Act which prohibited a foreign air carrier from engaging in foreign air transportation — *i. e.* common carriage — without an air *carrier* permit.
[359] CAB E-12945/6, 12 Aug 1958.
[360] *Supra* page 125.

*CHAPTER THREE*

# AIR CHARTER: A PROBLEM OF LEGAL CONSTRUCTION

SUB-CHAPTER 1

# GENERAL DISCUSSION

## SECTION 1. THE CITEJA DISCUSSION

Subject of discussion — *contrat de transport, location totius rei* — contract *sui generis* — the Glose dialogue

When the great Continental scholar Cogliolo was charged by the Citeja with the study of air charter contracts, he discussed this topic with his eminent Continental colleagues, including Ripert and Riese. These discussions concerned, *inter alia,* the placing of the charter contract in one or another of the recognized categories of contracts, *i.e.* in a contract type.

[O]ù il y a eu location d'une partie seulement de l'aéronef; alors nous avons le contrat de transport" said Cogliolo.[1] But if an individual chartered an aircraft for the carriage of a planeload of gold abroad and could dispose of the aircraft for his own use, that would — in the opinion of Ripert — not be any contract of carriage.[2] Such a carriage was held by Cogliolo to be a "location *totius rei*".[3] De Vos suggested that the charter of an aircraft might have to be considered as a contract *sui generis*.[4] Indeed, it looked as if there was reason for Riese to repeat his resigned confession that no principle was to be found providing any single workable solution as to whether the charter was a "contrat de transport" or some other type of contract.[5]

Further confusion was added by Knauth's introduction of the dialogue in the *Glose Case*[6] on the understanding that the legal nature of the air charter contract could be inferred from the terms thus evidenced. Knauth advised the Commission that Mr. Glose had been the only passenger and that three more passenger seats remained empty. As reported in the French Minutes the dialogue had run as follows, "On lui a demandé: à quelle heure voulez-vous partir? Il a répondu: quelle est l'heure de votre

[1] 336 Citeja 7.
[2] 336 Citeja 15.
[3] 336 Citeja 7.
[4] 336 Citeja 15.
[5] 297 Citeja 10.
[6] *Curtiss-Wright Flying Service v Glose*, 1933 USAvR 26, 228, 1934 USAvR 20. See further page 208 and note 363, and page 209 *infra*. Also page 7 note 17 *supra*.

départ? — 9 heures — C'est un peu tôt . . . — 9 heures et demie, si vous voulez. On a accepté et à 9 heures et demie il est parti."[7]

Was the solution, then, not so easy as would seem to follow from Goedhuis' declaration in 1932 to the effect that "le contrat . . . est un contrat de transport parce que le fréteur s'oblige à faire un certain nombre de transports"?[8]

It appears not. But this question is a complicated one and requires an analysis of what was really discussed between these eminent lawyers. We cannot accept their discussion at face value. That may be sufficient for a practising lawyer to whom all statements of law are equal except for such variations in authority as relate to the person or corporate body making the statement. Here, such a method would lead only to the conclusion that "the opinions . . . include nearly everything."[9] Only if the method is supplemented by an historical approach which will place the arguments advanced in the discussion in their historical-systematical context, will such arguments be sufficiently illuminated to permit positive conclusions about the law. The text will therefore begin by posing the problem, then proceed with an historical exposition, and finally revert to the present-day problems involved.

## SECTION 2. AIMS OF LAW AS TO CONTRACTS

### § 1. *Primary functions of contract law*

Characteristics of contract as a legal phenomenon — *pacta sunt servanda* — express terms and bona fide terms — sanctioning function of contract law — directing function of contract law — contract as symptom — mandatory contract terms — the statutory contract

Characteristic of the contract, as opposed to other legal categories, is the phenomenon that the contents of the contract are decisive as to its legal consequences; the contract involves such legal consequences as can be read from its very words. The party that has promised by contract to pay has to pay; the party that has promised to deliver has to deliver. *Uti lingua nuncupassit, ita jus*

[7] 297 Citeja 14. Arnold W Knauth was counsel for plaintiff, Mrs K. Glose, in the case, and his memory therefore presumably may be relied upon although the official transcript of the testimony as kept in Federal Records Center, New York City, does not contain this dialogue. The discussion in Court, as on record, *i. a.* related to whether Mr Glose had made such a contract with Curtiss Flying Service, the aircraft operator, that no other passenger could embark without Mr Glose's consent.

[8] 1932 RDILC 701.

[9] GRÖNFORS, *Air Charter and the Warsaw Convention*, Stockholm & The Hague 1956 p 59.

*esto.* This phenomenon expresses a rule at the root of our notion of contract and it may conveniently be identified with the maxim *pacta sunt servanda.*[10] The rule can be applied strictly so that only express terms are covered thereby, or it may be applied more *ex bona fide* so that terms are within its application which were not expressed but nevertheless in the minds of both parties. The rule thus gives effect to the will of the parties and to nothing more. It enables the parties to have their way and limits the function of the law to that of sanctioning what they have decided. In effect, the contract contains the law between the parties *(lex inter partes);* contracting may be viewed as a rule-making activity, engaged in by the parties.[11]

But contract law may involve a further function. It may sometimes be used by legislators to direct societal life in certain respects, and thus direct the conduct of the parties to the contract. Contract law, when exercising this function, will not look upon the contract solely as an expression of what should be sanctioned, but will rather consider the contract as a symptom indicating conduct of the parties that may call for direction. In order to direct conduct the law must, of course, be mandatory.

People's future conduct, however, can be deduced not only from the contracts which they make. Sometimes, other expressions of societal life can be equally useful as symptoms of intended future conduct. The bill of lading contract is certainly a symptom of a carriage situation, but — as is shown by the American law — the outward expressions for carrier and passenger *status,* respectively, may with equal success warrant conclusions as to the carriage situation. Facts not compressed in a contract form may therefore be taken as a basis for a directing law which, — while avoiding reliance upon the many intricacies of contract law (formation, capacity to contract etc.) — has the same function and serves the same purpose as the mandatory contract law supplying implied terms. This parallelism is important in carriage law and serves to explain the relationship between

[10] Cf KANTOROWICZ, *Glossators of the Roman Law,* Cambridge 1938 p 134.

[11] Cf Code civil art 1134 first sentence: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites." This article is the expression of a conscious trend among the drafters of the Code civil to strengthen the binding effect of the contract. See CHARMATZ, *Zur Geschichte und Konstruktion der Vertragstypen im Schuldrecht,* Brünn, Prag, Leipzig & Wien 1937 p 146. Similar ideas of the contract as *lex inter partes* appeared in the Prussian codification of the same epoch, see CHARMATZ 352.

certain aspects of Continental, inclusive Scandinavian, European law and Anglosaxon law.

## § 2. *Legal construction of contracts*

Implied terms — terms being the result of inductive construction — the contract type — economizing function of the contract type — comparison with the printed contract form — terms being the result of deductive construction — Roman consensual contracts — notion of the abstract contract — Canonist change — survival of the Roman contract types — contract type notions in the Continental Codes reasons for survival of notion — *cause* — the legal system is complete — delay of inductive construction — at times write the parties' contract, at times not — impact of mandatory rules general law, special law and clausal law

Mention of the rules sanctioning the will of the parties, on the one hand, and the mandatory, statutory contract, on the other hand, does not complete the picture, however. Contract law can rarely be so restricted. There is an important intermediary area. Commonly, contracts, *e.g.* sales, have a number of legal consequences attached to the occurrance of various contingencies such as; delay, defective goods, and bankruptcy of one party, etc. To be sure, in so far as the contract has referred to any one of these situations, its provisions will prevail. In the absence of such provisions, however, a number of rules exist which will govern the details of the relations between the parties. These rules may be referred to as *implied terms*.[12]

From a more general point of view the legal problems raised by the implied terms, as opposed to the express terms, raise quite separate problems. There are two methods by which implied terms can be made to apply to a contract; as the result of inductive contruction or of deductive construction. Both methods are supposed to be a help to the parties in the rule-making process of contracting; yet each method, in its own way, produces sometimes rather peculiar results.

*Inductive construction* makes use of the "background of usage, familiar to all who engage in similar negotiations and which may be supposed to govern the language of a particular agreement."[13] Hence the contract will be construed by the courts as subject to terms which are, although not expressly mentioned by

[12] Assuming that the contract *in toto*, express and implied parts, rules the relationship between the parties to it, the result follows that within the boundaries of the contract, *rules* and *terms* are interchangeable references to these parts.

[13] CHESHIRE & FIFOOT, *The Law of Contracts* 5th 122.

the parties and at times relating to matters never anticipated by the parties, nevertheless "imported into the contract from its context".[14] The express contract terms, then, together with these implied terms make a *structure of* coherent and consistent regulations. In Continental legal language such a structure is referred to as a "contrat autonome", a "Vertragstypus", or a "kontraktstyp." In Anglosaxon terminology there would seem to exist no equivalent term. The expression closest in meaning appears to be the "statutory contract"[15] but it is, of course, not accurate because it relies on statute. Lawson uses the expression "stock types of contract".[16] Hereinafter, however, I will use the more Continentally inspired term, *viz.* contract type.

The creation of a contract type is supposed to perform a very important economizing function in that the existence of such a type enables the parties to arrive at a full and comprehensive regulation of their interrelation with a minimum of drafting effort.[17] It can be seen that in times of lively commerce in illiterate circles it is necessary that the law establish the equivalent of a contract type, although the drafting of contracts by notaries or solicitors may do something to compensate for illiteracy.[18] However, in modern society it is well to remember that the function of the contract type can to a large extent be performed by the use of printed contract forms which confer the desired stability of regulation upon the relationship of the parties and yet at the same time offer contract drafters almost unlimited freedom of variation. Thus, it may be that inductive construction is more duplicative than economizing.[19]

[14] *Ibid.* A good illustration of such construction is the *lex commissoria* (to be dealt with more extensively in Chapter 5) and the French sales contracts. In the times of *l'ancien régime*, the insertion of the *lex commissoria* in such contracts became a standard form of notarial practice, so much so that it was later implied by the *parlements* in contracts if omitted.

[15] BARTLE, *Introduction to Shipping Law*, London 1958 p 127.

[16] LAWSON, *The Rational Strength of English Law*, The Hamlyn Lectures 3rd Series, London 1951 p 50.

[17] *E. g.* HÉMARD, 2 *Précis de droit civil français* 2d 1932 no 1833; USSING, *Aftaler* 2d 435; AUGDAHL, *Retskilder* 5.

[18] MITCHELL, *An Essay on the Early Law Merchant* 1904 p 108, says that by the middle of the 13th century notarial contracts were common in Italy, and that by the middle of that century Genoa had 200 notaries, Pisa at its close nearly 300 and Milan, in the following century, well over 500. Since one single notary could draft nearly 60 commercial documents in a day, uniformity of language must have developed and probably did much to fix and generalize the mercantile customs. See further BEWES, *The Romance of the Law Merchant*, London 1923 p 30—31.

[19] The fact that the standardized, formulary contract itself performs the function of the contract type has long been recognized in French legal scholarship, which

Implied terms arranged into a contract type, however, are not applied only by way of inductive construction. The inductive terms, *sit venia verbo,* arise in the wake of new contract phenomenon. But terms to be implied are sometimes taken from legal structures which existed long before the appearance of such new phenomena. The materials supplied by such older structures are apparently quite distinct from the inductive materials and they can easily be treated separately. I have chosen to treat them separately in order to contrast the two kinds of implied terms and show how they combat each other, because it offers a perspective over what is taking place in commerce. The process of deriving terms to be implied from the older legal structures of contract law will be referred to as *deductive construction* because it advances from the general to the particular. Deductive construction of implied terms, which is one of the characteristics of Continental legal thinking, relies on general notions from which to deduce terms and rules. As a result of historical accident, the Continental law once received and further developed a legal system which contained the gist of such general notions relative to the various contract types. The matter merits a short review.

Classical Roman law knew only a fixed series of typical contracts and the parties were prohibited from making wholly new types.[20] It was not until late that they could even vary the terms of these contract types by express agreements.[21] The Roman law, as received by the mediaeval lawyers, contained four consensual contract types and in the course of the analysis of the Roman books by glossators and postglossators these four received well-defined features.[22] Although, in due time, the elements common

has pleaded for more than 50 years that "contrats d'adhésion" should be subject to other rules than the contract type regulations. So far, however, it appears that the French judicature has refused to distinguish between contracts of adhesion and other contracts when administering the contract type regulations; see AUBRY & RAU, 4 *Cours de droit civil français d'après la méthode de Zachariae* 6th 419 § 341 and notes 8 bis and 8 ter. — See also *infra* page 161.

[20] SCHULZ, *Classical Roman Law,* Oxford 1951 p 471 no 803.

[21] BUCKLAND & MCNAIR, *Roman Law and Common Law* 2d 269; SOHM—MITTEIS—WENGER, *Institutionen* 17th Berlin 1949 p 229—237 § 43; SCHULZ, *Classical Roman Law* 568—569 no 974.

[22] The typification of the Roman contract law depended upon the categorization of actions. The latter fell into decay towards the time of the lower Empire. However, the contract types survived the breakdown of those original fundamentals. "Als materiellrechtliches Substitut erstand dafür in der Lehre des Ostens die neue Idee der natura contractus, die, dem westlichen Vulgarrecht ebenso unbekannt wie der

to all contracts were analysed and stated as a foundation of the notion of the abstract contract, and eventually, under the influence of the Canonists and later the school of natural law, the idea developed that mere assent sufficed to create an enforceable contract — thereby suppressing the self-supporting quality of the contract type — yet the contract type and particularly the four Roman consensual contracts remained as basic notions of those legal systems built upon the fundamentals of Roman law.[22a]

The adoption of the great systematic codes on the European Continent resulted in particular emphasis being placed on the contract types. Common to the great codes was that each contract type was alloted a separate chapter — or an equivalent thereto — in the code and appeared as a distinct structure of implied terms. Transactions were to be classified as belonging to one or the other contract type and the very subsumption by the court, in the absence of agreement to the contrary in the contract itself, imported into the contract all the rules gathered around that contract type. The terms thus implied were the result of a deductive construction.

All the codes relied upon the contract type notions developed by the Roman law. The Code Civil, it is true, as a matter of principle only proclaimed the broadest principles in relation to the contract types. However, it was expressly stated in the preparatory works that the principles so enunciated were only "des règles élémentaires d'équité dont toutes les ramifications se trouvent dans les lois romaines. C'est là . . . que doivent s'instruire ceux qui . . . seront chargés de la défense ou de l'exécution des lois consignées dans le Code français" . . .[23] The German BGB adopted a much more detailed regulation of the contract types but nevertheless the main features of the regulation were taken from the Roman law as developed in *usus modernum pandectarum*.[24]

klassischen Vorstellung, dazu bestimmt war, dem einzelnen Vertragstyp Festigkeit und Begrenzung zu geben, aber doch, so elastisch aufgefasst wurde, dass sie sich dem jeweiligen konkreten Parteiwillen anzupassen vermochte." LEVY, *Weströmishes Vulgarrecht — Obligationenrecht*, Weimar 1956 p 32—33 and literature there cited. Compare in TERRÉ *Influence de la volonté individuelle sur les qualifications*, thèse Paris 1957 p 559 no 693.

[23] See exposé de motifs par M. Bigot-Préameneu, in FENET, 13 *Recueil complet des travaux préparatoires du Code civil*, 1827—1828, p 217 sq.

[24] CHARMATZ, *Zur Geschichte und Konstruktion der Vertragstypen im Schuldrecht*, 1937 p 223 sq.

The reasons for the survival of these contract types and their continued importance in Continental legal thinking involve a blend of historical, doctrinal, and practical considerations. Firstly, the doctrine of "cause" required that no obligation was to be recognized as effective unless coupled with a "cause"; and, since each contract type had a separate cause, this system obviously involved much consideration of the contract types.[25] Secondly, the theory of legal positivism as developed during the 19th century required the legal system to be complete. Already under the Code Civil no court could refuse to render a decision on the ground of the "obscurité de la loi".[26] The only comprehensive contract rules which existed were those structures of implied terms gathered around the Roman contract types. They generally would contain terms for the extraordinary contingency not expressly provided for in the contract due to the parties' lack of foresight. To the extent that a sufficiently comprehensive regulation could not be achieved by inductive construction, it could only be achieved by the subsumption of every contract under one of the contract types. The impact of this was clearly felt under the provisions of the Code Civil distinguishing between nominate and innominate contracts. Innominate contracts, broadly speaking, were such as did not fit into the patterns of the Roman contract types. They were, said the Code in article 1107, subject only to the general principles applicable to all contracts and thus were not to benefit from deductive construction. It was, indeed, not until 1873 that legal scholarship even proposed that the terms of the nominate contracts might be applied by analogy.[27]

[25] Referring to the Roman law difficulty of establishing a binding contract except within the framework of one of the four consensual contract types, Von MEHREN submits, 1955 15 La LRev 702 sq, "The Church supported strongly the proposition that a simple, formless promise should be binding . . . In the course of the development of the canonists' thinking on these matters, the notion of *causa*, which had played such a limited role in Roman law, came to be used as a new *vestimentum* ("garment"), thus maintaining continuity with Romanist teaching by fitting the canonist doctrine of *pacta sunt servanda* into the framework of the *pacta vestita* ("clothed pact") and providing a substitute for formal requirements by insuring, through the requirement of a *causa*, that a serious intention to assume a legal obligation had existed." — The four consensual contracts were considered *pacta vestita*. The passage also appears, with slight modifications, in *The Code Napoleon and The Common Law World*, edited by B Schwartz, New York 1956, Chapter 7 at p 122.

[26] Art 4. Cf DAVID & DE VRIES, *The French Legal System*, New York 1958 p 89.

[27] MARCADÉ, 4 *Explication théorique et pratique du Code Napoléon* 7th 1873 p 357 no 391: "mais ceci n'empêcherait pas d'appliquer à un contrat innomé tout ou partie des règles du contrat nommé avec lequel il se trouverait avoir plus d'analogie." Further in CHARMATZ *op cit* 266—270. MAZEAUD, MAZEAUD & MAZEAUD, 2 *Leçons* 1956 p 87 no 112.

The attraction of the deductive method thus became a function of the practical shortcomings of the inductive method. These shortcomings were apparent. Contractual terms which could be identified with certainty, although not expressly agreed, were to be found only in the most common types of transaction. Since the method of inductive construction depended on evidence of the usual practice, it was of slight avail in trades where no stable practice existed. Thus, in trades where there was rapid change, inductive construction could add little to the express terms of the contract. Of course, time might render the inductive method more effective. New transactions might mature, conforming to certain patterns which might permit the addition of terms to the contract by way of inductive construction. Where the transactions had not matured so that terms could be implied in this way, however, the courts were not able to go beyond the express terms of the contract. They could not help the parties, at least in this way, to write their contract, *i.e. a posteriori* provide a comprehensive regulation of the relationship between the parties. The effect of inductive construction in a society subject to rapid change thus would be that the courts could only haphazardly help the parties to write their contract, until the delay in the inductive rule-making was overcome. As a result, deductive construction was often the better method — notwithstanding that it also involved an apparent direction of the parties as to their conduct under the contract — until inductive construction had matured or was accelerated by legislation.[28]

The situation was not much different under the German BGB. The fact, however, that the contract types were drawn in much greater detail increased the importance of the subsumption process. As a result, the attention of legal scholarship was focused on the problem with an intensity finding no parallel in France.[29] With particular attention paid to the combination contracts,[30] the solutions advanced ranged from the "Absorptions-Theorie" which

[28] Cf JOSSERAND, *Les Transports 2d* 805 no 778 quinquies.

[29] The irst to draw attention to the problem was REGELSBERGER, *Vertrag mit zusammengesetztem Inhalt oder Mehrheit von Verträgen*, 1904 48 JhJ 453 sq. The most important works were HOENIGER, *Die gemischten Verträge in ihren Grundformen*, 1910; ENNECCERUS, 1:2 *Lehrbuch des Schuldrechts* 4th & 5th 1910 p 266 sq; and SCHREIBER, *Gemischte Verträge im Reichsschuldrecht*, 1912 60 JhJ 106—228.

[30] The combination contract is for example a contract with a housekeeper living in the house. This contract may superficially seem equally well subsumed under a work contract and a housing contract.

demanded that a combination contract always be subsumed under only one of the contract types involved in the combination, to the principles of the "Interessen-Jurisprudenz" which condemned the rigidity of the contract type structures and would permit the judge to find the regulation as he saw fit by "shopping" around the contract types.[31]

During the first half of the 20th century, however, there was a general decline in the appreciation of legal concepts. This trend was particularly evidenced by such phenomena as Geny's free law school, Heck's jurisprudence of interests and Hägerström's and Lundstedt's school of Scandinavian realism. It might have been natural had this tendency dissolved the contract types as well. To permit the judge to supplement the contract terms at will is of course to deprive the notion of contract types of their function. However, this tendency was neutralized by the increased use of the system of contract types as a basis for the directing functions of the contract law. The established system of implied terms came to be interspersed with mandatory rules. Inasmuch as those rules attached to the contract types, the latter received a hard core which would not be eroded away as long as evasions of the mandatory law were not permitted. The natural tendency towards consistency then helped to keep the rest of the contract type intact. The mandatory rules were not only those which were laid down to remedy asserted abuses of the contracting procedures, *e.g.* against negligence clauses in contracts of adhesion. They also appeared in the form of fiscal and economic and social regulation erected on the basis of contract type notions.[32] The result has been that though there is tension in the edifice of contract types, it remains standing erect.[33]

[31] For a review see CHARMATZ *op cit* 294—336.

[32] See CHARMATZ *op cit* 350—355; RIPERT & BOULANGER, 2 *Traité de droit civil d'aprés le traité de Planiol*, Paris 1958 p 38 no 89.

[33] BETTI, *Der Typenzwang bei den römischen Rechtsgeschäften und die sogenannte Typenfreiheit des heutigen Rechts*, in 1 *Festschrift für Leopold Wenger*, München 1944 p 249-283; HÉBRAUD, *Rôle respectif de la volonté de des éléments objectifs dans les actes juridiques*, in 2 *Mélanges offerts à Jacques Maury*, Paris 1960? p 419-476, at 435-442. — In more modern times, the view has sometimes been taken that the contract type is an entity existing for systematic reasons, that is to say, the focus of existing legal rules unconnected with each other for any reason other than the establishment of the contract type. Whatever the legal-philosophical merits of this theory, it clearly does not sufficiently reflect the complicated historical development of which, it must be remembered, we still are a part. Indeed, in a recent work it was said in reference to the general and the special contract law of Code Civil: "L'érosion des principes du Code civil s'est fait contrat par contrat et de telle sorte que les règles des contrats spéciaux, qui ont préexisté historiquement à la théorie générale,

Consequently, it may be observed that whenever rules to supplement the terms of a contract are needed, the Continental lawyer is inclined to construe the particular contract as belonging to one or other of the contract types and accept as implied terms the rules gathered around that type. — In the words of Lawson "it seems that modern civilians still tend to think primarily in terms of the particular contracts and are apt to be a little unhappy if they encounter an agreement which does not naturally fall within any one of them."[34]

In the wake of this influence of contract types it becomes natural to speak of three distinct areas of law. They may be referred to as general law, special law and clausal law. By *general law* I mean the general principles and notions applicable to all contracts unless specifically and validly excluded by the terms of the contract or by special law. Ever since the later school of natural law, it has been common to gather these general rules separately from the contract type regulations. By *special law* I mean the specific regulation which has been created for particular contracts, whether of a civil or a commercial kind or appearing only in particular fields of the law such as the maritime law. To this special law the general law is merely supplemental. The special law prevails over the general law but may be excluded by clausal law. By *clausal law,* I mean those rules which are created by the contract and derive their force from the validity of the contract, and to which both general and special law are supplemental, each in its pertinent area of application, except in so far as *ius cogens* is involved.

### § 3. *Contract drafting and the legal construction of contracts*

Anticipation of construction — effect of deductive construction — discarding the prearranged typical regulation — reapprehension of economizing function — standardized forms, advance results of inductive construction — legislative intervention to precipitate terms of inductive construction to arrive at stability — negative results — necessity that jurisdiction and operations have identical scope

As the fundamentals of deductive construction are always kept in mind by Continental lawyers while drafting contracts, their

reprennent une importance grandissante au détriment de cette dernière." FOYER, *Les Obligations*, in DAVID, 2 *Le droit français, principes et tendances du droit français*, Paris 1960 p 156.

[34] LAWSON, *The Rational Strength* 49.

approach to such drafting is likely to be of a special nature. Anticipation of the court's construction process will necessitate adding certain clauses to the contract in order to avoid the consequences of an unsuitable construction. But these additions may also lead to results other than those intended. Thus, the adoption of a clause permitting sub-contracting by the charterer may be held to show that the charterer was intended to be in control of, and to direct, the operation. If the court assumes this to be the intention of the parties the contract may be included under another category of contracts involving a set of implied terms other than the set conceived of by the contract draftsmen.[35]

The fact that the contract drafters currently discard the typical regulation provided by law, however, should indicate that a reappraisal of the supposed economizing function of the system of contract types is called for. There are two aspects to the relationship between contract drafting and the economizing function of a contract law distributed throughout various contract types. Firstly, where the system of contract types provides a set of basic rules to work with, the drafters select one contract type and modify its regulation to suit their own particular needs. When a contract type is so used and modified regularly, its economizing function is difficult to estimate. It is noticeable that typically the actual contract is very remote from the contract type. Secondly, as already indicated,[36] the economizing result may be achieved in yet another way. The use of standardized contract forms in itself strives to this end. And, when standardized documents form patterns showing themselves to be variants of a few main types, the legislature may step in and turn the main types — with exclusions, revisions, and reforms — into *structures* of implied conditions, making it unnecessary to express the implied conditions in the contract, provided that the parties have used the

[35] It must be noted that the contract drafting problems now indicated do not necessarily arise only in Continental law systems. They arise whenever a system develops general notions of particular contracts. For instance, the American irregular airlines tried every device to circumvent CAB control. As a means of mastering the developments in the irregular industry the Board has sought to develop general notions of charter contracts and lease contracts. As a result, it has become imperative when drafting inter-carrier contracts always to anticipate the Board reactions. In order to stay within the one or another of the contract categories (in relation to which the CAB pursues very different policies) certain words must be omitted and certain provisions avoided while others must be added, all the time with an eye on the Board doctrines in the matter.

[36] *Supra* page 133.

name of the structure. Such a contract type, as is easily seen, is an advanced result of inductive construction. — The results achieved by way of such legislative intervention, however, have thus far not been altogether encouraging. In some fields of carriage, the intervention seems to have been a failure if one considers the object to have been a reduction in the length of documents. Neither in maritime transportation nor in aviation has the legislation for contracts suppressed the abundance of contract clauses.[37] Perhaps one may conclude from these failures that it is a precondition for success that the geographical scope of application of the legislation must be coextensive with the total field of actual operations. Operations are seldom purely local. They most often affect areas not covered by the economizing statutes and conventions. As a precaution for litigation in such areas the documents must be drafted as if no legislation existed.[38]

## § 4. *Contracts sui generis*

Staying the effects of deductive construction — device to gather terms of inductive construction — the matured contract *sui generis* takes its place in deductive construction

The contract *sui generis* is the meeting point in the Continental legal system between deductive and inductive construction. By qualifying a new type of contract as being *sui generis* the Continental lawyer primarily indicates that it no longer will derive its supplementary terms from any of the pre-existing contract types by way of deductive construction.[39] From the point of view of inductive construction, on the other hand, the contract *sui generis*

[37] The time charter chapter of the Scandinavian Maritime Codes has not influenced drafting practices. As a practical matter, a charterparty is always executed on either the Baltime or the Produce form: GRAM, *Fraktavtaler og deres tolkning* 2d 169—170. IATA's pre-Warsaw General Transport Conditions as to passengers and baggage contained 16 sections. Their post-Warsaw equivalents (the Antwerp Conditions) contained 24 articles.

[38] The European railway ticket and waybill may be illustrative. Both are very simple documents, and both are governed by the European railway treaties which spell out the terms on which passengers and goods are carried. The Conventional area is almost completely coextensive with that of European international railway operations. However, the railway conditions of carriage appear in tariffs or regulatory ordinances applicable to all such contracts as a matter of law and those tariffs and ordinances are considered doctrinally to contain express contract terms.

[39] KAISER, *Der Personenbeförderungsvertrag* 47, submits that "mit dem Vorliegen eines contractus sui generis es unmöglich ist, innerhalb des Geltungsbereichs und des sachlichen Anwendungsgebiets des WA. bei Lücken der Regelung auf den Werkvertrag zurückzugreifen, soweit nicht das WA. ausdrücklich auf das Landesrecht verweist. Lücken aus dem WA. wären aus diesem selbst heraus zu schliessen."

may be viewed as the terminal point in the development. It may indicate that the transaction's background of usage has achieved sufficient stability to be implied in the contract as a matter of law. It is not necessarily so, however. A contract *sui generis* can well be recognized although there exists almost nothing in the way of contract terms to be so implied. The prime function of the notion of the contract *sui generis* therefore is to avoid deductive construction.[40]

Once accepted, however, the new structure of implied terms starts attracting neighbouring contracts. Thus it was found in French law that when the "contrat de transport" was accepted as a "contrat autonome" not only was the construction by use of the classical contract types avoided, but also the terms of the *contrat de transport* began to be applied to contracts such as those of moving furniture and towage.[41]

The importance of the notion of the contract *sui generis,* of course, depends on the practice of categorizing sharply between the various contract types. To desert that doctrinal approach also means to deprive the notion of the contract *sui generis* of any precise meaning.

## SUB-CHAPTER 2

## THE SIMPLE SITUATION

### SECTION 1. THE CONTRACT TYPES

### § 1. *Locatio conductio*

Roman origin — three variants — survival into modern times — unity

A central position in the Roman system of contract types was taken by the *locatio conductio.* The twin name relates to the

[40] Cf TERRÉ, *L'influence de la volonté individuelle sur les qualifications,* thèse Paris 1957 p 448 no 559: "L'avènement de qualifications innomées signifie un dépassement des qualifications préétablies. Devant l'insuffisance de celles-ci, les volontés individuelles imaginent de nouveaux cadres, seuls capables de promovoir les buts poursuivis." Compared with p 450 no 562: "L'utilité première de l'existence de contrats innomés consiste ici à dispenser les parties d'écarter, serait-ce implicitement, une règle supplétive donnée, dès lorsque le nouveau cadre ne saurait être logiquement soumis à celle-ci."

[41] See BRUN, *L'autonomie du contrat de transport,* 1935 3 Annales du droit et des sciences sociales 62 sq.

fact that the notion of the contract was a superstructure based on the actions, *i.e. actio locati* and *actio conducti.* There existed three variants of this type: *locatio conductio rei, locatio conductio operarum* and *locatio conductio operis.*[42]

Like the Roman law, the *locatio conductio* survived up through modern times and its unity was retained. Pufendorf[43] describes it as the contract "whereby the use of an article or labour is furnished another for a price." The Code Civil of 1804 uses it similarly "Le louage" — says Mégret[44] — "est une prestation de services, comportant un certain caractère de durée et effectuée contre une rémunération déterminée." In the same way the term "Miete" was used in Germany[45] and "lega" in Sweden. As late as the 1870's,

[42] The *locatio rei* would seem to have been the oldest form. It covered the hiring of chattels and possibly of lodgings. The *locatio operarum* was thereupon generated as parallel to the hiring of a slave. But a freeman could not hire himself out as a slave; it was inadmissible that he let anything but his services. The third variety, the *locatio operis'* was possibly joined to the *locatio conductio* by historical accident. KARLOWA suggests in 2: 1 *Römische Rechtsgeschichte — Privatrecht*, 1901, at p 644 sq that the contract emerged in the early days of the Republic when the prior method of calling upon the citizens personally to perform labour for the government had become unpopular, and as a result contractors were needed, willing to undertake for reward the erection of public buildings and the like works which had previously been performed by the citizens themselves. Once adopted in the public sector of life the habit of using contractors spread into the private sector replacing the hiring of the labour of freemen. The increasing supply of slaves accelerated the development. As the contractor's contract thus replaced the *locatio operarum* it was inserted into the same category of contracts under the name of *locatio operis.* Whether the difference between *locatio operis* and *locatio operarum* was ever deeply felt, however, may be doubted. But see BECK, *Zur Entstehung des römischen Mietvertrages, Festschrift Hans Lewald*, Basel 1953 p 3—13. Beck stresses that the *locatio conductio operarum* meant "eine statusähnliche Unterwerfung des Diensttuenden . . . unter die Disziplin seines Dienstherren" (at p 4) and intimates that the free craftsmen chose the *locatio conductio operis* in order to avoid this very feature. See also literature cited by Beck. However, in a remarkable paper in 1936 (*Des divisions du louage en droit romain*, 1936 15 Revue historique du droit français et étranger 4th series 419—475), OLIVIER-MARTIN attempts to strip the distinction between *locatio operis* and *operarum* of all Roman ancestry and attributes the trichotomy (*rei, operis, operarum*) to the teachings of Johannis Voet: "En effet, c'est dans le commentaire sur les Pandectes de Jean Voet que se trouve exposée pour la première fois la théorie des trois louages" (at 467). — Whether or not the decisions of the Digests are consistent on the point, it is still apparent that the Romans used all three designations and that the difference in terminology has generally been thought to represent a difference in conceptions; see *e. g.* Pothier's remarks on the affreightment, *infra* page 154 and note 91, which are not explained by Olivier-Martin, (cf p 466).

[43] *De Jure Naturae et Gentium*, Amsterdam 1688 p 503.

[44] *Elémenls de droit civil*, Paris 1948 p 165. The Code Civil here, as in many other respects, built upon the writings of Domat. Domat had submitted the following definition: "Le louage en général . . . est un contrat par lequel l'un donne à l'autre la jouissance ou l'usage d'une chose, ou de son travail pendant quelque temps, pour un certain prix." Livre 1, titre IV, sec 1-1.

[45] This usage, however, appears to be a fairly late development. In 1811, ZACHARIÄ, 2 *Handbuch des französischen Civilrechts* 2d Heidelberg 318 § 294 note 1, says;

analogous application of the rules relating to the hiring of chattels was recommended by a German writer where contracts of employment were concerned.[46]

## § 2. *Chattel lease*

Splitting of the *locatio conductio* — characteristics of chattel lease — non-performance of lessor's duty — destruction of chattel — duty to provide a non-defective chattel — damage incident to use after delivery

The industrial revolution, however, introduced a fundamental difference between contracts relating to human services and those relating to chattels and this distinction won favour with the drafters of the 1896 German BGB. In this code "Miete" was restricted to signify only the lease of chattels or land. The terms "Dienstmiete" and "Werkmiete" used in *Gemeines Recht* were replaced by "Dienstvertrag" and "Werkvertrag".[47]

In the course of this development, the *locatio rei* or chattel lease (the aspects relating to land are here deliberately left out) acquired autonomy as a contract type throughout the Civil Law area.[48] The features of this contract type were surprisingly uniform throughout the countries. The chattel lease may be summarized as a contract having as its object the transfer of the use of a chattel in consideration for a remuneration.[49] The exchange of two performances being the basis of the chattel lease,

"Die Deutsche Sprache besitzt kein Wort, das den Gattungsbegriff, locatio conductio, contrat de louage, bezeichnete. Ich habe gewagt das Wort Gedinge in diesem Sinne zu gebrauchen."

[46] DANKWARDT, *Die locatio conductio operis*, 1874 13 JhJ 314—315.

[47] SOHM—MITTEIS—WENGER 17th 433—434 § 71. This change of Continental views accounts for the opposition there may be between "hire" in Anglosaxon common law and hire in Continental law; see TIBERG, *The Law of Demurrage* 46. I doubt that before the turn of the century any difference could be found, and in view of the general Anglosaxon approach to contract types I doubt whether it had ever any importance, see *infra*.

[48] As to the meaning of contract type autonomy in technical rules, see *supra* page 310.

[49] Code Civil art 1709. It is noteworthy, however, that the particular rules of the Code Civil in the matter only relate to the lease of land, leaving it to the courts to pronounce whether they also should apply to the lease of a chattel; ZACHARIÄ, *op cit* 320 § 295 note, observes this feature and adds: "jedoch versteht es sich von selbst, dass die Vorschriften die der C. N. über die Hausmiethen und Pachtungen aufstellt, analogisch auch auf andere Fälle der locatio conductio rerum angewendet werden können." — BGB § 535. — Sweden: TENGWALL, *Tvistemålslagfarenheten utur Sveriges Rikes lag och stadgar utdragen och författad*, Lund 1794 p 169: "Denna *locatio rerum* är en Förening i kraft hwaraf, ägeren upplåter En annan nyttjandet af dess ägendom, för en wiss betingad afgift i pengar, wahror eller emot andre wilkor, på utsat tid, eller til wist ändemål." BJÖRLING & MALMSTRÖM 15th 1958 p 130: "upplåtelse av rätt att begagna en sak utan att ägaren avhänder sig densamma fullständigt" & "mot ersättning".

non-performance — wholly or partly — by the lessor will suspend the lessee's duty to pay rent for the period of non-performance.[50] The destruction of the chattel will dissolve the contract.[51] The lessor's duty is to provide for the use of the lessee a non-defective chattel and non-performance of this duty as a rule will involve damages irrespective of fault.[52] Since the lessor's duty does not extend further than delivery and maintenance of the chattel, he assumes no liability for damage incident to the use of the chattel after delivery. Such liability falls on the lessee unless caused by some inherent vice of the chattel.

## § 3. *Locatio operis*

Roman law — origin in French entreprise — *stipulatio operis* and *locatio operis* — *Werkvertrag* — Scandinavian parallels

The notion of the *locatio operis* or the contract for work[53] was fairly alien to the early European codifications notwithstanding its Roman tradition. In the course of the 19th century, however, French legal scholarship proposed a basic distinction between the lease where the remuneration varied with the time and contracts under which the remuneration was a lump sum, fixed "à forfait".[54] The latter contracts were termed "entreprise". The *entre-*

[50] Dig 19.2.9.4. PUFENDORF 504—505. Code Civil art 1722. BGB § 537. Cf BUCKLAND, 1932—33 46 Harv LRev 1285.

[51] Code Civil art 1722. The fact that the property could not be used or enjoyed for the purpose of the contract has been held to amount to destruction, *Sté du bouillon Kub v Gronnier*, Cass Civ 22 Nov 1922, 1925 Dalloz Périodique 1 p 213; *Veuve Thibault v Lumier*, Ch civ, sect soc 13 Feb 1958, 1958 Dalloz Sommaire 66. As to BGB, it is a corollary to § 537 that total destruction means total discharge of the duty to pay hire. — Sweden: The modern rule appears to be that the contract and thus the lease period have come to an end, *Dierck v Limborg*, 1876 NJA 503. It appears that this rule applies even if the destruction is due to fault on the part of the lessor, and likewise in the event of constructive loss. Some of the medieaval Codes porvided for payment of the full lease price in the case of destruction through the fault of the lessee but it is doubted whether this rule would prevail today, HASSELROT, 8 *Juridiska Skrifter — Ett och annat om saklega* 117.

[52] Code Civil art 1720. BGB § 537 as construed in 52 RGZ 172, 81 RGZ 200, 1921 JW 334. FRITZ, *Schlechtleistung im Besonderen Teil des Schuldrechts*, Freiburg diss 1931 p 70; KAISER, *Die Sachmängelhaftung und ihr Verhältnis zur allgemeinen Verschuldenshaftung bei Sachkauf, Miete und Werkvertrag*, Erlangen diss 1933 p 37. *Reichsgerichtsräte Kommentar zum BGB* § 537 Anm 1.

[53] The term "contract for work" may mean little to Anglosaxon readers. The reasons therefore will be explained *infra*. This term however, is the one used in COHN, *Manual of German Law*, to translate the German term "Werkvertrag".

[54] This view of the development has been forcefully argued by PLANIOL, see 1904 30 Revue critique de législation et de jurisprudence 473, and 2 PLANIOL 8th 613 note 2. Also COSTES, *Essai sur la nature juridique du contrat d'entreprise*, thèse Toulouse 1913 p 18, 145, 169—171.

*prise,* however, was not an entirely new creation, it was one of the creations of the Code Civil;[55] although its statutory regulation was most incomplete. The gaps were left to be filled by the courts and by legal scholarship. The *Gemeines Recht* of Germany for a long time did nothing more than reproduce the Roman texts on *locatio operis.* The idea was toyed with of splitting the contract in two: one contract of employment under which the workman's pay was varied according to the results *(locatio operis),* and another type, close to the French *entreprise,* characterized by a lump sum to be paid for the result and nothing else *(stipulatio operis).*[56] In the BGB, however, the contract was constituted as the "Werkvertrag" the governing viewpoint of which was that the performance *(in natura)* to be rendered under the contract was the *result.*[57] The nature of this work result, on the other hand, was allowed to vary and could mean both "der unmittelbar durch die Tätigkeit herzustellende Erfolg" and "ein damit verknüpfter weiterer Erfolg".[58] Somewhat parallel to the German development of the *Werkvertrag,* Scandinavian law arrived at recognition of the contract for work as a particular contract type.[59]

[55] In the Code Civil, the *contrat d'entreprise* was merely a denomination used in connection with some of the subdivisions of the *contrat de louage d'ouvrage et d'industrie, i. e.* "les entrepreneurs de voitures publiques" in art 1785, and the "entrepreneur" mentioned in relation to "l'édifice construit à prix fait" in art 1792.

[56] DANKWARDT, 1874 13 JhJ 305—308.

[57] OLIVIER-MARTIN *op cit* 443—445 submits that this definition of the *locatio operis* goes back to WINDSCHEID's *Lehrbuch des Pandektenrechts.* In the 2d volume, 5th edition, of that work, Frankfurt am Main 1882 p 449—500 § 399, it is stated: "Ein besonderer Fall der Dienstmiethe ist der, wo der Vertrag nicht sowohl auf die Dienste als solche, als vielmehr auf das durch dieselber herzustellende Arbeitsresultat gerichtet ist. Diesen besonderen Fall bezeichnet der Ausdruck Werkverdingung, oder auch Verdingung schlechthin." — It is noteworthy that the French distinction between "obligation de moyens" and "obligation de résultat" was developed at about the same time as the BGB consecrated these characteristics of the *Werkvertrag.*

[58] ENNECCERUS-LEHMANN, *Recht der Schuldverhältnisse - Ein Lehrbuch,* in ENNECCERUS-KIPP-WOLFF, 2 *Lehrbuch des Bürgerlichen Rechts* 15th 1958 p 642. § 150. The driver undertakes to carry the cab-passenger to the railway station, and he undertakes to carry him there in time to catch the train, respectively.

[59] Denmark: PEDERSEN, *Enterprise,* Copenhagen 1952 p 34—42 and literature there indicated. Pedersen proposes a split, however, between the "entreprise" and the "Vaerksleje", *op cit* 38—45. Sweden: WIKANDER, *Arbetsbetingsavtalet* Uppsala 1913. A new systemization was proposed by RODHE in 1951, see 1951 SvJT 610.

## § 4. *Contract of carriage*

Roman law — mediaeval suspension of the system of communications — restoration of regular transportation services — Napoleonic times practices — contract of carriage assimilated to other contract types — improvement of mail services — position of consignee — autonomy of French "contrat de transport" — definition — *Frachtvertrag* in ADHGB — definition — no autonomy — thirdparty contract — Swedish contract of carriage — German-Roman law pattern — no autonomy

Under Roman law the *contract of carriage* was recognized as something apart from, although affiliated with, the *locatio operis.* In particular, special rules attached to the carriage by sea because of the consignor's rights under the *actio de recepto.*[60] The downfall of the Roman empire, however, terminated the system of communications used by the Romans and this system was not replaced for a very long time.[61] As a result, there was a decline in the importance of the contract of carriage. Indeed, the general state of affairs in Europe permitted no independent system for the exchange of merchandise and passengers; conveyances were generally executed by the owners of the goods and persons wanting to move from one place to another had to organize their transportation themslves. The idea of a commercial contract of carriage could not be grasped until the regular transportation services were restored.

Public mail services first existed in the far-flung Austrian Empire about 1500 and were introduced in France during the 17th century.[62] It was not until after the Napoleonic legislation, however, that this system sufficiently improved in safety and regularity to permit the consignee to be reached in two ways: by the consignment itself, and by the mail. The Napoleonic legislation was made to suit a commercial practice[63] whereby the consignor sent his letter with the carrier to the consignee telling him

[60] Dig 4.9.1. *princ.* See Francesco DE ROBERTIS, *Receptum nautarum*, 1952 12 Annali della Facolta di Giurisprudenza della Universita di Bari 165 sq. As to Antique shipping generally, see DAUVILLIER, *Le contrat d'affrètement dans le Droit de l'Antiquité*, in 2 *Mélanges offerts à Jacques Maury*, Paris (1960?) p 97-110.

[61] See particularly PIRENNE, *Economic and Social History of Mediaeval Europe*, translation Clegg, 1937.

[62] FORSSELL, 1 *Svenska postverkets historia* 3, 8—9.

[63] Concerning the conditions of land transportation in France under *l'ancien régime*, see generally Paul DAVENAS, *Les Messageries Royales*, thèse Paris (droit) 1937 (Les Presses Modernes); and Suzanne BUDELOT, *Messageries Universitaires et les Messageries Royales*, thèse Paris 1934 (Editions Domat-Montchrestien).

about the consignment and asking him to pay the freight.[64] The consignee could take no action until the carrier chose to present him with the letter. The contract of carriage at this time was assimilated into one or another of the classic types.[65] The Code Civil treats it in a subdivision of a chapter devoted to the "louage d'ouvrage et d'industrie", the Code de Commerce joins it to the *mandate*. As the mail services improved sufficiently to permit letters advising about the consignment to arrive before the consignment itself, the consignee developed into a party actively interested in the contract for transportation. This development, perhaps even more than the specialization of transportation technique, worked towards the separation of the contract of carriage from the contract for work. By the time a few decades of the 20th century had passed, the autonomy of the French "contrat de transport" was a settled matter. Rodière felt entitled to conclude: "La question ne se discute plus."[66] As defined by Rodière, the "contrat de transport", in relation to cargo, is the contract by which a commercial carrier undertakes to move merchandise by an agreed method of transportation and within such a time as is considered reasonable in relation to the given method of transportation, provided that the movement of the merchandise is the principal object of the contract.[67]

In the absence of any pan-German legislative force equal to that of France, German law rested generally on the bases provided by the Roman law. Legal opinion abided by the *locatio operis* and until the advent of the forceful Hohenzollern Reich the development had advanced little further than to disputes on the issue of the application of the *actio de recepto* to the railways although they neither kept horses, nor inns, nor traversed the sea.[68] But the commercial and technical development parallelled that in France.

[64] Cf DAVENAS *op cit* 59—60, 92. Cargo moved by the so-called "Roulage". The regimentation of this traffic, as laid down in *l'arrêt* du Conseil d'Etat of 21 Dec 1778, contained *i. a.* the following provision: "Le roi . . . ordonne aux rouliers et voituriers, de conduire directement aux lieux de leur destination les marchandises dont ils seront chargés . . . conformément aux lettres de voiture dont ils seront porteurs; . . ."

[65] 2 RODIÈRE 16 no 348.

[66] 2 RODIÈRE 17 no 348 C.

[67] 2 RODIÈRE 15—16 no 347.

[68] VON HOLZSCHUHER, 3 *Theorie und Casuistik des gemeinen Civilrechts* 2d Leipzig 1858 p 825, discusses whether "die strengen römischen Rechtsvorschriften auch auf öffentliche Post- und Boten-Anstalten, auf öffentliche Niederlagen, endlich auch auf blosse Fuhrleute andwendbar [sind]" and concludes, at 828, that: "Bei

The first pan-German commercial code, however, the ADHGB of 1861, which was developed when the new conditions prevailed,[69] provided rules for all three parties connected by the contract: the "Absender", the "Frachtführer" and the "Empfänger". This code's provisions were carried over into the imperial federal HGB without much material change. This German contract of carriage — the "Frachtvertrag" — in accordance with Continental tradition, was left to be defined by legal scholarship. Lehmann defined it as an independent contract under which a merchant in his capacity as merchant agreed to perform the carriage on land of goods entrusted to his custody.[70] Yet the contract never received general recognition as an autonomous contract type. In the code it was construed as a variety of the *Werkvertrag*[71] and therefore subject to the BGB regulation of this latter contract, as well as — in view of the independent rights conferred upon the consignee — to the BGB regulation of the third party contract.

The Swedish contract of carriage developed by scholarly efforts during the latter half of the 19th-century.[72] The 1734 Code did

gewöhnlichen Frachtfuhrleuten ist nicht einmal der Gerichtbrauch für die von Manchen behauptete Ausdehnung." See also MÜLLER, *Ueber die actio de recepto und deren analoge Ausdehnung auf die Postanstalten*, 2d Leipzig 1857 (Serig'sche Buchhandlung). GOLDSCHMIDT, *Das receptum nautarum, cauponum, stabularium*, 1860 3 ZfdgHR 331, (appendix in 1871 16 ZfdgHR 324), at 362, submits: "Was insbesondere den Post- und Eisenbahnverkehr anlangt, so gelten für diesen freilich in manchen Beziehungen strengere Normen als für den gewöhnlichen Landfrachtvertrag, allein nicht etwa wegen dessen Beurtheilung nach den Grundsätzen des receptum, sondern nur infolge eines für diese grosse Institute theils gewohnheitsrechtlich, theils durch autonomische Satzungen ausgebildeten Sonderrechts." See also same author, *Die Haftungspflicht der Eisenbahnverwaltungen im Güterverkehr*, 1861 4 ZfdgHR 569. BESCHORNER, *Das deutsche Eisenbahnrecht*, Erlangen 1858 p 263.

[69] HILLIG, *Das Frachtgeschäft der Eisenbahnen*, Leipzig 1864 p 30, submits: "Die Haftung des Frachtführers für Verlust oder Beschädigung des Frachtgutes ist im Art. 395 beinahe wörtlich nach 1.3 § 1. D. 4. 9. nautae, caup., stabularii etc. . . bestimmt. . . "

[70] *Lehrbuch des Handelsrechts*, Leipzig 1908 p 852.

[71] The framing of the *Werkvertrag* so that it would include the contract of carriage was a matter of some controversy because it meant that the *Werkvertrag* notion of the *gemeines Recht* and of the Saxon BGB would prevail over the Prussian *Allgemeines Landrecht* in which the *Werkvertrag* could only concern "materielle Produktionen". See 2 *Motive* 506 sq; CHARMATZ *op cit* 246.

[72] There were many reasons why people would not think in terms of a contract of carriage before this time. First, the carriage of passengers in the vast, unpopulated, well-wooded Swedish and Finnish country and archipelagoes was organized by the imposition of a public law onus on the peasantry which entitled the traveller to demand his carriage from appointed peasants domiciled along the highways and the navigable passage channels. Secondly, because of the enormous investments required and the small return permitted by the small amount of traffic that would

not give much guidance and the early 19th-century Civil Code drafts were most laconic as to the character of the contract of carriage.[73] As a result the development of a notion of a contract of carriage came to follow the pattern of the German-Roman law in accordance with the general trend in the Swedish law of obligations.[74] The first comprehensive Swedish treatment of the contract of carriage was published in 1886.[75] Like the German pattern the contract was subsumed under the contract for work[76] and this construction has come to prevail.[77]

## § 5. *Affreightment*

Three historical periods — cargo owners voyage with cargo — cargo owners stay ashore — advent of line shipping — the contract of affreightment and inductive construction — unity of contract — splitting of contract — classification at the tow of the standardization of contract documents — bills of lading — Government Form — time charters — voyage charters

For many centuries the only transportation industry which existed in Europe, was that of seagoing vessels. As a result, long before the problems of commercial carriage were even considered by lawyers in general practice many of their maritime solutions were found and practised. Moving goods at sea was called by a special term, the English variant of which was affreightment, the French variant "affrètement".[78] In the course of time the law of affreightment underwent great changes. Originally owners of cargo were invited to participate as associates in the voyage enter-

move, all attempts by private enterprise to organize a commercial transportation system by land failed whatever privileges bestowed upon them by the Crown. In 1772 the Post Director in Chief, Benzelstierna, reported that the establishment of a transportation service with carts could be accomplished only at the expense of the Crown. As a result the passenger-carrier relation always was considered under the aspect of public law. Carriage of goods, on the other hand, did exist as a local trade open to the peasants and subject to public law regulation only in relation to geographical limits. The first case dealing with a contract for the carriage of goods was reported in 1844, *Johansson v Persson*, 15 SJA 351. The idea of a contract of carriage on land therefore most certainly was imported from the Continental railway law.

[73] *Förslag till Allmän Civillag, — Motiver*, Stockholm 1826 p 193; *Förslag till Handelsbalk och Utsökningsbalk — Motiver*, Stockholm 1850 p 38.

[74] LUNDSTEDT, *Strikt ansvar, Om culpa-fiction*, Uppsala 1948 p 537 note 2.

[75] HAMMARSKJÖLD, *Fraktaftalet*.

[76] HAMMARSKJÖLD *op cit* 3, also in *Sjörättsliga anteckningar*, 1903 16 TfR 265.

[77] BJÖRLING, *Civilrätt*, 1st 150; SCHMIDT, *Föreläsningar i Sjörätt*, Lund 1944 p 46.

[78] The word seems to be derived from the German "Fracht", formerly "Freht". Hence, even the Germanic expressions "Befrachtung" (German) and "befraktning", "Befragtning" (Scandinavian) belong to the same family. The vocabulary is discussed at length by MAGNENAT, *Essai sur la nature juridique du contrat d'affrétement* thèse Lausanne 1948 p 19 sq.

prise.[79] The next important period was characterized by such owners hiring space for themselves and their cargo on board the vessel. By thus accompanying the goods the owners retained them in their custody during the voyage.[80] The agreement between the shipowner and the cargo owners, incorporated into a charter-party, assumed the features of a lease contract.[81] The law of this period was codified in the 1681 French Ordonnance de la Marine and the Scandinavian Maritime Codes of slightly earlier dates.[82] During the subsequent centuries, however, the cargo owners stayed ashore, asking the shipowner to assume the custody of the goods as well as their safe delivery at the port of destination. Furthermore, there developed the practice of using bills of lading representing the cargo. During the course of the 20th century, the expansion of line shipping helped to suppress the importance of the identity of the vessel. The law of the first part of this period was codified in the German ADHGB of 1861 and the Scandinavian contemporary maritime codes, all of which lean heavily on the German product. The third important period was marked by the increasing importance of time chartering, particularly as a means for a line shipping company short of tonnage to engage extra, fully equipped vessels for its services.

The recurrent codification of the body of rules making up the contract of affreightment, to form a statutory contract, — al-

[79] HASSELBERG, *Studier rörande Visby stadslag och dess källor*, Uppsala 1953 p 102—113. See also VON AMIRA, *Nordgermanisches Obligationenrecht—Altschwedisches*, Leipzig 1882 p 635, 650, *Westnordisches*, Leipzig 1895 pp 2, 788; PAPPENHEIM, *Zur Entwicklungsgeschichte des Seefrachtvertrages*, 1931 51 Savigny Zeitschrift Germ Abt 175—203, at 177—181.

[80] FLETCHER, *The Carrier's Liability* 43: "[T]he laws of Oleron contemplate that the merchants will accompany their merchandise on the voyage." Cf PAPPENHEIM, *op cit* 181: "Der Vertrag, kraft dessen der senyor de la nau die ihm von dem nicht mitreisenden Kaufmann übergebenen Güter zu befördern und darnach an einen bestimmten Empfänger abzuliefern hat, ist augenscheinlich ein Frachtvertrag im heutigen Sinne. Er hat sich . . . aus einem Reisevertrag entwickelt, welcher von dem seine Waren mit sich führenden Kaufmann geschlosssen wurde."

[81] There has been a trend to consider this construction of the affreightment as a Germanic contribution to the law. The proposition may look plausible since one of the few legal structures besides sale in early Germanic society was possibly one relating to the bailment of cattle; when needed, this structure may have been introduced in maritime carriage. Yet, doubt is thrown on the thesis by the decline of the lease which took place when it was put into the hands of the Germanic successors to the Roman Empire, see LEVY, *Weströmisches Vulgarrecht — Das Obligationenrecht*, Weimar 1956 p 251—258. Furthermore the modern trend in legal history appears to be to reject the authenticity of what hitherto were regarded as Germanic sources of law and consider them as off-shoots of the ever-more appreciated Canonic and Roman Law influences. It may be added that at the time when this construction emerged the lease was an all-inclusive concept.

[82] Sweden: 1667. Denmark: 1561.

though not untouched by powerful legislators' wishes to further particular ends and direct the parties — offers a good example of inductive construction.[83] For centuries the contract by charterparty was looked upon as uniform and single. No difference between time and voyage agreements was thought to be important.[84] Indeed, the importance of the weather hazards made it generally prudent to express the freight in a sum of money "for every month or week of the ship's employment".[85] When eventually it was thought necessary to split the contract of affreightment into several varieties, the resulting classification followed in the wake of the standardization of commercial documents. The bill of lading was separately classed. Also a particular type of document developed in the new kind of chartering trade which was introduced by the advent of line shipping and its temporary needs for additional freight capacity. The transaction for the use of such capacity appeared fairly parallel to the previous practice of the British government of using private ships for carrying commissions during naval expeditions. Indeed, this transaction came to be characterized by the use of a certain type of document patterned on those used by the British government when organizing their naval expeditions.[86] This type of document was

[83] It is noteworthy that the French as well as the Swedish 17th-century enactments were ordinances of an administrative character and not Acts of parliamentary bodies; the rules of the Law Merchant, however, were codified. As to the history of the drafting of the Ordonnance de la Marine 1681, see CHADELAT, *L'élaboration de l'Ordonnance de la Marine d'août 1681*, 1954 31 Revue historique de droit français et étranger 4th series 74—98, 228—253. As to the history of the Swedish Maritime Code, 1667, see PALMGREN, *Återfunna förarbeten till 1667 års sjölag*, 1960 SvJT 25—29 and literature there cited.

[84] The 1667 Swedish Maritime Code as well as the 1681 French Ordonnance contained provisions relating to the hiring of a vessel for a sailing season — 3 Cap. Sommarhyra — and for a month — art 275 Code de Commerce — respectively, but these provisions were in no way considered to express any new class of contracts by charterparty.

[85] ABBOTT, *A Treatise of the Law Relative to Merchant Ships and Seamen*, (4th American edition from 5th London edition) Boston 1829 p 165.

[86] The practice of using others' ships to work one's own enterprise, of course, by no means was limited to the British Government. MAGENS — 1 *An Essay on Insurances*, London 1755 p 55 § 52 — reports that the East India Company hired all ships they employed in their trade from private people and, at least partly, on uniform terms. Cf PRAUSNITZ, *The Standardization of Commercial Contracts in English and Continental Law*, London 1937 p 17. ABBOTT mentions that a ship could be let "so as to be employed in warfare ... under the entire management of the hirer", *op cit* 162, but it appears that such charters were not felt to be in another category than the normal ones. In *Fletcher v Braddick*, 5 Bes & Pull 182, there was a charter to the Navy Commissioners for half a year and the Navy put on board a commander in the Navy who had the command of the ship, but the owners were to provide a crew and pay and victual them. The ship was run down and the Navy sued the owners, see

called the *Government Form*,[87] and although it was not a uniform document, but rather one of many varieties; these varieties always contained certain characteristics in common. About the turn of the century, the custom of referring to this type of agreement as time charter became established. The term, voyage charters, was left to the contrasting negative category.[88] The Government Form enjoyed widespread popularity and in the course of time arrived at an even more dominating position over both European and North American chartering when its characteristic provisions were inserted in the Baltime and the New York Produce Exchange forms. As a result, the numerous standard voyage charter forms varying from trade to trade existed side by side with one single dominating form for time charters. Time chartering thereby came to be influenced by some of the clauses of the time charter type document which never appeared in voyage charterparties, such as the important *Employment Clause*.[89]

ABBOTT, *op cit* 23 sq note. A similar case was brought before Lord Ellenborough in *Master of Trinity House v Clark*, 1815, 4 M & S 288, 105 ER 845.

[87] Cf JANTZEN, *Tidsbefragtning*, 8—9. For sample, see CARVER 4th Appx B, cf JANSSEN, *Die Zeitcharter* 12 note 1. See also WÜSTENDÖRFER, *Studien zur modernen Entwicklung des Seefrachtvertrags*, 1905 p 145 sq.

[88] It may be noted that the "time charter" was not a term to be placed on the Index to Abbott's 1867 edition, but does appear in the Index to the 14th edition, London 1901, and furthermore in the Index to CARVER's *Carriage by Sea*, 2d edition, London 1891. Litigation on time charter forms is reported in 1877, *Omoa & Cleland Coal & Iron Co v Huntley*, 1876—77 2 CPD 464, 37 LT 184, 25 WR 675.

[89] JANSSEN 25; DUSENDSCHÖN, *Der sogenannte "Deuzeit"-Frachtvertrag als Chartermiete*, diss Hamburg 1926 p 5, Lia GUTMAN, *Le Time Charter*, thèse Paris 1935 p 16. — In the Government Form, reprinted at p 891—894 of CARVER, *Carriage by Sea* 4th 1905, the clause reads as follows: "The master (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangements; . . ." See also original Baltime of 1912 clause 9. Francharte clause 12 : "Le Capitaine (bien qu'engagé par les Armateurs) sera sous les ordres et la direction des Affréteurs pour ce qui concerne *l'emploi* du navire." Deuzeit clause 9: "Obwohl der Kapitän von der Reederei angestellt ist, hat er doch die Anordnungen des Befrachters für die Beschäftigung und Adressierung sowie sonstige ähnliche Anordnungen des Befrachters zu befolgen". As to the German translations of the original Employment Clause, see *infra* pages 159 sq. Time Charter — Government Form, Approved by the New York Produce Exchange (as amended 3 Oct 1946) clause 8: "The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; . . ."

## § 6. *Attempts towards deductive construction of affreightment contracts*

Ordonnance de la Marine — limited significance of classification — Pothier's two variants — 19th century tension — French allegianceto Code provisions — exceptions — part charters — bills of lading — attempts towards wholesale construction as an *entreprise de transport* — attraction of *locatio operis* in *Gemeines Recht* — German affreightment a *Werkvertrag* — problems posed by advent of time charter — lease construction — maritime law difficulties — contract for work construction — advantage — difficulties — Employment Clause — maritime law particularities — HGB § 774 — shipowner no recourse action against time charterer — French course — *location — entreprise de transport* and the Baltime — German departing points — *Ausrüstervertrag* and *Frachtvertrag* — the third category — interpretations of the Employment Clause — court positions — *locatio navis et operarum magistri et nauticorum* — limited importance of classification — Scandinavian law — § 275-contracts — role of the courts

The interrelation between maritime commerce and the legal profession, however, had been characterized by continuous efforts to place the contract of affreightment in one or another of the classical contract types. The early contributions, which were mainly French,[90] construed the affreightment as a lease pursuant to the express provision in the *Ordonnance*. The significance of this classification, however, was small. Pothier, in his posthumuously published 1774 edition, stated that the charter contract could be viewed either as *locatio navis et operarum magistri ad transvehendas merces,* or as *locatio operis transvehendarum mercium,* but that the alternatives differed only in name since the actions of the parties were treated the same whether called *actio locati* or *actio conducti.*[91] As the differences between the varieties of the *locatio conductio,* as well as the changes of maritime practice became more marked, the resulting tension in the situation prompted proposals that the chains of the classical contract system should be broken by accepting the contract by charterparty as a contract *sui generis.*[92] However, since the provision classifying the affreightment as a lease had been carried over into the 1807 Code de Commerce, French writers endeavoured

[90] Chauveau, *De l'armateur-affrêteur (Locataire du navire),* thèse Rennes 1923 p 194 no 158: "Imbus des théories du Code civil dont on connaît l'influence énorme à cette époque [19th century], non seulement en France, mais même à l'étranger, les auteurs oublient les principles généraux du droit maritime, que les tribunaux spéciaux, les amirautés, supprimés, ne peuvent plus rappeler. Et ils font appel d'une façon excessive aux notions du Droit civil."

[91] Pothier, *Traité des contrats maritimes, sociétés et cheptels,* Orleans 1774. The text is quoted as appearing in 4 *Oeuvres-Contrats des louages maritimes* 419 sq no 103.

[92] Molengraaff, *Etude sur le contrat d'affrètement,* 1882 14 Revue de droit international et de législation comparée 56 and authors there cited at p 53.

to retain as many varieties of the contract of affreightment as possible within the ambit of a chattel lease but to view the rest as varieties of the "contrat de transport".

This line of distinction came to be most controversial. The classic view prevailed as to charters of whole ships, but charters of part of a ship were generally considered to be contracts of carriage. Some authorities stated that if the possession of the ship passed to the charterer, the contract was a lease; if it remained with the shipowner, the contract was one of carriage. Naturally a part charterer could never be said to have possession of the ship.[93] Others held that the essence of the lease concept was that it must refer to some specific property. But the proportional share of a ship was not specific property.[94] The bill of lading, of course, had to be considered to be a contract of carriage, for particularly the obligations relating to the custody of the cargo — *i.e.* its loading and unloading — were difficult to reconcile with the concept of the chattel lease. Towards the turn of the century, legal scholarship attempted to qualify the whole of the contract of affreightment as representing an "entreprise de transport"[95] However, although the Court of Cassation has approved of this construction,[96] courts in general appear to be prone to continue to apply the construction prescribed by the Code.

Having for a long time leaned upon the French law,[97] the German contract of affreightment received original features in 1861 by the adoption of the ADHGB. The attraction of the notion of *locatio operis* in *Gemeines Recht* was remarkable. First to receive characterization as a *locatio operis* was the "*Stückgütervertrag*"[98] *i.e.* the contract for the conveyance of particular goods,

[93] Cf POTAMIANOS, *L'autonomie du contrat de transport maritime des marchandises*, thèse Paris 1937 p 43 no 10.

[94] Cf *e. g.* RIPERT, 2 *Droit maritime* 4th 242—243 no 1339; CHAUVEAU, *De l'armateur-affréteur (locataire du navire)*, thèse Rennes 1923 p 55—56 no 38; further in MAGNENAT, *Essai sur la nature juridique du contrat d'affrètement*, thèse Lausanne 1948 p 66.

[95] Particularly RIPERT, see 2 *Droit maritime* 4th 245—248 nris 1341—1342.

[96] *The Calonne*, 1949 JCP II no 5155.

[97] It would seem, however, that the Roman law was relied upon in the case of subchartering. In such a case the owners of cargo by use of the notion of *receptum* could proceed against the master as the representative of the owners-lessors of the ship. See GRAM, *Den private Søret*, Copenhagen 1851 p 156 and PAPPENHEIM, 3:2 *Handbuch des Seerechts-Schuldverhältnisse*, München & Leipzig 1918 p 434—436, 449—451 and literature cited at 435 note 1. Compare notes 60 and 68 *supra*.

[98] CROPP, in HEISE & CROPP, 2 *Juristische Abhandlungen*, Hamburg 1830 p 636;

and by 1861 the whole contract of affreightment came to be viewed as a *locatio operis*.[99] The ADHGB regulation followed the principles of the contract of carriage by land and used a similar terminology. Since these provisions of the ADHGB were carried over into the 1897 HGB almost without change, the German contract of affreightment is at present basically a *Werkvertrag*.

The new time charter contract, however, posed difficult problems of deductive construction.[100] On the one hand attempts were directed towards its subsumption under the lease. This classification now meant the chattel lease, rather than the other off-shoots of the older notion, and it involved the consideration of the possession and tort liability as having moved from the shipowner to the charterer. A number of rules of maritime law, however, particularly those relating to liens and limitation of liability which were unaffected by the classification, caused difficulties. Thus, although the time charterer as a lessee was liable for some if not all of the acts of the master and crew in relation to the vessel, the vessel would not be burdened with any liens in the case of such liability. Furthermore, the charterer was not able to benefit from the limitation of liability.[101]

If, on the other hand, in accordance with the general trend in the field of carriage, the time charter was construed as a variety of the contract for work, so that the liability for the acts of the vessel fell on the shipowner, certain advantages accrued. The time charterer would benefit from the shipowner's limitation of liability for the shipowner defended the tort suit and could in that proceeding invoke this limitation. If the shipowner was judged liable for any amount in this suit he could bring a recourse action in the same amount against the charterer (indemnity). While the shipowner's exposure to risk was thus

ULLRICH, 2 *Neues Archiv für Handelsrecht*, Hamburg 1860 p 322; PAPPENHEIM, 2 *Handbuch* 104.

[99] PAPPENHEIM, *op cit* 104.

[100] A general discussion of these difficulties under the French and German maritime law as it stood before the Brussels Conventions is offered in Lia GUTMAN, *Le Time Charter*, thèse Paris 1935.

[101] PAPPENHEIM, 2 *Handbuch* 95—96 § 7-V; JANSSEN 126; GUTMAN 12; CHAUVEAU, *De l'armateur-affréteur* 198—201 nris 163—164. Note that the American courts by resort to the fiction of the personality of the vessel could hold the vessel as such liable for collision though operated by the charterers under a demise charter. *The Barnstable*, 1901, 181 US 464, 21 SCt 684, 45 LEd 954, Cf HERBERT, *The Origine and Nature of Maritime Liens*, 1929-30 4 Tulane LRev 381-408, at 384.

increased, the charterer's risk was reduced to the amount which the shipowner had to pay in the tort suit.[102]

Construction of the time charter as a contract for work, however, was fraught with considerable difficulties. First, the very wording of the time charter forms militated against such a construction. The Employment Clause could not be reconciled with it, since this meant that the *conductor operis* would be under the direction and control of the *locator operis* (the charterer), a proposition which to orthodox legal scholarship appeared to be a contradiction in terms.[103] In Germany, furthermore, HGB § 662 had ruled that the sub-charterer's right of action on the *Unterfrachtvertrag* was, with certain reservations, against the shipowner and not against the charterer, and the very basis of this provision was the asserted impossibility of the charterer's giving orders to the shipowner.[104] Also, § 774 of the HGB further complicated the German situation. This was a penalty provision to the effect that, if the shipowner sent the vessel on a new voyage after she had completed one voyage, without having previously freed the ship from all liens attaching to her because of the first voyage, the shipowner was to answer for the underlying claims without limitation towards the holder of such liens. But since the time charter contract contemplated that the charterer was the party to order the voyages of the vessel, the result of the provision was to expose the shipowner to the risk of being penalized for the acts of the time charterer.[105] This was further aggravated by the fact that the shipowner was denied his recourse action against the time charterer by § 662 in so far as loading the cargo and signing the bills of lading were concerned.[106]

During the first decades of this century it was the task of Continental legal scholarship to steer a course between all these difficulties. Under French law, writers were inclined to classify

[102] GUTMAN 13.

[103] CHAUVEAU. *De l'armateur-affrêteur* 64—65 no 44; "Nous avons du mal à comprendre comment un homme peut passer sous la direction d'une personne et rester au service d'une autre, elle-même entrepreneur! Elle peut être sous la direction et au service de deux étrangers à la fois, dans des sphères d'activité différentes; mais dans une même sphère, si elle passe sous ma direction et reste à votre service c'est qu'elle vous remplace dans l'exécution d'une obligation contractée envers moi: cela équivaut à votre passage sous ma direction et vous n'êtes plus entrepreneur."

[104] Cf GUTMAN 27, JANSSEN 101—104. Also PAPPENHEIM, 2 *Handbuch* 94.

[105] Cf PAPPENHEIM, 2 *Handbuch* 95.

[106] Cf GUTMAN 13—14.

the time charter contract as "un contrat de location" in the absence of imperative reasons to contravene the express wording of article 273 of the Code de Commerce.[107] A forceful minority opinion, however, most prominently represented by Ripert,[108] assimilated the time charter to the affreightment in the modern sense, *i.e.* to the "entreprise de transport". The judicature was not very helpful in deciding the point.[109] As time went by, however, the majority rule was thought to be defensible only by restricting the category of time charters to those charters where the recruitment of the crew and the navigation of the vessel were left to the time charterer without interference from the shipowner.[110] Since even the most extensive interpretation of the Baltime employment clause[111] never conferred such an authority upon the time charterer, the practical effect was to accept the Baltime as an *entreprise de transport.*[112] The dividing line between "transport" and "location" thus came to follow the

[107] GUTMAN 35 summarizes the situation: "En France, comme en Italie, la plupart des auteurs considèrent le time charter comme un contrat de location . . ." The literature is reviewed by CHAUVEAU, *De l'armateur-affrêteur* 39—48 nris 20—32; p 193—226 nris 157—195, and more recently, by MAGNENAT, *Essai sur la nature juridique du contrat d'affrètement* 81—92. Magnenat's reservation at p 82 note 2, should be noted, however: ". . . les auteurs, ne traitant le problème qu'incidemment, ne sont pas toujours très clairs. Leurs opinions, interprétées et reprises par d'autres, sont souvent fort différentes suivant les ouvrages qui les citent."

[108] Nris 1368 sq.

[109] CHAUVEAU, *De l'armateur-affrêteur* 68 no 47, submits: " . . . la jurisprudence française ne semble jamais avoir abordé la question doctrinale de la classification des contrats d'affrètements. On la voit presque toujours juger chaque espèce d'après les clauses de la convention. Et en pratique on est toujours obligé de revenir sur chaque point à la loi des parties." — Leading cases were: *Liquidation de la Sté Roubaissienne de Madagascar v Macbeth et Cie*, Req 9 Jan 1906, 22 Revue Maritime 425, in which the shipowners pursuant to lease principles were held entitled to recover the cost of redelivery of their vessel, *i.e.* the costs of her voyage back to Europe, from the charterers when the shipowners had terminated the charterparty because charterers went bankrupt during charter period. *Mènage, Beaugeois et comp v Balcomb*, 79 Dalloz 2 p 30 in which, the time charterer had abandoned charter after two voyages whereupon the shipowners sued the sub-charterers for freight due for the carriage performed of their cargo. Judgment was rendered in favour of shipowners, the result to be explained by application of Code civil art 1753. *Contra: Cie transatlantique v Enregistrement*, Cass 25 Nov 1868, 69 Dalloz 1 p 233, relating to a charter to the Mexican government for the transportation of Austrian volunteers to Vera Cruz. The Austrian government prevented the vessel, *i.e.* the Tampico, from leaving Trieste with the troops, Tampico sailed back to France empty, and shipowners sued the Mexican government for demurrage and reimbursement of costs. The French tax on chattel leases thereupon was levied on the court's award. The shipowners then successfully sued the French treasury for the restitution of these taxes.

[110] GUTMAN 36, referring to BRUNETTI, *Diritto marittimo-privato italiano* no 190.

[111] As to the French interpretation of the Employment Clause, see cases cited in CHAUVEAU, *De l'armateur-affrêteur* 60 no 42 note 2.

[112] GUTMAN 37.

operation of the vessel; the problem was to know "si la conduite du navire se trouve entre les mains du propriétaire ou dans celles du time charterer, c'est-à-dire si le capitaine est le préposé de l'un ou de l'autre".[113] Finally, in *The Calonne Case* the Court of Cassation firmly established that a time charter was a contract of affreightment as contrasted to a *location*.[114]

Under German law the points of departure were quite different. The ADHGB only provided two categories of maritime contracts: the "Ausrüstervertrag"[115] and the *Frachtvertrag*.[116] Since an express statement in the preparatory works excluded time charters from the former category,[117] they had to be varieties of the *Frachtvertrag*. But, the difficulties created by some of the code provisions when applied to time charters[118] induced legal scholarship to attempt to build a third category in which to place the Government Form contract. To a certain extent these efforts were governed by the interpretation given to the Employment Clause. This had changed from time to time. The first interpretation limited the effect of the clause to such an extent that the qualification of the contract as a *Frachtvertrag* created very little difficulty.[119] About 1905, however, Wüstendörfer suggested a new translation to the effect that the master was subordinate to the charterer "hinsichtlich der Verwendung des Schiffs, der Adressierung desselben an Vertreter des Charterers sowie hinsichtlich *anderer*[120] Anordnungen des Letzteren".[121] Under the impact of this new translation, the idea spread throughout legal opinion that the time charter was characterized by the charterer's employing the master and crew. To this, numerous pleas were added that if the time charter was not assimilable to the *Ausrüstervertrag*, it should at least be considered as forming a category of its own. The position of the German courts, indicated by frequent observations in their

[113] GUTMAN 33.
[114] 1949 JCP II no 5155.
[115] ADHGB § 477, HGB § 510.
[116] ADHGB § 566, HGB § 556.
[117] *Protokolle der Kommission zur Beratung eines ADHGB*, 1656 sq.
[118] *Supra* pages 156—157.
[119] The interpretation was based on a translation made by a Hamburg court in 1873, 1873 Hans GZ No 226; cf WILLNER 58 note 160 — which confined the effects of the clause to "die Erteilung von Aufträgen, die Bestellung von Agenten und den Abschluss von Verträgen".
[120] My italics.
[121] WÜSTENDÖRFER, *Studien zur modernen Entwicklung des Seefrachtvertrages*, 1905—1910 p 149; cf WILLNER 59.

judgements,[122] was that the time charter generally was to be considered as *locatio navis et operarum magistri et nauticorum* — a contract category which the Reichsgericht had imported into German maritime law from English maritime law and which the English in turn had taken from Pothier.[123] The importance of this classification, however, was limited; it did not suffice to shift the *Ausrüster* quality — to which was attached the tort liability — over to the charterer;[124] and it did not protect the contract from the application of the code provisions;[125] it operated only to relieve the shipowner from being liable to the charterer for faulty loading by the crew.[126]

The Scandinavian positions were close to the German ones. § 117 of the 1864 Swedish Maritime Code[127] was patterned on § 477 of the ADHGB and so was its successor in the 1891 Swedish Maritime Code § 275. The impact of German thinking was indeed striking.[128] In opposition to the German scheme, however, the Scandinavian Codes preferred, subject to certain exceptions relating to liens, to leave it to the courts to decide the problems arising when somebody engaged in a shipowner's business by use of a ship which he had hired.[129] The Codes were believed to have in no way envisaged the case of time chartering,[130] but this is an exaggeration: the case of time charters was discussed relative to § 152 in the 1887 draft maritime code.[131]

## § 7. *Impact of the Brussels Conventions*

Fading interest in deductive construction — turn towards inductive construction — adoption of time charter as a statutory contract — basic Italian distinction between charters and contracts of carriage

Most of the controversial issues necessitating and arising under the deductive construction of time charters were taken care of

[122] *The Trio*, 48 RGZ 91; *The Henry*, 56 RGZ 361; *The Portonia*, 69 RGZ 129; *The Rygja*, 71 RGZ 333; *A Hamburger Lighter*, 82 RGZ 429; *An Excursion Steamer*, 98 RGZ 328; *The Reg I*, 22 BGHZ 199.

[123] *Infra* page 174 sq.

[124] *The Henry*, 56 RGZ 360; *The West Chatala* — relative to an American General Agency Agreement — 103 RGZ 280; *The Reg I*, 22 BGHZ 197.

[125] *The Feliciana*, 98 RGZ 186.

[126] *A Hamburger Lighter*, 82 RGZ 427; *The Rygja*, 71 RGZ 330.

[127] 1864 SFS No 22.

[128] The Norwegian *Motives* at p 356 refer to the German ones: "Bestemmelsen [*i. e.* § 275] er derfor i enhver Henseende i Sohandelns Interesse. Cfr tysk lov Art. 477."

[129] *Motives* 12.

[130] Cf JANTZEN, 1910 11 NDS 418: "fordi Sjofartsloven slet ikke kjender Tidsbefragtning".

[131] See *1887 års betänkande — motiv* 114—115.

by the Brussels Conventions of the twenties to such an extent that subsequent interest in this kind of scholarly exercise faded away.[132] The creditor's lack of security when the debt was incurred by the time charterer was remedied by the provision that liens attached to the vessel whether operated by owners or charterers.[133] Furthermore, another provision entitled the charterer to benefit from the shipowner's limitation of liability.[134]

While the interest in deductive construction was thus waning, legislators moved towards inductive construction, accepting and enacting the commercial classification without resort to the general contract type categories. Evidence of this trend is found in modern Dutch, Scandinavian, Italian, and even fragmentarily in British, maritime law. The Dutch and Scandinavian legislations adopted the time charter contract as a statutory contract.[135] A Scandinavian Code revision drew a basic line of distinction between voyage and time charter.[135a] The revision probably does not suggest any change of fundamental views about deductive constructions as the preparatory works indicate that the time charter should be viewed as a variety of the contract for work. It appears that the importance of the human services included in the charter contract has been decisive in this classification.[136] The most important of the new legislations, however, the Italian Codice della Navigazione of 1942, jettisons all subsumptions under the classical contract types and makes a basic distinction of its own between charters and contracts of carriage.[136a]

[132] In Germany the discussion abated after it was shown that Wüstendörfer's translation of the Employment Clause was probably wrong and that the charterer's authority under this clause was confined to "nur Anordnungen kommerzieller, nicht dagegen nautischer Natur"; WILLNER 60 and note 169. In 1956 the Bundesgerichthof in the case *The Reg I* held that the shipowner under the Baltime in no way had lost his "Unternehmerstellung" although perhaps the charterer in certain respects did acquire such a quality simultaneously, 22 BGHZ 206, and the court refused to apply the *Ausrüster*-provision even by analogy. This decision was received as proof that it was possible to hold the time charter to be a *Frachtvertrag;* WÜRDINGER, 1957 MDR 257: "Der BGH erkennt damit die Möglichkeit an, dass das nach dem Deuzeit-Vertrag begründete Rechtsverhältnis sehr wohl auch als Seefrachtvertrag aufgefasst werden kann".

[133] Convention 10 Apr 1926 "pour l'unification de certaines règles relatives aux privileges et hypothèques maritimes", art 13.

[134] Convention 25 Aug 1924 "pour l'unification de certaines règles concernant la limitation de la responsabilité de navires de mer", art 10.

[135] As far as Scandinavian conditions are concerned, however, this statutory contract never proved a success, see GRAM 2d 169.

[135a] Sweden: revision by an Act 5 Jun 1936, 1936 SFS no 276. Denmark: revision by Act 7 May 1937. Norway: revision by Act 4 Feb 1938.

[136] AFZELIUS & WIKANDER, *Sjölagen* 15th 96.

[136a] MANCA, *The Italian Code of Navigation,* Milano 1958 p 145.

SECTION 2. THE ANGLOSAXON SYSTEM

## § 1. *The relational obligation*

Fundamental idea in the common law — meaning of relational obligation — impact of the relational source of obligation during the formative period of Anglosaxon law — bailment — common carriage — bailee's two grounds of liability — private carriage — the common carrier — historical origin — definition — assimilation of passenger carriers to the notion of the common carrier — obligations of common carrier — refusal to carry — loss or damage to cargo — carrier's excuses — passenger injury — *Excursus: Differences between English and American law of common carriage* — Can the common carrier contract out of his common carrier obligations? — special contracts — *Nicholson v Willan* — 19th century English consecration of *Nicholson v Willan* doctrine — 20th century intrusions on doctrine as to passenger carriage — American rule before 1870 — public policy and negligence clauses — obligations may be mitigated down to negligence liability, not further — *Lockwood Case* — Restatement — undertaking to serve all comers — reservation of right to reject customers — American view of disclaimers and subterfuges

One characteristic of the Anglosaxon legal system is the recognition of relationships between parties as sources of their legal obligations. Roscoe Pound has even proclaimed the relational source of obligations as the "fundamental idea" in the common law.[137] The relational obligation means — says Williston — "that certain respective rights and duties are defined by law and imposed upon the parties without any question of their knowledge or assent to these specific terms", on the other hand it "may be varied to some extent by contract".[138] Prior to the time when bilateral contracts became generally enforceable,[139] relationships were the major source of obligations under Anglosaxon law. Although, during the 19th century, obligations previously based on relationships were compressed under the heading of contractual obligations,[140] the impact of these legal

[137] POUND, *Interpretations of Legal History* (*Cambridge Studies in English Legal History*) Cambridge 1923 p 56. See also same author, *The End of Law as Developed in Juristic Thought*, 1916—17, 30 Harv LRev 219; *Liberty of Contract*, 1909, 18 Yale LJ 454; *The New Feudalism*, 1930 16 Am Bar Ass n J 553; cf 1 WILLISTON 3rd 88 § 32 A note 4.

[138] 1 WILLISTON 3rd 90 § 32 A.

[139] In 1 WILLISTON 3rd 385 § 103, the first recognition of bilateral contracts is said to have taken place about the end of the 16th century.

[140] 1 WILLISTON 3rd 88 § 32 A and note 4. Cf ISAACS, *The Standardizing of Contracts*, 1917—1918 28 Yale L.J 35; in reference to the relation between principal and agent, the author speaks of "The naïve statement in many textbooks and judicial opinions that 'agency is a contract' and submits that this is evidence of the tendency to veer from status to contract

relationships during the formative period of Anglosaxon law remains deeply felt. Their present importance can be easily seen in the choice of titles of legal textbooks. Such books are called "Master and Servant", "Landlord and Tenant", or simply "Bailments and Carriers" but not, as under Continental law, by the names of contract types.

One of these fundamental relationships is the *bailment.* A bailment is defined as "the rightful possession of goods by one who is not the owner."[141] The party who delivers the goods is called the bailor, the party receiving the goods is the bailee.

It has been the singular liability of the bailee which has evolved the law of *common carriage*[142] and has probably exerted a considerable influence upon the evolution of general contract law.[143] The right of the shipper to sue a common carrier upon his contract was not recognized until 1750.[144] For centuries prior thereto the exclusive remedy in carriage had been in tort. The ferryman of 1348 who overloaded his ferry and drowned the plaintiff's horse was liable in tort.[145]

This tort liability of the bailee to the bailor was based on

[141] 4 WILLISTON 2d 2888 § 1032.

[142] The text proceeds on the theory of HOLMES, *The Common Law*, Boston 1881 pp 164—205, particularly p 180—181, which at least is supported in essentials by great authorities, such as POLLOCK & MAITLAND, 2 *History of English Law* 170, and HOLDSWORTH, 3 *History of English Law* Boston 1927 p 337 sq, and which — says PATON in *Bailment in the Common Law*, London 1952 p 57 — "has the merit of explaining history by generalisations which have a broad sweep and give a plausible theory."

[143] HOLMES, *The Common Law* 195, 185.

[144] *Dale v Hall*, 1 Wils 281, 95 ER 13; WINFIELD, *Province of the Law of Tort* (Tagore Law Lectures delivered in 1930), Cambridge 1931 p 61, accounts for the development in the following way: ". . . in 1817 Lord Ellenborough C. J. said that since *Dale v. Hall* (1750), it had been usual to declare against a common carrier in contract, and not upon the custom of the realm; yet the modern use does not supersede, although it has supplanted, the former procedure of declaring in tort. This doctrine was driven home by the Court of Exchequer Chamber in *Bretherton v. Wood.* In a declaration upon the case against a common carrier for negligent injury to a passenger, the first count alleged breach of a duty undertaken for hire and reward, the second; breach of a duty after receiving the plaintiff as a passenger. It was held that the action was founded on misfeasance, that the duty of safe carriage by a common carrier was imposed by law and needed no contract to support it. . ."

[145] *John de Bukton v Nicholas*, 1348 YB 22 Lib Ass 94 pl 41, generally referred to as the *Humber Ferryman Case.* The report in the Book of Assizes is translated in PLUCKNETT, *Concise History of the Common Law* 4th 411, also in FIFOOT, *History and Sources of the Common Law — Tort and Contract* 330. For further details, see KIRALFY, *The Humber Ferryman and the Action on the Case*, 1951—1953 11 Cambridge LJ 421—424. FLETCHER, *The Carrier's Liability* 19, accounts for the case in the following terms: "it was objected that the action would not lie because no tort was supposed; the court held that the overloading was a tort, and the carrier was held liable." Also PROSSER 2d 479 § 81 note 9.

either of two grounds: the first was *assumpsit,* and in the course of time this ground assumed the features of contract. Secondly, the bailee was liable when he exercised a public calling.[146] Liability on the first ground came to prevail in so-called private carriage, which is difficult in Anglosaxon law to define as anything but such carriage as is not common carriage. It is sometimes asserted that the private carrier, in the absence of an express contract, carries under an implied contract.[147] However, the relational obligation remains fundamental: for instance, the carrier is entitled to his freight independent of the contract,[148] and, in the opinion of Williston and Thompson, the weight of authority supports the view that the carrier is liable if after notice he delivers to a consignee goods to which a third person is entitled.[149]

The carrier exercising a public calling developed into the *common carrier.* In the Middle Ages there had developed the concept of "common calling". "Common" carriers existed just as there existed common tailors, common millers, common surgeons and the like. The use of the term "common" in those days seems to have meant nothing more than that the individuals so designated offered their peculiar services to the public at large as distinguished from those other craftsmen who worked for private account.[150] Certain of these common callings, including carriers, ferrymen and innkeepers, were singled out for special consideration by the courts for some reason that is not entirely clear, and during the reign of Elizabeth I, if not earlier, there was imposed upon them a rule of extraordinary responsibility.[151] This rule was later enshrined in a public policy announced by the courts, apparently because when custody of other persons' goods was obtained there were special opportunities for dis-

[146] HOLMES *op cit* 183—184.
[147] RIDLEY, *The Law of the Carriage of Goods by Land, Sea & Air,* London 1957 p 11.
[148] BARTLE, *Introduction to Shipping Law,* London 1958 p 181.
[149] 4 WILLISTON 2 d 2897 § 1038.
[150] See BURDICK, *The Origin of the Peculiar Duties of Public Service Companies,* 1911 11 Col LRev 514—531, 616—638, 743—764, at 522. Also ARTERBURN, *The Origin and First Test of Public Callings,* 1927, 75 U of Pa LRev 411, and literature cited in both articles.
[151] See WINFIELD, *The Province of the Law of Tort* (Tagore Law Lectures delivered in 1930), Cambridge 1931 p 59—62; FLETCHER, The Carrier's Liability 32—33, 112—113. — The leading case on innkeepers was *Calye's Case,* 1584, 8 Co Rep 32 a, 77 ER 520. There were, however, even earlier cases, see generally KIRALFY, *A Source Book of English Law,* London 1957 p 202, 206, 231.

honesty.[152] The common carriers became almost insurers of goods in their possession.

The judicial test for common carriage seems to have been established about 1710. It was determined in *Gisbourne v. Hurst*,[153] that "any man undertaking for hire to carry the goods of all persons indifferently" was as to the liability imposed to be considered a common carrier.

During the course of the 19th century the problem was raised whether the obligations of the common carrier should extend to the passenger carrier as well. The extension met opposition. Even the notion of common carrier of animals — a situation not known on land before the railways — met opposition because of the animate nature of the cargo.[154] In due course, however, it became firmly established that the obligation attached to the relation between the common carrier of goods and the shipper had broadened to cover the relation between the common carrier of passengers and the passenger.[155]

The common carrier's common calling makes him liable to an action for refusal to carry the first comer.[156] Williston and Thompson summarize some of the further obligations of the common carrier as follows:[157] The common carrier of goods is liable for loss or damage to the goods carried though he was not negligent, subject only to the excuses of Act of God,[158] act of the country's enemy, act of law, act of the shipper, and the inherent vice of the goods.[159] Carriers of passengers only incur this non-fault liability with respect to baggage and other articles delivered into the carrier's custody and control. Otherwise, such

[152] The principal enunciations of the public policy were made by Chief Justice Holt in *Coggs v Bernard*, 1701, 2 Ld Raym 909, at 918, 92 ER 107; reinforced by Lord Mansfield in *Forward v Pittard*, 1785, 1 Term Rep 27, at 34, 99 ER 953. It may be that these judges were merely expressing generally held views, and not laying down the public policy as a new statement of the law.

[153] L Salk Rep 249, 91 ER 220.

[154] DAVIES & LANDAU, *Transport Undertakings* 2d 7—8. Cf FLETCHER, *The Carrier's Liability* 210.

[155] MACNAMARA, *Law of Carriers by Land* 3rd 484 no 269; 4 WILLISTON 2d 3170 § 1113 and note 1.

[156] 4 WILLISTON 2d 2986—2987 § 1072. This obligation was enforced as early as in 1684, see FLETCHER, *The Carrier's Liability* 193

[157] 4 WILLISTON 2d 2987 § 1072.

[158] FLETCHER, *The Carrier's Liability* 146—147 submits that this exception was introduced into the common law by Lord Holt, and that *Coggs v Bernard, supra* note 152, is the first reported case of carriage by land in which Act of God is mentioned as an exemption from liability.

[159] The last defence was introduced to compensate carriers when common carriage was extended to include the carriage of livestock.

carriers are subject only to liability for negligence both with respect to the safety of the person of the passenger[160] and his effects which he carries with him in his own custody.[161]

As to passenger injury, legal opinion is unanimous on the point that liability depends entirely on negligence. The carrier must exercise due care for the passenger's safety during the journey and while he is on the carrier's premises, and he must provide a vehicle as safe as human care and skill can make it. The carrier's duty goes far — often the diligence required is described by the phrase: "as far as human care and foresight will go."[162]

The common carrier may not charge rates at pleasure: rates must be just and reasonable.[163] A person who has involuntarily paid a carrier an excessive charge for his services is entitled to recover the overcharge by common-law action.[164]

While much of the law of carriage is common to the United States and England the question of the relationship between common carriage and private carriage has generated a thorough divorce. The split is evidenced where two questions are raised — two questions which reflect the two aspects of the common carrier's liability, namely, the liability on the carrier's contract and the liability as an incidence of professional status with the cunning and skill which go with such status — 1) Can the common carrier contract out of his common carrier obligations? 2) Can a carrier avoid common carrier status altogether? In both matters profound differences exist between English and American law.

For a long time it was an unsettled question whether common carriers were entitled to accept cargo in a special manner so that

[160] This point, which might have been highly controversial when the notion of the common carrier of passengers was established, is now beyond dispute doctrinally. Cf MacNamara *op cit* 528 no 288; Kahn-Freund, *The Law of Inland Transport* 3rd 356; Davies & Landau *op cit* 52; Dobie, *Bailments and Carriers* 574; 13 CJS 1253 § 676.

[161] English law differs from the text statement as to the liability of carriers of passengers for loss of, or damage to, passengers' baggage. If the carrier is a common carrier, he is liable for the loss of luggage carried in the compartment or coach with the passenger unless the loss has been caused by the passenger's own failure to take reasonable care. See *Vosper v Great Western Rwy Co*, 1928 1 KB 340, and Kahn-Freund *op cit* 335—336.

[162] The phrase was first used by Sir James Mansfield in *Christie v Griggs*, 1808, 2 Campbell 79, 170 ER 1088.

[163] Dobie *op cit* 458. Hutchkinson, 2 *A Treatise on the Law of Carriers as Administered in the Courts of the United States, Canada and England*, 3rd Chicago 1906 p 893 sec 805; 3 same work 1586 secs 1342 sq.

[164] 13 CJS 766 § 320.

they would not be answerable for it. Lord Coke in 1601 was inclined to recognize such a right in the carrier,[165] and in 1769 Lord Mansfield upheld a notice of a coach carrier that he would not be answerable for conveyances of money unless he knew of the existence of the money: "the reward ought to be proportionable to the risk."[166] In 1804 this right was firmly established by Lord Ellenborough's judgement in *Nicholson v. Willan*.[167] Although his Lordship apparently lived to regret it — in 1814 he laments: "I am very sorry for the conveniences of trade that carriers have been allowed to limit their common law responsibility . . ."[168] — this judgment meant a fairly lasting recognition of this right and its tremendous practical importance. In the course of time, however, the American approach came to differ with that of the English on this point.

English statutes were promulgated in a long sequence reinforcing the *Nicholson v. Willan* doctrine as to the carriage of goods.[169] This doctrine was adopted in passenger carriage as well, and through the 19th century no statute affected the right of liability limitation judicially conferred upon the carrier.[170] During the 20th century, however, the tide turned. The mounting toll of road accidents resulted in the Road Traffic Act, 1930,[171] in which certain important classes of common carriers of passengers were singled out and forced to retain their common law duty to carry safely.[172] This meant that the carrier could no longer make use of contract to exempt himself from this duty.

[165] See Lord Coke's comment in *Southcote's Case*, 4 Co Rep 83 b, 76 ER 1061; cf HOLMES *op cit* 179, 187.
[166] *Gibbon v Paynton*, 4 Burr 2298, 97 ER 199: the sum of £ 100 was hidden in some hay in an old nail bag and sent by a coach and lost!
[167] 5 East Rep 507, 102 ER 1164.
[168] *Down v Fromont*, 4 Campb 40, at 41; 171 ER 13, at 14.
[169] The Carriers Act, 1830, sec 6, 1 Will 4 c 68; this section provides that nothing in the Act shall in any way affect any special contract between common carriers and other parties for the conveyance of merchandise. The Railway Clauses Act, 1845, 8 & 9 Vict c 20. The Railway and Canal Traffic Act, 1854, sec 7, 17 & 18 Vict c 31: special contract could affect any liability of the carrier except for neglect and default. The Railway Act, 1921, 11 & 12 Geo 5 c 55. Cf KAHN—FREUND *op cit* 216. It may be fair to point out, however, that this legislation was passed to make it more difficult for the carriers to contract out of their liability.
[170] KAHN-FREUND *op cit* 427—429. *Van Toll v S E Rly*, 12 CB (NS) 75, 88; 142 ER 1071; *Parker v S E Rly*, 1877 2 CPD 416, 428; *Clarke v West Ham Corporation*, 1909 2 KB 858; *Grand Trunk Rwy of Canada v Robinson*, 1915 AC 740, 113 The Law Times 350; *Luddill v Ginger Coote Airways*, 1947 USAvR 1, 1947 AC 233.
[171] 20 & 21 Geo 5 c 43. This Act has been repealed and re-enacted by the Road Traffic Act, 1960; 8 & 9 Eliz 2 c 16.
[172] Sec 97. Now Road Traffic Act, 1960, sec 151.

Those carriers affected by the statute were the operators of "a public service vehicle".[173] After the nationalization of the British railways, the public enterprises formed to operate them were similarly required to retain their liability towards "any person making use of" the services or facilities of the enterprise, provided that he was not a passenger travelling on a free pass;[174] and provided furthermore that all conditions were reasonable.[175]

The American development, by contrast, was characterized by a much more marked trend towards the conferring of mandatory liability upon certain portions of the common carrier's obligations. Prior to 1870, however, American carriers were in almost the same situation as were the British carriers under the *Nicholson v. Willan* doctrine.[176] But even then they could not contract out of their liability for fraud and gross negligence.[177] There was almost no federal jurisprudence on the subject until 1887, and the State courts differed in their views. In 1838, New York would not allow a carrier to limit his liability by a mere notice.[178] But in 1874, that State supported the validity of an English bill of lading clause disclaiming all liability for negligence.[179] New York held this view as to ocean bills of lading until the federal Harter Act became effective in 1893,[180] and as to domestic railway bills of lading until the Carmack Amendment[181] to the Interstate Commerce Act[182] in 1906. In the 1870's, however, American courts began to reflect a change in the public mood towards carriers and commenced to find public policy hostile to clauses limiting liability. Massachusetts led the shift and were soon

[173] Secs 121-1 and 61. Definition now in Road Traffic Act, 1960, sec 117.
[174] Passenger Charges Scheme, 1954, part 9 no 32.
[175] *Ibidem.*
[176] KNAUTH, 1951 ASAL 539 note 69.
[177] This position is taken by STORY in *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law*, 1832, 1st 351 § 549. Whether it fully reflects the factual situation need not be discussed here. As to English law, it was said by the Lord Justice Denning in 1956 in *J Spurling Ltd v Bradshaw* (1956 2 AER 121, at 125) that if a bailee handles the goods "so roughly as to warrant the inference that he was reckless and indifferent to their safety" he would not be able to rely on a clause seeking to exclude his libility. For an account of the effect of exemption clauses on the bailee's liability under English law, see the note called "*The Bailee's Negligence*", 1956 222 Law Times 74 and 86; also GRUNFELD, *Reform in the Law of Contract*, 1961 24 Mod LRev 62, at 65—79. For review of the doctrine of "fundamental breach of contract", see GUEST, 1961 77 LQR 98.
[178] *Hollister v Nowlen*, 19 Wend 234.
[179] *Gleadell v Thompson*, 58 NY 194, 197.
[180] Harter Act, 13 Feb 1893, 27 Stat 445, 46 USCA 190 sq.
[181] 34 Stat 595.
[182] 24 Stat 386.

followed by the Federal courts (which were free to do so under the then prevailing *Swift v. Tyson* doctrine).[183]

As applied to cargo carriage this development meant that the carrier could still rid himself of his non-fault liability. In passenger carriage, however, it meant that the liability could not at all be affected by contract. The mandatory character of the passenger carrier's liability was established by the United States Supreme Court decision in *New York Central Railroad Company v. Lockwood,* 1873.[184] The Court said: "First. That a common carrier cannot lawfully stipulate for exemption from liability when such exemption is not just and reasonable in the eye of the law. Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from reponsibility for the negligence of himself or his servants. Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter . . ."

The Lockwood holding was followed by the great majority of the later cases and eventually developed into the majority rule of the Restatement of Contracts,[185] which read: "A bargain for exemption from liability . . . for the consequences of negligence is illegal if . . . one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation." Further, Congress has intervened as to the operation of passenger vessels, requiring that the standard of liability for negligence in the case of "loss of life or bodily injury" be retained.[186] A minority rule, however, permitting exoneration for sufficient consideration passing from the exonerated party to the other exists in some states.[187]

The very definition of the status of the common carrier involves a certain difficulty because of the required rôle of serving all comers indifferently. "The fact that a carrier invites all persons to employ him does not make him a common carrier, if he reserves the right to accept or reject offers within his dis-

[183] KNAUTH, 1951 ASAL 539 note 71. The *Swift v Tyson* doctrine supported the uniformity throughout the United States of the development of the federal common law. 1842, 16 Peters 1.
[184] 17 Wall 357, 21 L Ed 627.
[185] Sec 575.
[186] 49 Stat 1480, 46 USCA 183 c.
[187] 13 CJS 1184 § 629. But see 4 WILLISTON 2d 3143 § 1109, and GWERTZMAN, *Transportation Law and Insurance*, Larchmont NY 1950 p 130.

cretion."[188] On this rule is built the English practice of repudiating common carrier status. Such repudiation is effected "by merely exhibiting a notice or otherwise reserving the right to reject the goods of any particular customer".[189] Of course, carriers subject to a statutory duty to carry, such as the railways, cannot put up such a notice or reserve the right to reject goods.;[190] but other carriers in most cases avoid common carrier status by such means.[191] — The American interpretation of the rule, however, has been different. "[O]ne holding himself out as a common carrier does not divest himself of that status ... because he may on occasion refuse to perform the services for which he is equipped."[192] "[S]o long as the service is actually rendered on a public basis ... disclaimer or subterfuges designed to simulate private carriage will not absolve the proprietor from the duties of common carriage."[193] "Whether one is a common carrier is determined by the business actually carried on or the obligation assumed ..."[194]

## § 2. *The fundamentals of contract classification*

British views of maritime contracts — common law approach fundamentally different from Continental law approach — all agreements suddenly enforceable — disfavour of implied terms — increasing scope for implied terms — domination of Continental ideas in the field of bailments and carriage — Lord Holt and Sir William Jones — emphasis shifting from relationship to contract — modern rejection of contract emphasis — superficiality of the reception of the Continental contract types — period of reception — Anglosaxon maritime law guided by Roman law — Pothier — Pothier's distinctions between maritime contracts — *Schuster v McKellar* — reversal of British course — demises and non-demises — reliance on the pattern of the documentary contracts — common carriage relation in maritime law — historical origin — general ship — assimilation of the notions of common carrier and general ship — the chartered ship — *Liver Alkali v Johnson* — American charter doctrine — Sprague and Benedict — Harter Act — Pomerene Act

Inasmuch as the relational obligation in the field of carriage[195]

[188] 13 CJS 28 § 3.
[189] FLETCHER, 1934 50 LQR 330.
[190] KAHN-FREUND *op cit* 210. Under English law, however, this does not mean that the railway is held to any professional standard. KAHN-FREUND, *loc cit*, points out that although railways may remain common carriers, they can contract out of their common carrier liability, subject to the Carriers Act, 1830, and even out of liability for negligence if they comply with the Railway and Canal Traffic Act, 1854, sec 7.
[191] The editors of SHAWCROSS & BEAUMONT 2d 314 no 341 submit "that there is no English case in which an air carrier has been held to be a common carrier".
[192] 13 CJS 28 § 3.
[193] 4 WILLISTON 2d 2983—2984 § 1072.
[194] 13 CJS 28 § 3.
[195] The relationship between the relational obligation and contract will be further

lost its mandatory character, as was the case in British maritime carriage, interest came to centre on the contractual aspects. Since shipowners invariably excluded the application of the common carriage rules under British law, the British views taken of the maritime contracts are all the more interesting.

The Common Law approach must be fundamentally different from that of Continental law. Firstly, under Anglosaxon law the concept of enforceable contract was never tied to any particular variety of the contract; the English "law of contract developed as a whole out of the law of negligence and at a fairly early date suddenly reached a stage at which all agreements became enforceable".[196] Secondly, English law does not favour implied terms in contracts.[197] As stated in *The Moorcock*[198] the law will imply only such terms as are necessary to give business efficacy to the actual contract. As a result Anglosaxon law has avoided the Continental contract types. "Such a law of contract could never have suited us at any time after the end of the Middle Ages."[199] "There has never been a time since the fifteenth century when commerce and industry have been in anything like equilibrium. It is always necessary for business men to think out new terms for their contracts. In other words, express terms are much more important than implied terms . . ."[200]

But Anglosaxon contract law was not able to do entirely without implied conditions. Despite all hostility such conditions have developed,[201] first as a technique of mitigating the often harsh effects of holding a man only to his express promise,[202] then with the idea that the express contract should not be seen

treated in Chapter 4 pages 271—282.

[196] RADCLIFFE & CROSS, *The English Legal System* 3rd 162. See also BUCKLAND & MCNAIR, *Roman Law & Common Law* 2d 194 and in particular 265 sq which contain an important addition by LAWSON to this edition. Also PARRY, *The Sanctity of Contracts in English Law*, The Hamlyn Lectures 10th Series, London 1959 p 8.

[197] POLLOCK *on Contracts* 13th 227; BUCKLAND & MCNAIR *op cit* 268—269, PARRY *op cit* 46.

[198] 1889 14 PD 64, 1888 58 LJP 73, 60 LT 654.

[199] LAWSON in BUCKLAND & MCNAIR *op cit* 269.

[200] Same at p 268.

[201] "Implied conditions" are here taken in the proper sense of the words, and should be kept apart from "the unfortunate terminology . . . owing to which the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had contractual origin." Per Lindley, L. J., *In re Rhodes*, 1890 44 Ch D 107.

[202] PARRY *op cit* 39.

in isolation, but rather within the framework of the more general relation which it covers, to the effect that terms of common trade usage, local custom or conveyancing practice could be imported into the contract.[203] In due course these latter terms were, in a number of instances, codified.[204] And in recent times, there is reason to believe that the circumstances occasioning judicial use of these implied terms have been further extended.[205]

In the field of bailments and carriage, however, Continental ideas exercised a deep influence upon Anglosaxon law. While bailments, as defined in Les Termes de la Ley, first published in 1563, did not even attach to bailment the notion of contract,[206] the law was severely reshaped by Lord Holt in *Coggs v. Bernard,* 1702,[207] so as to conform closely to the Continental ideas of contract types. Story arrives at "the conclusion, that our law is mainly a derivative from that [Continental] source".[208] The subject came to be closely linked with the establishment of a contract called "hiring" — an equivalent to the *locatio conductio* which was borrowed from the Civil law with subdivisions: *locatio rei, locatio operis faciendi, locatio custodiae* and *locatio operis mercium vehendarum.* "These divisions" — says Story expressly — "have been transferred into our law by the elaborate opinion of Lord Holt in the case of *Coggs v. Bernard,* and by the elegant genius of Sir William Jones in his Essay on Bailments".[209] It is therefore not surprising that later definitions of bailment place more and more emphasis on contract[210] and it is only lately that

[203] CHESHIRE & FIFOOT, *Law of Contract* 5th 1960 p 122; PARRY *op cit* 40 sq.
[204] *E. g.* Bills of Exchange Act, 1882; Sale of Goods Act, 1893; Marine Insurance Act, 1906; Housing Act, 1936. See also PARRY *op cit* 43.
[205] See PARRY *op cit* 44.
[206] As reproduced by ANGELL *on Carriers* 5 note 1, the definition is: "Bailment is a delivery of things, whether writings, goods or stuff, to another; sometimes to be delivered back to the bailor, that is, to him that so delivered it; sometimes to the use of the bailee, that is, of him to whom it is delivered; and sometimes, also, it is delivered to a third person. This delivery is called a bailment."
[207] 2 Ld Raym 909.
[208] *Commentaries on the Law of Bailments* 3rd Boston & London 1843 20 § 18; (1st ed 13 § 18).
[209] *Op cit* 11 § 8; (1st ed 5 § 8).
[210] JONES, *An Essay on the Law of Bailments* (the edition used is the 4th with notes by W Theobald, London 1833) p 1, 117; BLACKSTONE, 2 *Commentaries on the Laws of England* 10th 1787 p 451; STORY, *op cit* 4 § 2; KENT, 2 *Commentaries on American Law* 2d New York (O Halsted) 1832 p 558. Cf WINFIELD, *Province of the Law of Tort,* Cambridge 1931 p 96—97, HOLDSWORTH, 7 *HEL* 433. FLETCHER, *The Carrier's Liability* 194—195, referring to *Lyon v Mells,* 1804, 5 East Rep 428, submits that this would seem to be the first case "in which was formulated the idea of *implied* contractual terms. Henceforth an obligation considered to arise from the

some of this emphasis has been rejected.[211] It should be added, however, that the reception of the Continental notion of contract types by the Anglosaxon law was only superficial. Having stated the rules of the *locatio rei* in Continental law Story hesitates to transfer them as implied conditions into Anglosaxon law: "it is difficult to say, (reasonable as they are in a general sense) what is the exact extent, to which they are recognized in the common law. In some respects the common law certainly differs, and in others it probably agrees."[212]

The period of reception seems to extend to the end of the 19th century. Its length is not surprising in view of the fact that during the 19th century some of the foremost jurists and judges still received part of their University education in law at Continental universities or took at least apparent guidance from the teachings of Continental scholarship.[213] The increasing hostility to conceptualism and doctrinal methods which spread about the turn of the century, however, resulted in the jettison of much of the Civilian imports.[214]

In the field of maritime carriage the influence of Continental law was particularly felt and the trend to force Roman principles onto the British law of contracts was particularly strong in maritime and mercantile law. Potter submits in reference to the former that "This branch of English law has undoubtedly drunk deep at the well of the old Roman Law . . .[215]

During the early 19th century English lawyers were inclined to seek guidance in French writings and in particular those of Pothier enjoyed high authority.[216] It may therefore come as no

carrier's common law status is translated into the law of contract under the language of 'a term of the contract implied by law'."

[211] Statements to this effect will be found in PATON, *Bailment in the Common Law*, London 1952 p 5 note 7 and p 30 note 23, pp 36 sq and 40; WINFIELD, *Province of the Law of Tort* 97, also BUCKLAND & MCNAIR *op cit* 222. WRIGHT, in POLLOCK & WRIGHT, *Essay on Possession in the Common Law* 1888 p 160, submits: "Although ordinarily a contract is an essential element of a bailment, yet it was held on the statute of 1861 that a married woman, notwithstanding her then incapacity to contract, might be a bailee within the statute." — The case referred to was *Robson*, 1861, 31 LJMC 22; the statute: 24 & 25 Vict c 96 sec 3.

[212] STORY *op cit* 383 § 392.

[213] See generally FIFOOT, *Judge and Jurist in the Reign of Queen Victoria*, The Hamlyn Lectures 11th Series, London 1959, and in particular p 18, 28—29. Also PRAUSNITZ, *The Standardization of Commercial Contracts in English and Continental Law*, London 1937 p 101.

[214] FULLER, *Basic Contract Law*, St Paul 1947 p 520—526.

[215] *Historical Introduction to English Law* 3rd 204.

[216] By 1781 Sir William JONES could recommend Pothier on Contract as a work

surprise that Pothier was followed as to his distinctions between maritime contracts. Pothier had coined the terms *locatio navis et operarum magistri ad transvehendas merces* and *locatio operis transvehendarum mercium,* both referring to the contract of affreightment.[217] These terms now recurred in the system of maritime contracts which was adopted by Arnould in 1848 as useful in the treatment of barratry,[218] and his distinctions gained much in authority by Lord Campbell's judgement in *Schuster v. McKellar,* 1857.[219] In this judgment three categories were enumerated and defined in the following way: (1) *"locatio navis* — a demise of the ship itself, with its furniture and apparel." (2) *"locatio navis et operarum magistri et nauticorum* — a demise of the ship in a state fit for mercantile adventure"; (3) *"locatio operis vehendarum mercium* — a contract for the carriage of the merchant's goods in the owner's ship and by his servants: where the owner has all the responsibility of a carrier of the goods".

Towards the end of the 19th century the British changed course.[220] In 1860, in his treatise on the law of merchant shipping, David Maclachlan observed about the distribution of maritime contracts that "the distinction on which it proceeds is of no value on the question of temporary ownership under the charter-party."[221] In modern writings, accordingly, the distinction has been discarded and charters have come to be divided into two, not three classes, "depending upon whether the charterer is by the agreement to have possession of the vessel (the demise charter-

"the greatest portion of which is law at Westminster as well as at Orleans" (*Essay on Bailment* 29). In 1806 it was translated as a model for English textbooks by Sir W D EVANS, a disciple of Lord Mansfield. (The edition published in Philadelphia in 1826 was titled: *A Treatise on the law of Obligations or Contracts.*) In 1822 Mr Justice Best in *Cox v Troy,* ( 5 B & Ald 474, at 480; 106 ER 1264, at 1266) affirmed its authority to be "as high as can be had, next to the decision of a Court of Justice in this country". See also *Philipps v Brooks,* 1919 2 KB 243. See generally FIFOOT, *Lord Mansfield,* Oxford (Clarendon Press) 1936 p 243. ABBOTT acknowledged the treatises of Pothier as "remarkable for the accuracy of the principles contained in them . . ." see 1829 ed preface p xii.

[217] See MAGNENAT, *Essai sur la nature juridique du contrat d'affrètement* 84.

[218] ARNOULD, 2 *A Treatise on the Law of Marine Insurance and Average with references to the American Cases, and the later Continental authorities,* London 1848 p 834. Pothier's terms were slightly modified.

[219] 7 E & B 704, at 723.

[220] As early as in the 7th English edition of ABBOTT *on Shipping,* SHEE criticizes the distinction from the aspect of carrier's lien being attached to the possession of the ship: "and yet when it becomes necessary to enforce the Common Law security for that, which alone makes the ship valuable to the owner — the freight earned by her — by dint or subtle distinctions between the contract of *locatio rei et operarum* and the contract of *locatio operis,* the possession of the master is made out not to be the possession of the owner." At p 300—301. As quoted in ANGELL 364 § 378.

[221] MACLACHLAN, *A Treatise on The Law of Merchant Shipping* 1st 1860 p 308; here cited 3rd ed 1880 p 342.

party) or is to have his goods carried in the vessel, the placing of the vessel at his disposal and the services of the master and crew being subsidiary thereto."[222] The two demise classes thus are merged and only two types of contracts exist — in conformity with the relational obligation[223] —, contracts under which the shipowner is a bailor of the ship and contracts under which he is a bailee of the cargo.

The relational obligation thus restored, the English law lost much of its interest in the Continental contract types. In the matter of contract classification only those divisions were felt useful which conformed to the type of document used. The contract of affreightment in the sense of Continental law was replaced by the mere notion of a charterparty, the contract of carriage of goods by a structure centring on the bill of lading.[224]

Although the importance of the common carriage relation in British maritime law was most insignificant, great interest was attached to this same relation in the United States. Notwithstanding that common carriage properly speaking may at one time have been a land-bound concept,[225] it is clear that this institution provided a maritime variant. In 1785, Lord Mansfield stated that there was no distinction between a land and a water carrier as to their liability.[226] The common carrier of the high seas was tied to the concept of the "general ship". Abbott, who was one of the first to use this term,[227] pointed out the two ways to trade a ship, by charterparty or as a general ship.[228] A general ship was employed under contracts by which the master or owners of a ship destined on a particular voyage separately engaged with a number of persons unconnected with each other to convey their respective goods to the place of the ship's destination.[229] In 1889 the United States Supreme Court remarked: "By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship carrying goods for hire ... is a common carrier."[230]

[222] ARNOULD-CHORLEY, 2 *Marine Insurance* 14th 776 note 23.
[223] This aspect need not be further elaborated here. The text will revert to it again in Chapter 4.
[224] See COLINVAUX, 1959 JBL 399—400.
[225] See FLETCHER, 1934 50 LQR 331; *The Carrier's Liability* 36, 112.
[226] *Proprietors of the Trent and Mersey Navigation v Wood*, 3 Esp 127, 4 Doug 287, 99 ER 884.
[227] DE HART, *The Liability of Shipowners at Common Law*, 1889 5 LQR 20 and note 2.
[228] ABBOTT, *A Treatise of the Law relative to Merchant Ships and Seamen*, 5th Boston 1829 p 90, 212.
[229] ABBOTT *op cit* 212.
[230] *Liverpool & G W Steam Co v Phenix Insurance Co*, 129 US 397, at 437.

While this basic principle remained common to both the English and the American law of carriage, the status of the owner of a ship under charterparty came to be a matter of controversy. In England, courts were inclined to subject even owners of certain chartered vessels to the common carrier's liability. The matter was raised in 1872 by the decision in *Liver Alkali v. Johnson.*[231] "The principle that appears to follow from *Liver Alkali v. Johnson*" — says the tenth edition of Carver[232] — "is that there is a class of public carriers by water, such as lightermen, who carry subject to the liabilities of common carriers but who must be distinguished from them because they are not liable to indictment or action for refusing to accept goods for carriage as common carriers are, and that class includes shipowners who let their ships under charter." This doctrine, however, failed to win American approval. On the contrary, during the 19th century, there developed in the United States the principle that the chartering of an entire vessel precluded common carrier status. Despite some early dissent, primarily in New York,[233] the American principle became established about the middle of the century.[234] Judge Sprague supported it in 1857[235] and in 1881 Judge Benedict refused to follow the English cases to the contrary.[236] Furthermore, in the course of construing the Harter Act a line of distinction was struck between common carriers and carriers by charterparty or private carriers and the application of the Act restricted to the former.[237] Eventually, when construing the Pomerene Act[238] which only governs "bills of lading issued by any common carrier", it was held[239] that the application of the Act was excluded when the whole ship was chartered, because the ship, in that event, could not be a common carrier.

[231] LR 7 Ex 267.
[232] CARVER-COLINVAUX, *Carriage of Goods by Sea* 10th 8.
[233] *Elliot v Rossell*, 1813, 10 Johns 1, 6 Am Dec 306.
[234] STORY *op cit* 509 §§ 501, 504 and note 1.
[235] *Lamb v Parkman*, 1857, 14 Federal Cases p 1019 no 8020, at 1023 col 2: "By the charterparty the whole ship was let to the defendant, who was to furnish a full cargo, and the owners had no right to take goods for any other person. In no sense were they common carriers, but bailees to transport for hire . . .".
[236] *Bell v Pidgeon*, 1881, 5 Fed Rep 634.
[237] *The G R Crowe*, 1923 AMC 162; 1924 AMC 5, CCA 2; 264 US 586; *The Monarch of Nassau*, 1946 AMC 853. See also *The Fri*, 1907, 154 Fed Rep 333, CCA 2. *Koppers Connecticut Coke Co v James McWilliams Blue Line*, 1937 AMC 719, 89 F 2d 865; but *The Ferncliff*, 1938 AMC 206. — KNAUTH, *Ocean Bills of Lading* 3rd 144 sq.
[238] The Federal Bills of Lading Act, 1916, 39 Stat 538, 49 USCA 81.
[239] *The Robin Gray*, 1933 AMC 770, 65 F 2d 376, 290 US 653, 54 SCt 70.

SUB-CHAPTER 3

# THE COMPLICATED SITUATION

## SECTION 1. FUNCTION OF THE CONTRACT TYPE

Simple situation and complicated situation — use of contract type drafted for simple situation in multiparty situation — symmetrical application — same and *lex inter partes* — same and mandatory law — mandatory law and unity of contract — mandatory law and symmetrical regulation — instrumentality contract and load contract in complicated carriage situation — analysis of complicated carriage situation — examples of such situation — prearranged formulas — search for carrier — regulation of relationship between carrier and third party — carriage formula is uniform feature of solutions advanced — examples of carriage liability formula — solutions of carrier identity problem — solutions of carrier-third party relationship problem — explanations of abundance of variations

The contract type functions at its best when *two* parties agree as to their future conduct. In this *simple situation* it is easy to transcribe the regulation they wish into terms to be implied into a contract. Certain contract types are drafted to function in situations involving three or more parties. The surety and guaranty situations offer examples in this respect.[240] Generally, however, the contract type formula makes no provision for the interests of a third, or for that matter, of a fourth or a fifth etc., party who independently enters the legal relationship. Examples of such entry may be found in successive carriage. Here the shipper is successively faced with new carriers as the shipment proceeds to destination. Multiparty relationships of this type will here be referred to as the *complicated situation,* in contrast to the two-party simple situation.

In the absence of special contract types drafted for complicated situations, lawyers have felt obliged to rely on the contract

[240] In certain respects it may be proper to consider the German *Frachtvertrag* as a structure for a multiparty situation. It is drafted to suit the interests of three parties, carrier, consignor and consignee. It cannot, however, easily be expanded to suit further parties entering the relationship, as can *e. g.* the bill of exchange.

types made for the simple situation. This latter type of structure can be made to work in a multiparty situation by separate application to each contractual relationship involved. Application of a contract type in this situation may be termed symmetrical because, although names, dates, prices etc. change, similar terms are implied in the various contracts between the three or more parties involved. Symmetrical application throughout the multiparty situation is most easily achieved by the reliance on the printed terms of identical standard documents. The attraction of a symmetrical regulation may be considerable, for such regulation normally means that the contractor's situation under the contract law will not change even if his customer chooses to subcontract his part in the affair.[241]

Symmetrical regulation, of course, is quite possible when the applicable contract law pursues no other purpose than to accommodate the parties so as to let them use the instrumentality of the contract to set a law for themselves *(lex inter partes)*. The applicable contract law, however, may have the function of directing the conduct of the parties and thus a mandatory character. This moves the focus of legal observation. The essence of the law no longer is to help the parties to have their way. Indeed, on the contrary, the essence is to consider the contract as a mere symptom of the relations and future conduct of the parties. Under this aspect, of course, it is not relevant which documents have been used, nor under which contract type the parties wish to subsume their agreement. Whether to establish a symmetrical regulation or an asymmetrical one is a question resting entirely with the legislator.

The contract structures of everyday practice, however, do not split according to the division in functions of the contract law. These structures are simple creations which cannot, as a practical matter, move between several plans of law, one for contract as law, another for contract as symptom. To contract drafters these different plans are so closely interrelated by action and reaction of the various facts relevant to and under the contract that the contract must retain a considerable if not perfect unity. What is important to contract drafters is that they are able to strike by

[241] Cf HESSE, *A Paper on the Problems of Liability Arising from Charterparties in Air Law*, (unpublished term paper, 1952, IIAL, Montreal) p 26.

a simple technique the note which brings into play the one uniform regulation which they have anticipated.

When contract law is mandatory, of course, it cannot limit its application to the simple situation. That would too easily open up a road to evade the law, since anyone burdened with a mandatory regulation could rid himself of the burden by merely subcontracting his performance.

Whether the regulation provided by the mandatory contract law in application to the complicated situation will be symmetrical or asymmetrical should depend upon what conduct it wishes to direct and whether this conduct is equally evidenced by all the contracts concluded between the parties to the situation. Differences may exist between the various contracts as to their value as symptom. Often the symmetrical regulation cannot allow for these differences. If it nevertheless is retained, it may merely reflect that the purpose of the mandatory law is furthered by, what Wahl has called "zwischenvertragliches Recht",[242] for instance the well-known direct action.

The least intricate complicated situation in carriage involves three parties. Analysing this situation down to its components, we see that one party will furnish the instrumentality of the carriage, another party will furnish the load for the carriage, and the middleman will combine both undertakings into a profitable operation. The contract between the first party (hereinafter called the supplier of a manned vehicle, or *supplier* for short) and the middleman may be referred to as the *instrumentality contract.* The contract between the middleman and the other party (hereinafter referred to as the *passenger/shipper)* may be referred to as the *load contract.*[243]

The execution of the instrumentality contract is part of the middleman's performance under the load contract. This involves that the supplier may appear as carrier under the instrumentality contract, but as agent under the load contract pursuant

[242] WAHL, *Vertragsansprüche Dritter im französischen Recht unter Vergleichung mit dem deutschen Recht dargestellt, an Hand der Fälle der action directe*, 1935 p 216.

[243] This terminology would seem better to allow for conceptualistic variations than the terminology which was intimated by GRÖNFORS, *Air Charter* 60, but not much used by him, *i. e.*: "The contract of carriage represents the sale and purchase of *transportation of persons or goods*, i. e. an obligation to carry passengers or goods from one place to another. The charter contract relating to a fully equipped airplane represents the sale and purchase of *moving space*, i. e. an obligation to fly the airplane (loaded or not loaded) from one place to another."

to which the middleman assumes the status of carrier.

In this situation there are three distinct relations between the parties concerned, namely: supplier — middleman, middleman — passenger/shipper, and passenger/shipper — supplier. In the most simple structure of the situation, two of these relations are covered by contract. The third relationship, then, is an open relation subject only to the principles of the general law.

The complicated carriage situation may arise in a number of ways. It is known in maritime transportation as the case of the charterer serving separate shippers under sub-charter or under bills of lading. It arose in land transportation when the French *commissionnaires de transport,* a class of special tradesmen, offered their services to the transportation-seeking public, undertaking to perform the carriage either by their own carts and teamsters or by carts and teamsters belonging to others.[244] The situation appeared in railway transportation. After the advent of regular transportation services in the 19th century but prior to the era of railway amalgamations, a shipper of goods or a passenger would frequently have to use the services of several railway companies. In order to establish a connecting transportation line service these companies then entered into inter-carrier agreements under which they undertook to carry-on goods and people presented to them by the other connecting railroad and honour the tickets and waybills issued by this other company. The connecting railroad here was the middleman. In the United States where railway amalgamations have not advanced as far as in Europe, this complicated situation remains a living problem. The complicated situation furthermore arose in the wake of the auxiliary transportation services offered by express companies, freight forwarders, and sleeping and parlour car companies in so far as these enterprises generally relied on railway services. The introduction of regular services on a greater scale in mari-

[244] SAUTEL, *L'histoire du contrat de commission jusqu'au Code de commerce,* in HAMEL, *Le contrat de commission,* 51—52: "Ces opérations étaient souvent dans notre ancien Droit plus complexes qu'elles ne peuvent l'être de nos jours, d'une part à cause de la multiplicité des barrières douanières à l'intérieurs même du territoire national, d'autre part en raison de la longueur et de la difficulté des transports . . . Au point de vue juridique . . . On admet volontiers que les comissionnaires son personnellement responsables de l'exécution des contrats de transport qu'ils passent. . . . Cette solution rigoureuse . . . s'explique . . . par une certaine confusion qui est faite entre le contrat de commission et le contrat de transport: on considère le commissionnaire comme un transporteur principal responsable du fait de ses sous-transporteurs et qui doit rendre la chose en bon état à sa destination finale."

time transportation[245] developed the pattern of the complicated situation parallel to the successive railway carriage. In the absence of any general movement of shipping lines to mergers, the successive carriage problem is one of living law.

As in many other fields of industrialized contracting, there developed in the field of transportation a pattern of simple and uniform regulations under which one would deal with the general public. This regulation could be achieved, either by the creation of a contract type, or by reliance on standardized documents. For the sake of convenience both devices may be referred to in common as instances of *pre-arranged formulas.* These formulas, the most common being for various reasons the documentary formula, were relied upon in complicated situations as well as in the simple more normal situations for which they were framed.

The reliance on a pre-arranged formula of this kind generates as the vital problem in the complicated situation the determination of the identity of the bearer of the essential liability under this formula (herein referred to as the *carriage liability).* The avenue of approach will be to search for the *carrier,* rather than to try to subsume the contracts under contract types. Which, as between the supplier and the middleman, is the carrier? If the formula based liability on promise, as did the bill of lading, which was the promisor to carry? If the formula was the aggregate of the rules for a relation such as the common carriage relation, which was the common carrier in the relation?

Assuming that the carrier identity problem could be solved, there remained the further problem of which rules to apply to the remaining relations between the parties. Was a symmetrical regulation to be achieved by application of the formula to the relation between the carrier and the third party as well, or an asymmetrical regulation by resort to some other contract type, or further should only the express terms of the contract involved prevail, leaving the relation without any constructive regulation? Should a contractual relationship be considered to exist between all parties involved in the situation, or only between those having

[245] The first regular transatlantic services were inaugurated by the Black Ball Line in 1816, but such services had existed on smaller runs long before the 19th century. Between Ystad and Stralsund, important points in the 17th century Swedish realm, regular sea transportation had been offered since the inauguration of the Swedish Mail services during the Thirty Years' War.

orally agreed to one and same contract or signed one and same contract document?

The adoption of a pre-arranged formula conferring rights and duties upon the passenger/shipper has been the only uniform feature of all solutions advanced for the complicated carriage situation. As to the identity of the carrier in the sense of the bearer of the carriage liability and as to the regulation of the relation between this bearer and the third party, solutions diverge to such an extent that no single workable principle can be detracted. The regulation of the relation between this third party and the passenger/shipper is a matter of the dichotomy of contract and tort law and will be treated separately.

The carriage formula appears in the shape of a basic carriage document issued to the public,[246] whether or not supplemented by a statutory contract type. This is the case, for instance, in the uniform waybill established pursuant to the Berne Convention,[247] the through bill of lading in maritime successive carriage as well as its simple counterpart in maritime charter carriage,[248] the through bill of lading in American successive railway carriage, and the house bills of lading appearing in European groupage operations.

Solutions as to the carrier identity problem range from the joint and several liability schemes which were imposed upon all participants in favour of the passenger/shipper by the *Transport-*

[246] When the requirement of a basic uniform waybill was introduced into the first Swedish Traffic Regimentation Decree (1862 SFS No 21 § 32) the drafter submitted: "Daily experience substantiates the need to require the use of certain waybill formulas for railway carriage." H. Ericson, Memorial 25 Mar 1861.

[247] Convention Internationale sur le Transport de Marchandises par Chemin de fer, 14 Oct 1890. The Convention was made in French and German; both languages are equal: GERSTNER, *Internationales Eisenbahn-Frachtrecht*, Berlin 1893 p 35. The German preponderance during the preparatory works, however, was indeed considerable. BRUNET, DURAND & DE FOURCAULD, *Les Transports Internationaux*, Paris 1927 p 2 no 4, submit: "La Convention primitive, au lendemain de l'unification de l'empire allemand, répondait à une préoccupation surtout politique: faire des règlements allemands relatifs aux transports ferroviaires l'équivalent terrestre des textes anglais en matière maritime."

[248] Certain complications arise under the Hague Rules. SCRUTTON 16th 469: "Art. II provides that the Rules shall apply '*under every contract of carriage.*' But by Art. I (b) '*contract of carriage*' is confined to contracts under bills of lading from the time the bills of lading regulate the relations of the parties. There is, therefore, no contract of carriage to which the Rules apply so long as the bill of lading is held by the charterer, and during that period presumably a bill of lading exempting the shipowner from all liability whatsoever is not subject to the Rules."

*gemeinschaft* which was created by the Berne Convention,[249] by the *societas* notion which preceded it in German railway transportation[250] and the partnership arrangement, which appears in Anglosaxon inter-carrier relationship;[251] through the burdening of the supplier of the manned vehicle, a scheme which has appeared in maritime charter carriage[252] and in American successive

[249] GERSTNER, *Internationales Eisenbahn-Frachtrecht* 1893 p 98, compare p 317: "Hiernach haftet jede der auf Grund des direkten Frachtbriefes mit dem Transport befassten Bahnen für dessen ganze Ausführung, sowohl auf ihrer eigenen Strecke, als auf den übrigen, am Transporte betheiligten Eisenbahnen. Jede dieser Bahnen haftet dem Publikum gegenüber in gleicher Weise für ihre eigenen Handlungen, wie für diejenigen der übrigen betheiligten Bahnen." RUNDNAGEL, *Die Haftung der Eisenbahn*, 3rd & 4th Leipzig 1924 p 177—178.

[250] The various German private and government railways formed in 1847 the Verein deutscher Eisenbahnverwaltungen, and joined to draft a *Normativ-Reglement* to be applied in all traffic. The first to appear was adopted by the General Conferences of the Verein in Frankfurt am Main on July 21—22, 1856, called Vereins-Reglement für den Güterverkehr, effective 1 Dec 1856 (reprinted in BESCHORNER 246—260), followed by a similar Reglement for passenger traffic, effective 1 Jul 1859. See HILLIG, *Das Frachtgeschäft der Eisenbahnen* 6—7 § 3. Under these agreements the carriage regulations were made uniform and the relations between the railways engaged in carrying the connecting traffic were agreed upon. § 1 of this GüterReglement read: "Auf Grund dieses Reglements werden von den vereinigten Eisenbahnverwaltungen Güter von und nach allen für den direkten Vereins-Güter-verkehr bestimmten Stationen übernommen . . . Behufs des Ueberganges der Güter von einer Bahn auf eine andere bedarf es keiner Vermittelung des Absenders oder Empfängers. . . ." This provision was taken by certain courts and writers (see HILLIG 16) to render the railways *socii*. For further discussion, see HILLIG 14—19.

[251] English and American courts have sometimes been able to arrive at joint, or joint and several, liability, by considering the railways' inter-carrier relationship as one of partnership. Under partnership law each of the partners is liable without limit for all the debts and obligations of the business, and the existence of such a partnership may be inferred from the mere fact of receipt by a person of a share of the profits of the business. This inference is not necessarily wrecked by a declaration, written or not, by the carriers that they shall not be deemed partners. See *Pawsey v Armstrong*, 1881, 18 Ch 698; GELDART-HOLDSWORTH-HANBURY, *Elements of English Law* 4th 87; FRENCH, *Partnership Law* 6th 19—34; 13 CJS 927—928 § 424. Where a partnership relation exists, as for instance under a partnership arrangement for through freights, each carrier is liable for breach of the duty of carrier by any one of them in the course of the carriage, and a suit for the loss may be brought against any one of them; and this is so even though the general management is retained by the respective companies: see 13 CJS 934 § 428.

[252] In the English maritime law, having emerged as something distinct from the general maritime law, the first case in point was *Parish v Crawford* of 1745 (reported in Abbott). In this case it was held that the shipper under a bill of lading could recover against the owners of the ship although the ship was chartered for the voyage. Later cases deviated from this holding (see note 254), but when the isolated English cases were related by the 19th century writers to the doctrines which had been laid down by the Continental jurists, *Parish v Crawford* was brought back to govern. In 1867, SHEE found reassurance of its correctness in the writings of Valin and in the Digests, see ABBOTT, 11th 36 note e. About the middle of the 19th century there was a tide in favour of holding the owner liable rather than the charterer, see MACLACHLAN 5th 376. The same principle was enacted as § 662 of the German HGB of 1897; and was laid down by the Norwegian Supreme Court in *Vestlandske Lloyd v Meyer*, 1903 4 NDS 331, to be followed in Scandinavian maritime

railway carriage;[253] down to the burdening of the middleman with this carriage liability, as was usual in early English maritime charter carriage[254] and successive railway carriage,[255] as well as in German and Scandinavian maritime successive carriage,[256] and in the American law of common carriage as applied to freight forwarders and express companies.[257]

Solutions to the problem of regulation between the bearer of

law generally, see KNOPH, *Norsk Sjørett* 274; GRUNDTVIG, *Kort fremstilling af den danske Søret* 1922 p 144; SCHMIDT, *Föreläsningar i sjörätt* 125.

[253] 13 CJS 924 § 424-2: "It is very generally held in the United States that the fact that the initial carrier makes a contract of through shipment with the shipper will not prevent the shipper from suing a connecting carrier for loss or injury sustained on its own line, its liability being fixed by the applicable valid terms of the original bill; and except in a few cases, most of which have been overruled or disapproved, the rule laid down by the courts of England and Canada that, where the initial carrier has made such a contract there can be no recovery for loss or injury as against any but the initial carrier . . . has never obtained any foothold in this country . . ."

[254] From *James v Jones*, decided in 1799, to *Newberry v Colvin*, decided by the House of Lords in 1832, the cases indicated an inclination to hold the charterer liable rather than the owner. In *James v Jones* (3 Espinasse's Nisi Prius Cases 27) the shipper under a bill of lading was non-suited when he sued the owners of a ship under charter. Probably this was a reflection of some marine insurance cases which had permitted the charterer to recover on policies for losses due to barratry in which the owners were involved: *Vallejo v Wheeler*, 1774, 1 Cowp 154; and *Soares v Thornton*, 1817, 7 Taunt 627, In *Hutton v Bragg*, 1816, the doctrine was carried further, inasmuch as is was there held that the charterer was in possession of the ship and that, accordingly, the charterer having his own cargo on board a ship that was his own in this possessory sense, the general owner could have no lien on the charterer's cargo; 7 Taunt 14. This holding caused some alarm in shipping quarters (ABBOT 11th 244) and in 1819, Lord Tenterden indicated it to be "an act of imprudence on the part of a shipowner to enter into a contract which may have the effect of employing his ship for a long time, and at a great expense to himself without any remuneration, if the person with whom he contracts should happen to fail before the termination of the voyage." (*Saville v Campion*, 2 B & Ald 503). The support of Lord Ellenborough in *Master of Trinity House v Clark*, 4 M & S 288, in which the Crown had chartered a vessel and the vessel thereupon was held exempt as a Crown ship from certain lighthouse dues, helped to keep the doctrine alive; but the House of Lords decision in *Newberry v Colvin*, 7 Bing 190, could not prevail against the fact that shipowners no longer wanted to be imprudent when giving their ships to people under charter.

[255] Under the English doctrine, the first carrier's acceptance of goods for carriage to a point beyond its own terminus was a prima facie evidence of an undertaking to carry the goods beyond that terminus: LEVY, 1951 51 Col LRev 855. Cf note 253 supra. Similarly ADHGB § 401, compared with § 400: HILLIG 39 § 15.

[256] SCHMIDT, *Föreläsningar i sjörätt* 126—127; *Huvudlinjer i svensk frakträtt* 117—119.

[257] The common law doctrine was to the effect that a common carrier's liability was restricted to loss or damage on his own line; see 13 CJS 893 § 406. The first American case in point, *Nutting v Conn River Rr*, 67 Mass 502, accordingly held that in the absence of special contract, a carrier receiving goods consigned to a place beyond his terminus and payment only covering their transportation over his own lines, was not liable for any losses incurred after delivery of the goods to the connecting railroad. Similarly, in *Hersfield v Adams*, NY 1855, 19 Barb 577, it was declared that control was essential for common carrier status, and that only such person as owned or controlled the transportation vehicle could be a common carrier. With the growing importance of connecting railroads, express companies, freight forwarders, and parlour- and sleeping-car companies, the rule changed, and

liability and the third party diverge no less than those to the carrier identity problem. The regulation may follow the principles of special contract types. In Continental and Scandinavian maritime charter carriage, for instance, the time or voyage charter contract figures are relied upon;[258] in freight forwarding the commission contract is used in the same way.[259] At times, there have developed principles establishing a symmetrical regulation. In American railway law, for instance, inter-carrier relationships involving railways and freight forwarders have been considered as tariff relationships rather than as contractual relationships outside the application of the tariff.[260]

Considering the abundance of variations outside the carriage formula, the explanation would seem to be found in two different directions. On the one hand, it would seem that the balance of interests between the parties is not very stereotyped, and that they therefore prefer themselves to have variable relationships. On the other hand, it appears that the ample evidence of asymmetrical regulations must reflect the fact that a symmetrical regulation cannot allow sufficiently for those aspects of the regulation which attach to parts of the carriage formula having mandatory character.

### SECTION 2. DICHOTOMY OF CONTRACT AND TORT

> The open relationship in the complicated situation — tort rules — relationship between tort and contract — industrialized contracting — reluctance to upset balance arrived at by industralized contracting — example

Having reviewed the important contractual relationships in the complicated situation, it remains to consider the regulation of the remaining open relationship, that between the passenger/shipper and the third party who is not bearer of the carriage

the majority of later cases united in holding to the contrary that such control was not essential for common carrier status: see AHEARN, *Freight Forwarders and Common Carriage,* 1946 15 Fordham LRev 248—267, at 259. As to parlour- and sleeping-car companies, see DOBIE 309 and note 54, and PATON 198 and note 16.

[258] See *supra* pages. 161.

[259] The commission contract was conceived as a commercialized variation of the Roman *mandatum.* It involved agency.

[260] In successive carriage the relationship between the initial and the second carrier can be based either on tariff or on contract. Under the tariff regulation, the first carrier assumed the status of shipper as against the second carrier. See AHEARN *op cit* 267. When dealing with the express companies, the railroads accepted a contract relation as the basis of arrangements pursuant to the *Express Cases,* 1885, 117 US 1. See AHEARN 265—267, DOBIE 323. When the freight forwarders entered the field of railway carriage, some railways would argue that their common carrier duty to carry only extended to owners of goods, and refused to serve the

liability. In this relationship, the regulation depends on the interrelationship between the two liability bases generally recognized, *i.e.* tort and contract.

The tort rules here are the important ones because they are characterized as the rules which apply in the absence of applicable contract rules, and the third relationship presumably is one not covered by contract. However, it is precisely this quality of tort rule application that is open to doubt, owing to the expansion of the contract rules in modern life. It has become an accepted, if not an openly endorsed, feature of modern life that industrial enterprise needs liberty to decide itself, to a great extent, the legal setting in which it will serve the community. By standardizing its contracts with its customers, so that only certain terms are offered, and refusing to deal on any other terms, the industrial enterprise lays down rules for its relationships with the customers in a way which is quite similar, if not equal, to the use of delegated legislative powers. This use of contract has been particularly dominant in the field of carriage, and inter-carrier associations drafting uniform conditions of contract often bear a striking resemblance to legislative bodies at work. Governments have felt the necessity to tolerate this development, and have sometimes gone so far as to subject the terms of such contracts to governmental approval.

This novel use of contract has reacted upon the setting of tort and contract rules. Realization that the regulations introduced by means of industrialized contracts serve as a means of subordinate legislation has brought with it a general reluctance heavily to upset the balances established by such contracting schemes. This has meant more favour for the contract rules than for the tort rules and a dislike of the latter upsetting the former. Perhaps the most famous enunciation of this inclination was the reasoning of Lord Justice Scrutton in *Elder Dempster v. Paterson Zochonis*.[261] As restated by Paton[262] it read: "Any other decision would have had the fantastic result that the shipper could nullify the exceptions of the bill of lading by suing the owner instead of the charterer."

forwarders on the basis of the railway tariffs. This argument, however, was quashed by the United States Supreme Court in *ICC v Delaware, Lackwanna & Western Rrd*, 1910, 220 US 235. See AHEARN *op cit* 261 note 50. See further *supra* pages 93 sq, for the situation in aviation.

[261] 1923 1 KB 420, at 441. Before the House of Lords: 1924 AC 522.

[262] PATON 41.

SUB-CHAPTER 4

# AIR CHARTER CONTRACTS

## SECTION 1. NECESSITY OF CONSTRUCTION

### § 1. *The Citeja discussion revisited*

A typically Continental legal discussion — system of interlocking concepts — contract of carriage in the Warsaw Convention — the broad conceptualism — the roots of the arguments — propriety of discussion — contract of carriage not only a notion of the Warsaw Convention but one of the general Continental law — failures of inductive construction — *Junkers Case* of 1926 — *Zone Case* of 1959 — back to deductive construction

After having dealt at such length with the history of certain legal concepts and the general law of carriage, it may now be easier to appreciate the Citeja discussion about the legal nature of the air charter contract.

This was a typically Continental legal discussion, seeking to project the new phenomenon of air charter onto the established system of interlocking concepts, principles and rules which should form a complete network of private law.[263] The evident reason for the discussion was the meaning of "contract of carriage" in the Warsaw Convention within the context of the much broader aspects of the general Continental conceptualism.

The roots of some of the arguments advanced in that discussion are now evident. Both the *location totius rei* as one category and the *part charter* as another category have had counterparts in 19th century elaborations of the maritime contract of affreightment. The American introduction of the *Glose Case* dialogue was a sidetrack in this discussion, being merely a description of an attempt to introduce into American aviation law the maritime doctrine

[263] LAWSON, *A Common Lawyer Looks at the Civil Law*, Ann Arbor 1953 p 53: "The German Code . . . aimed at a complete statement of the law in terms of interlocking concepts, principles, and rules . . . The intention of the compilers was that every problem of civil law that came within its scope should be capable of solution by applying it, that it should provide the practitioner with all the tools he would need. They might not give him an immediate answer to all the questions he might put . . . but he should, by combining the use of the various tools, be able to work out the answer to any problem."

of a charter contract as excluding the common carriage relation.[264]

Is it then proper to indulge in this exercise in legal construction? The first and main reason for such construction, of course, is the fact that the Warsaw Convention itself uses a product of such construction, *i.e.* the contract of carriage. Continental lawyers, being inclined to view the law as a coherent system, are likely to hold that the meaning of the Conventional terms should be decided in the context of general law. Furthermore, to abstain from deductive construction is thought to be unsatisfactory under the Continental view as then should remain only inductive construction of implied terms, the failure of which might result in no law other than such as the parties may have introduced by the express terms of their contract. And, in fact, as regards inductive construction, the necessary evolution of practice into implied terms has been severely delayed. The possibility of implying terms into a charter contract as a matter of the custom of the trade was considered in the case *Junkers-Luftverkehr AG v. Verein Luftverkehr Halberstadt*[265] in 1926, but the possibility was rejected. This same issue was considered in the case *Zone Redningskorpset v. Transair Sweden*[267] in 1959, but again the result was negative.[268] Both cases were decided by a close interpretation of the express terms of the contracts concerned.

Deductive construction, on the other hand, in the closely knit net of Continental conceptualism, generates a great many implied terms and provides a great many rules which ostensibly confer stability and certainty upon the chartering business. A few examples will be illustrative.

[264] The Convention anyway applies to both private and common carriers. See art 33 and 4 WILLISTON 2d 2987 § 1072 note 16 *in fine*.
[265] 1 ZLR 224, 1931 2 JAL 426.
[267] 1961 USAvR 212; 1 Ark f L 264.
[268] In the *Junkers Case* the question was raised whether the charterer was entitled to embark passengers on the ferry flight of the aircraft to the airfield where it was to make demonstration flights. — In the *Zone Case* the dispute concerned whether the charter price, in the absence of special agreement, was to be paid on a trip or time basis.

## § 2. *Exercise in deductive construction*

Lease construction — damage to cargo — aircraft unserviceable — original and subsequent defects in airworthiness — original and subsequent defects in airworthiness — contract of carriage construction — demurrage payment — implications of possession — vicarious liability — aircraft lost through negligence of crew — conflicts of law aspect — "Erfüllungs"-theory

If a charter is considered as essentially a lease contract, the following consequences follow under German law: The lessor of the aircraft is not liable in the case of damage to the cargo. Should the aircraft be unserviceable for some time, the owner of the aircraft will be liable to the charterer for breach of contract and have to compensate the latter for his expenses due to the interruption of services — for instance conveying the cargo in a substitute aircraft. This duty will not be affected by an off-hire clause, since such a clause only refers to the payment of hire and not to damages. The duty of the owner to provide an airworthy vessel continues throughout the whole period of the contract and there can be no reason to distinguish between original and subsequent defects in this respect.[269] Under French law, it has been pointed out that considering the charter as a contract of carriage means that demurrage payments are equivalent to payments of additional freight; it therefore follows that if no freight has been earned, additional freight cannot be due.[270] Furthermore, the possession of the aircraft moves between the parties according to the selection of the contract type (although perhaps it is equally true that selection of the contract type follows the true possession of the object of the contract).[271] There are important legal consequences attached to possession, such as the placing of vicarious liability. Assuming that the aircraft is lost owing to the negligence of the crew, then, if the aircraft was in the possession of the owner he may be liable to compensate the charterer for damage caused by the loss or, if the aircraft was in the possession of the charterer, he may be similarly liable towards the owner for the loss. This phenomenon, which may be termed the *hull risk,* is governed by the selection of the contract type.

[269] The consequences are an adaption of what is believed to be the law in maritime carriage. See WÜRDINGER, 1957 MDR 258 col 2.

[270] DE JUGLART, *Traité élementaire de droit aérien*, Paris 1952 p 300 no 251.

[271] The relationship between "entreprise" and "possession" is reviewed by BRUGEILLES, *Essai sur la nature juridique de l'entreprise*, 1912 11 Rev trim dr civ 111—130, in particular 124—129, in order to support the author's ideas "comment la notion d'entreprise opère la synthèse entre les droits réels et les droits de créance" (at 126).

The contract of carriage is characterized by possession remaining with the owner, with possession not only governing the hull risk but also tort liability against third parties; the lease is characterized by possession moving to the charterer.[272] Indeed, generally speaking, the rules relating to the cancellation of contracts,[273] the right to subcontract the performance under the contract,[274] the hull risk, and the vicarious liability,[275] all may vary greatly between different contract types.

The selection of the contract type may be important from the point of view of conflicts of law as well. Under the Savigny "Erfüllungs"-theory, the performance — "Erfüllung" — was the essence of the contract and the performance being localized to one place the whole contract should be considered so localized.[276] Now, the essential non-pecuniary performance involved in a lease is the transfer of the chattel to the hands of the lessee. But a contract of carriage is believed to centre on the delivery of the person or cargo transported to its destination. As a result, the former contract is localized to the point of delivery of the aircraft but the latter to the point of destination.[277]

[272] See in relation to motor trucks, *e. g. Thiéry v Cooperation pharmaceutique française,* Nancy 23 Dec 1959, 1960 Dalloz Jurisprudence 563; and see also RODIÈRE's note to this decision, at 564, where he summarizes generally the effects of the deductive construction. Compare as to maritime charters JANSSEN 89.

[273] This subject will be treated in more detail in Chapter 5.

[274] CHAUVEAU, *Droit aérien,* Paris 1951 pp 234—235 nris 458—459, asserts that, under French law, the charterer should have the right to sub-contract "par un contrat de sous-location ou sous-affrètement" whether the charter contract should "s'analyser en un simple louage de chose accompagné d'un louage de service, ou en un contrat d'entreprise".

[275] The aspects of tort liability will be treated in Chapter 4 in so far as they affect passengers or goods carried in the aircraft.

[276] SAVIGNY, *System des heutigen römischen Rechts,* 1849 §§ 369, 372. The principle of *lex loci solutionis* has numbered many and distinguished adherents in Germany: DERNBURG, 1 *Das bürgerliche Recht des deutschen Reichs und Preussens — Die allgemeinen Lehren,* 3rd Halle 1906 § 40—III; STAUB, *Kommentar zum Handelsgesetzbuch* 12th—13th Berlin & Leipzig 1926—27, Anhang zu § 372 A 5, 7—11 b; more literature in VON BAR, *Theorie und Praxis des internationalen Privatrechts* 2d Hannover 1889 § 249 note 9. It appears still to prevail. For leading cases on contracts of carriage, see *W v Deutsch-Ostafrik. Bank,* 107 RGZ 121; *The Stettiner Greif,* 6 BGHZ 127. See also ACHTNICH, 1952 1 ZfL 333—335. But *contra,* see RAAPE, *Internationales Privatrecht* 4th 1955 p 448—452; RIESE, *Luftrecht* 396, and 1958 7 ZfL 280.

[277] See FRESE, *Fragen des Internationalen Privatrechts der Luftfahrt,* diss Köln 1940 p 32—34.

SECTION 2. DEDUCTIVE CONSTRUCTION

## § 1. *The early problems*

Rules of absolute tort liability — the problem and the alternatives of solving it — place for deductive construction — requirement that one of the parties be selected as liable — establishment of intermediary concepts — British views — importance of appointing the crew

Commercial aviation sprang up overnight. It burst upon governments, offering new advantages, demanding new rights, and carrying new threats. Suddenly it used the term "charter" to designate a variety of contracts related to flying. Some of these, such as the chartering of an aircraft engine, were easily assimilated into the classic contract categories. The charter of an aircraft with crew, however, presented problems. At first the main problem was the placement of the vicarious tort liability. Legislatures which had adopted one or another rule of absolute liability faced the important problem of whether this liability should move between the parties, or be assumed jointly. Moving the liability introduced an element of uncertainty as to the identity of the party liable[278] and required supplementary systems to fix this identity, *e.g.* by immatriculation.[279] Joint liability, on the other hand, involved other drawbacks, such as double insurance[280] and the undermining of the effectiveness of the contract as a device of subordinate legislation.[281]

In this situation, there was but slight interest in deductive construction. The tort liability rule provided no basis for construction unless it indicated one of the parties to the contract as the bearer of liability. The writers reverted to the principles and arguments of the maritime discussion, at that time animated: if a charter contract was a lease, the lessee was burdened with the tort liability; if a contract of carriage, the carrier was so burdened. Thus, by looking at whom was burdened, one could conclude as to the type of the contract. But if none or both of the parties were liable, the contract type structure was of no avail. The various legal systems took different courses. Swedish law was content to stipulate joint liability in cases when, under the

[278] Cf LeGoff, *Traité théorique et pratique de droit aérien*, Paris 1934 p 202 no 385.
[279] LeGoff *op cit* 202 no 386.
[280] Le Bourhis, *Des obligations et de la responsabilité des compagnies de navigation aérienne dans le transport de personnes*, thèse Paris 1929 p 70.
[281] Ripert, 1921 17 Bull Sté d'Et Legisl 286 and note 2.

contract, the charterer was entitled to appoint the pilot or commander, or when he, without being so entitled, did nevertheless appoint the pilot or commander.[282] The Norwegian and the German law both established intermediary concepts, "the person on whose account the ship is used"[283] and "holder" (*Halter*) of the aircraft,[284] respectively, and attached the tort liability thereto, thus detaching liability from the systematics of contract. Under the original Danish law[285] the owner and the user were both liable, leaving the choice of defendant to the plaintiff, but this scheme was later abolished in order to make the Danish Act conform more closely to the Norwegian statute.[286]

The early British views, for natural reasons, were remote from contract type terminology.[287] Early English regulation transferred the liability to the charterer provided two conditions were satisfied: first, that the contract ran for a period exceeding 14 days; secondly, that no pilot, commander, navigator, or operative member of the crew be in the employment of the owner.[288]

[282] Aviation Accidents Act, 1922, § 4.
[283] Air Traffic Act, 1923, § 37.
[284] Air Traffic Act, 1922, § 19. As to *Halter*, see page 328 *infra*.
[285] Act 4 Oct 1919 no 558 concerning the use of aircraft, § 20.
[286] See 1922-23 75 Rigsdagstidende, Tillægg A II col 3702—3703. — The Scandinavian States had drafted their first aviation statutes in common. The pan-Scandinavian 1920 draft placed the liability on "him for whose account the ship was used", to speak arrestingly, the operator. On its way to parliamentary endorsement, however, it was subjected to several changes. The only country to retain the original idea of the operator's being burdened with the liability was Norway. Denmark modified the definition of the operator towards ownership: "the owner, or the one on whose account the aircraft is used, respectively". See Danish Air Traffic Act, 1923, § 36. Sweden outright left the path of burdening a defined operator and preferred to place the liability on the owner, making co-responsible such lessee of an aircraft as was entitled to appoint the pilot or commander, or did it without being so entitled. The statutory obligations being divided between owner and operator, the Norwegians felt that it should be left to owner and operator, when not identical, to agree freely upon the ultimate distribution between themselves of expenditure arising under their agreement. Indeed, it was expressly indicated that the need for legal rules in the matter should be filled by analogous application of the rules relative to the equivalent relations in maritime, and, to some extent, railway law. See 1923 Ot prp nr 44 p 5 col 1. The Swedish view, on the other hand, was adverse to the creation of charter contracts. The government bill being circulated for comment in the customary Swedish manner, the Air Traffic Committee observed that it would be "inappropriate that the owner of an aircraft could divest himself of his liability by allowing his undertaking to be operated by some other person". The Committee therefore proposed that "liability, in all cases be placed upon the owner of the aircraft", and in the final government bill the system was changed to follow closely the scheme of motor car liability. See 1922 NJA II 310 sq.
[287] Air Navigation Act, 1920, sec 9 referred to the contract merely by the sequence: "bona fide demised, let, or hired out". The first writer to pay special attention to chartering, McNair, *The Law of the Air*, London 1932 chapter 9, was concerned only with whether a demise existed or not, *i. e.* bailment law.
[288] Air Navigation Act, 1920, sec 9. Note McNair's statement, *op cit* 153, that the

Thus, the employment or appointment of members of the aircraft crew was established as the demarcation line for affixing tort liability. But this feature followed the pattern of contract types only inasmuch as the *conductor operis* could not be under the command of the *locator operis*.[289] This accepted feature of the Continental contract for work distinguishing the contract from neighbouring contract types, alone could not establish any classification.

## § 2. *The French "location"*

French entry upon the path of deductive construction — Ripert — Air Navigation Act of 1924 — *location* — two assumptions underlying the French air charter contract

The only lawyers decisively committed to upon the path of deductive construction were the French. This was not unnatural since they employed as drafter of the first comprehensive air legislation a jurist whose interest in these matters was known.[290] The French Air Navigation Act of 1924 was largely inspired by the 1921 work of Ripert as the Rapporteur to the Société d'Etudes Législatives.[291] In the chapter on air transportation, Ripert's point of departure was the "contrat de transport" which contract he felt should be characterized: "Ce problème n'est pas spécial au droit aérien, mais il se posera certainement et comme, faute de règle précise, il est difficile à résoudre, mieux vaut donner une solution légale."[292] Having the air taxi contract in mind — so important in 1921 when few airlines were firmly established — and mindful of its relation to the maritime time charter, Ripert proceeded: "La personne qui loue un aéronef pour la transporter à un endroit déterminé conclut un contrat de transport, malgré la dénomination de louage donnée à ce contrat et alors même qu'elle aurait

tendency of the time (1932) was for agreements for the hiring or chartering of aircraft to take the form of a demise, "special provisions as to personnel being incorporated if the charterer does not operate the aircraft by means of his own personnel".

[289] *Supra* page 157 and note 103.

[290] *Supra* page 158.

[291] LEMOINE, *Traité de droit aérien*, Paris 1947 p 69 no 108. There had been a prior governmental bill on aviation legislation in 1921 which had been voted on in the Chambre des Députés on 29 June but that bill had not dealt with air transportation, so the work of Ripert on "Transports par air" was truly original. Ripert's report will be found in 1921 17 Bull Sté d'Et Législ 261—291.

[292] 1921 17 Bull Sté d'Et Législ 281.

le choix de l'itinéraire et l'option du point d'arrivée."[293] The owner thus having "la maîtrise de l'appareil", consisting of the right of direction with regard to pilot and crew, Ripert felt that "l'exploitation" remained with the owner, and that, hence, "le contrat était en principe un simple contrat de transport".[294]

The resulting regulation by the French Air Navigation Act[295] superficially conformed to the idea of the charter contract being a lease. The contract is designated "location" in the chapter headline and certain features of the contract resemble the lease situation, such as the delivery of the aircraft and the owner's warranty as to the concealed defects of the aircraft.[296] In two respects, however, the governing notion of the contract of carriage can be seen. First, unless otherwise agreed, pilot and crew remain under the orders of the owner-lessor.[297] Secondly, the lessor is charged with all statutory obligations relating to the aircraft, although liability in the event of violation is conferred upon the lessee as well.[298] There is an evident relation between these rules. Since the lessor is liable it is only equitable that he should exercise the "direction" of the aircraft;[299] and the regulation warrants this conclusion as to the construction of the contract: "Si c'est le

[293] *Ibidem.*

[294] *Ibid.* The "contrat de transport" being so characterized, there remained the case of an aircraft being taken on charter in such a way that the charterer "en prend la direction complète". Ripert wanted to take care of this situation as well because of the opportunity of the charterer and the owner to circumvent the regulation relative to the nationality of the aircraft (*op cit* at p 282) — possibly the charter agreement was felt to provide a device for voiding ownership of its contents as to aircraft — and consequently Ripert proposed that the owner remain burdened with his "obligations légales" in joint and several liability with the charterer. — Furthermore, Ripert previewed that "la location d'un aéronef peut être consentie par une compagnie de navigation qui n'utilise pas tous ses appareils à un autre exploitant qui peut temporairement les utiliser": *ibidem.* Here, Ripert wanted to provide some means by which the airlines concerned could "séparer leurs obligations et leur responsabilité" (*op cit* at p 282). To that end he proposed that the placing of the charter contract on record should shift the burden of being considered "l'exploitant" of the aircraft to the charterer. *Ibidem.*

[295] The text will suffice to show the error of STAEHELIN when he asserts that the French Act "keine Regelung des Chartervertrages enthält"; *Der Chartervertrag,* in *Einführungskurs ins Luftrecht,* Zürich 1959 p 90.

[296] LE BOURHIS *op cit* 68.

[297] Art 49: "Au cas de location d'un aéronef pour plusieurs voyages successifs ou pour une durée déterminée, le commandant, le pilote et l'équipage restent, sauf convention contraire, sous la direction du propriétaire de l'appareil." Text re-enacted as art 125 CAvi.

[298] Art 50-1: "Le propriétaire de l'aéronef loué à un tiers reste tenu des obligations légales et est solidairement responsable avec le locataire de leur violation." Text re-enacted as art 126 CAvi.

[299] LE BOURHIS *op cit* 68; Cf CONSTANTINOFF, *Le droit aérien français et étranger,* Paris 1932 p 72.

propriétaire de l'appareil qui en garde la direction, ce n'est plus qu'un simple contrat de transport; . . .[300]

Ripert had indicated in his report that the air charter contract was equivalent to a maritime time charter when the former was for a series of flights or ran for a certain period of time.[301] This proposition was made the basis of subsequent enunciations in French legal scholarship of the principles relative to the "location" of an aircraft. The view was consistently adhered to that this contract was equivalent to a maritime time charter, and that the time charter was a contract of carriage.[302] Of course, if a time charter in Ripert's sense was a contract of carriage, the same construction must apply to all kinds of voyage charters. Consequently, the French charter contract was considered to be a

[300] LeGoff *op cit* 202 no 385. Under art 50-2 of the Act, however, by having the charter contract immatriculated as proposed by Ripert, see note 294 *supra in fine*, the parties could eliminate the liability of the owner in consideration of which he had received the right to direct the commander and crew. Leases of aircraft with crew were accepted for immatriculation as well as leases without crew: information received at SGACC, Paris (Charpentier interview), see also Hürzeler, *Probleme des Chartervertrags nach Luftrecht*, diss Zürich 1948 p 6.

[301] 1921 17 Bull Sté d'Et Législ 281. Note that the French "location" only related to several successive flights or to a fixed period of time: art 49, in note 297 *supra*.

[302] Tissot, *De la responsabilité en matière de navigation aérienne*, thèse Paris 1925 p 151: "Ce contrat, plus évidemment encore que le time-charter du droit maritime, est un contrat de transport, puisque la gestion commerciale et la gestion nautique sont entre les mains du propriétaire de l'aéronef." Le Bourhis *op cit* 67; LeGoff *op cit* 202 no 385; Hamel, *La loi du 1er juin 1924 sur la navigation aérienne*, 1925 Annales de droit commercial 196; cf Perraud-Charmantier, *Petit dictionnaire de droit*, Paris 1957 *verbo* "Affrètement". Se also Hirschberg, *Luftfahrtrecht*, in Schlegelberger's *Handwörterbuch* 290—309, and Balogh 285. — In 1932 Constantinoff directed an attack on the very foundation of this construction of the French air charter contract, *viz.* that the owner continues to give orders to the crew. Constantinoff characterizes this interpretation of the owner's position under the contract as absurd and recommends that at least it should be met by clauses in the contract "plaçant le personnel sous l'autorité du seul locataire". See Constantinoff *op cit* 72. He furthermore points out that the liability of the owner is placed on weak foundations. "Ces stipulations de la loi ne s'expliquent guère. On ne voit pas en quoi le fait que la location a été inscrite au registre pourrait exonérer le propriétaire vis-à-vis des tiers . . . Comment et pourqoui la personne se trouvant sur la surface et victime d'un accident aurait-elle consulté le registre et examiné l'immatriculation de l'aéronef auteur de l'accident? N'aurait-il pas été beaucoup plus logique de laisser entièrement de côté le propriétaire de l'aéronef loué puisque celui-ci se trouve désormais sous la garde juridique du locataire?" *Ibidem* — Constantinoff's criticism probably takes inadequate account of the suspicions of the legislature that the charter contract might serve to circumvent the whole system of the Air Navigation Act, and that the Act was created in an atmosphere of nationalism, protectionism and Germanophobia. Furthermore, his criticism loses much of its point when it turns out that in practice "la garde juridique" very seldom moved to the charterer and that the way of immatriculation hardly ever was used. The Direction des transports aériens of the Ministère des travaux publics, des transports et du tourisme advises me by letter (3895 DTA/I (SGACC)) of 21 Sep 1960 that during the years 1933—1934—1935 the number of immatriculations of charters totalled 4.

contract of carriage, and it appears that this construction was held to prevail even if the parties had eliminated the owner's liability as the basis of the construction, as they were free to do pursuant to articles 50-2 and 55-2 second paragraph by way of having the charter agreement immatriculated. Probably the only requirement was that the owner of the aircraft "en garde la direction".[303]

## § 3. *The German "Chartervertrag"*

The *Halter* system — guidance of maritime law — the two maritime contract categories — *Ausrüster-Vertrag* — the *Charterung*-contract in aviation, a contract category of its own — relation between *Charterung* and *Halter* status

Under the German law, owing to the reliance on the *Halter* system, more leeway was left to theoretical considerations than elsewhere. This system allowed the parties to the contract to govern the placing of the tort liability between themselves by shifting responsibilities within the contract without resort to such formalities as the immatriculation in France and the time limit in England. When endeavouring to insert the aviation contracts into the general system of particular contract types, German legal scholarship was prone to seek guidance in the maritime law. Remarkably enough, maritime law had two main types of contracts, the "Ausrüstervertrag" and the "Frachtvertrag",[304] and maritime charters in the main were subsumed under the latter category, including time charters,[305] yet aviation charters were proposed to belong to the *Ausrüster* contract category. Schreiber wrote in 1924: "Dieser Chartervertrag ist dann aber keineswegs der Chartervertrag des Seerechts, bei welchem bekanntlich Schiff und Mannschaften vom Reeder gestellt werden und der Kapitän seinem Reeder verantwortlich bleibt, sondern es ist der Ausrüstervertrag des Seerechts (HGB. § 510), bei welchem der Schiffseigentümer den nackten Schiffskörper zu Verfügung desjenigen stellt,

[303] Cf LeGoff *op cit* 202 no 385. *Contra*, however, Tissot *op cit* 152: "... il semblerait que l'on soit dans l'obligation de faire peser cette responsabilité sur l'exploitant seul." Also at 155.

[304] *Supra* page 159 sq.

[305] At the most there was accepted a distinction between charters which were contracts of carriage and charters which were combination contracts consisting of *Sachmiete* and *Dienstverschaffungsvertrag* (*The Trio*, 48 RGZ 89); but the latter category, although much supported by legal scholarship as an autonomous contract category of its own, failed to achieve any importance in the opinion of the judiciary. *Supra* page 160.

der damit die Seefahrt zu betreiben gedenkt."[306] While this proposition was probably motivated by the conditions of the time limiting charters to such of the inter-carrier kind[307] its effect was lasting. Thereafter, the term "Charterung" in German air law was supposed to be separate from the category of contracts of carriage in general[308] and instead to form a category of its own in air law.

But the *Halter* notion came to be detached from these attempts at construction. Although Wüstendörfer seems to support the proposition that the *Halter* quality moved to the charterer[309] the courts have taken a contrary view and generally allowed it to remain with the aircraft owner.[310]

[306] SCHREIBER, *Juristische Fragen* 170, in *Jahrbuch für Luftverkehr 1924*, edited by Fischer von Poturzyn & Jurinek, München. Possibly, at that time, Schreiber's statement was more of a prediction than an observation, since he adds: "Im Luftverkehr werden sie auf Grund der geschilderten Verhältnisse für gewisse Typen der Luftfahrzeuge sehr bald die Regel werden." See further page 8 *supra*.

[307] See reasons therefor *supra* at page 12.

[308] VON TSCHUDI said in 1927: "Zwischen chartern und mieten einen Unterschied zu machen, empfielt sich nicht". He stated furthermore that the maritime "Laderaum-Charterung ist in der Luftfahrt nich üblich" and found "Charterung und Miete als eine und dasselbe, nämlich Erwerbung des Rechts der Benutzung des Flugzeugs auf Rechnung des betreffenden Erwerbers". See *Pflicht des Flugzeughalters und Charterung von Flugzeugen*, 1927 Der Luftweg No 6 p 80. — The victorious Allies certainly reinforced this doctrine by their retreat from the "Chartern" notion to the "Halter" notion in the 1951 revision of the Durchführungsverordnung Nr 12 (see *supra* page 52 note 6) in order to meet "Der durch die Verwendung des Wortes Chartern entstandene Zweifel, ob ein Deutscher oder ein deutsches Unternehmen fremde Luftfahrzeuge chartern oder mieten darf, um unter fremder Flagge einen eigenen gewerblichen Luftverkehr zu betreiben . . ."; C WEGERDT, *Der Charterverkehr in der Luftfahrt*, 1952 Der Flieger 45). Operational authority was only to be awarded the owner or the *Halter*, and by this provision it was intended to show that Proklamation Nr 2 of 20 Sep 1945 provision no 30 remained in force. WEGERDT *loc cit*, and DIEHL, *Die rechtliche Gestaltung der Bodenorganisation der Luftfahrt unter Berücksichtigung ihrer Entwicklung und der gegebenen Rechtslage*, Anhang 1, 9 and 11, in *Probleme des deutschen Luftrechts* 86, 106, 109. Also *supra* page 22 and note 88.

[309] "Halter . . . ist gegebenenfalls auch der Zeitcharterer, der ein fremdes Luftfahrzeug in seinen Liniendienst einstellt . . .": 1931 1 AfL 209.

[310] See the cases accounted for in note 345 at pages 328 sq *infra*, in particular the *Schindler* and the *Bitterfelder Balloon* cases. BALOGH, at p 272, states on the authority of the former case: "Auch durch 'Vercharterung' des Flugzeugs wird das Halterverhältnis nicht geändert." LORENZ, in 1940 11 JALC 227, is less sweeping in his interpretation and arrives at the result that the charterer did not "become operator in the sense of holder because it was not the intent to establish a connection for a certain length of time." But SCHOLL, *Die Luftverkehrshaftung in der Rechtsprechung*, diss Köln 1938, who makes an elaborate review of the *Schindler Case* at p 23—26, rejects this interpretation (at 25) and, stressing "dass für die Festellung der Haltereigenschaft die Rechtsnatur des zwischen den Parteien abgeschlossenen Vertrages keine Rolle spielt" (at 26) he refuses to conclude anything as to the *Halter* status "Daraus, dass das Flugzeug, wie das Gericht es ausdrückt, an Schindler 'verchartert' worden ist . . ."

## § 4. *Advent of the Warsaw Convention*

Relation between the Convention and contract — the geographically limited application — reference to contracts of carriage only — contract of carriage required — relation between air charters and the statutory Warsaw contract — designation of contract as charter — charters being contracts of carriage — confusion due to the difference in outlook — French dilemma — reasons for French silence — German discussion — relation between *Beförderungs-Vertrag* and *Charterungsvertrag* — structure of distinctions — Warsaw charters, non- Warsaw charters and typical charters — Kaiser — the *Leitungsbefugnis* — Riese — Hürzeler — recognition of charters without typical performance — Abraham — attraction of maritime doctrine of time charters — Reber — the *allgemeine Befehlsgewalt* — departing points in Scandinavian maritime law — all charters are contracts of carriage — control of aircraft crew — if no control, a lease — Codice della Navigazione — distinction between charters and contracts of carriage

A new era was inaugurated with the advent of the Warsaw Convention.

The Convention, if read literally, purports to cover all international carriage by air without any limitation whatsoever (Art. 1). Because its application has geographical limits, however, it is evident that the Convention can apply only to contracts which permit determination, whether or not these geographical conditions are satisfied.[311] Furthermore, it appears that the Convention is intended only to apply to contracts of carriage. It refers only to such contracts. The Convention contains, *inter alia,* the following rules: For the carriage of passengers the carrier must deliver a passenger ticket (Art. 3-1); but the absence of the ticket does not affect the existence or the validity of the contract of carriage (Art. 3-2). For the carriage of checked baggage the carrier must deliver a baggage check (Art. 4-1); but the absence of this document does not affect the existence or the validity of the contract of carriage (Art. 4-4). Every carrier of and every consignor of goods may insist upon an air consignment note (Art. 5-1); but the absence of this document does not affect the existence or the validity of the contract of carriage (Art. 5-2). Whether these documents exist or not, the contract of carriage is governed by the rules of the Convention (Articles 3-2, 4-4, 5-2). As a result the rules of the Convention governing the traffic documents presuppose a contract of carriage. In turn, this means that the liability rules contained in the Convention also presuppose the contract of carriage, since the rules of liability are based on the rules for the traffic documents. One is therefore inclined to hold

[311] First indicated by Goedhuis, 1932 RDILC 687 sq.

that a contract of carriage must exist if the Convention is to apply, and the conclusion seems justified that carriage being performed without a contract of carriage cannot be covered by the Convention.[312]

Because the construction of the air charter contract became decisive in its relation to the statutory Warsaw contract, a new dimension was created in the construction problem. At first, it was even doubtful whether the mere designation of a contract of carriage as a charter would place it outside the ambit of the Convention.[313] It soon was accepted, however, that the Convention must cover also such charters as were contracts of carriage.[314] The resulting discussion was confused, the confusion being due mainly to the differences in outlook. The French point of depar-

[312] See DE VOS, *Rapport 25 Sep 1928 présenté au nom du CITEJA sur l'Avant-Projet de Convention . . . II Conférence* 159—166, at 160: "Le texte ne s'applique donc uniquement qu'au contrat de transport . . . Comme il s'agit de la responsabilité engagée à l'occasion d'un contrat de transport *determiné*, la Convention ne s'applique évidemment qu'aux dommages causés par le matériel affecté à *ce* transport pour l'exécution du contrat." RIESE, in 1933 ZAIP 978, 1934 4 AfL 46, stated that "Voraussetzung für die Anwendbarkeit des Abkommens ist stets dass ein Beförderungsvertrag der Beförderung zur Grunde liegt". The proposition recurred in the parliamentary papers. Thus the German *Denkschrift* (*Amtliche Sonderveröffentlichungen der Deutschen Justiz Nr. 1 — Das erste* (*Warschauer*) *Luftprivatrechtsabkommen — Die Haftung des Luftfrachtführers und die Beförderungsscheine im internationalen Luftverkehr*) said, at p 29: "Die einheitlichen Regeln über die Beförderungsscheine und die Haftung des Luftfrachtführers gelten nur für Transporte, die auf Grund eines Beförderungsvertrags übernommen sind." The Swedish Report, 1936 SOU no 54 p 30, reprinted in 1938 NJA II 309 "Förutsättning för att lagen överhuvud skall bliva tillämplig är, att befordringen äger rum på grund av ett befordringsavtal;. . ." "The Danish Report, (*Indberetning fra de danske medlemmer af den nordiske luftprivatretskomité*, Copenhagen 1936 p 16 col 1): "*Udenfor* [Konventionen] falder saaledes . . . alle Tilfaelde, hvor Transporten sker uden Befordringsaftale . . ." The proposition furthermore has so far as can be seen gained the support of a unanimous Continental legal opinion. See MEYER, 1 *Internationale Luftfahrtabkommen* 106; DRION, 1953 2 ZfL 308, *Limitation* 54 no 50; DOLK, 1953 2 ZfL 314; GOEDHUIS, *National* 133; HÜRZELER, *Probleme* 5, 24; KOFFKA, BODENSTEIN & KOFFKA, *Luftverkehrsgesetz und Warschauer Abkommen* 268; RIESE & LACOUR, *Précis* 233 no 281; SCHWEICKHARDT, *Lufttransportrecht* 14; ALTEN, *Ansvaret for passasjerer og gods ved befordring med luftfartøy* 4; AMBROSINI, 9 1 ICAO LC 43; SCHLEICHER REYMANN-ABRAHAM 3rd 258 Anm 3.

[313] BEAUMONT, 17 IATA Inf Bull 12; BELARDINELLI, 1933 Rivista di diritto aeronautico 131, 140; RIPERT, 336 Citeja 14; BALOGH 285. — It may be recalled that in Sweden it had been argued by BAGGE, 1923 SvJT 235, that shipowners could avoid the application of the Hague Rules by requiring the establishment of a charterparty also in relation to particular goods to be carried. See further *infra* page 205.

[314] BEAUMONT, 20 IATA Inf Bull 18; RIESE, 1934 4 AfL 47; COQUOZ, *Le droit privé international aérien* 91. Cf recently, the American Court of Claims in *Flying Tiger Line v United States*, 1959 USAvR 112, 6 Avi 17.291. But compare LEGOFF, *infra* note 317. The problem how the Convention applies to the relationships involved in a complicated air charter situation and in particular, which of these relationships are excluded from the Convention and thus left altogether to be determined by the agreement between the parties to the charter contract, will be treated in more detail in Chapter 4, Sub-chapter 2.

ture was that all charters were contracts of carriage and as such covered by the Convention. The German point, on the other hand, was that charters were not contracts of carriage. While the problems of deductive construction were fully familiar to lawyers with a Continental legal education, their bases and implications were, it would seem, only vaguely conceived by other lawyers and in particular those brought up in the Common Law.

The French were caught in the horns of a dilemma. Under the Air Navigation Act, article 55, the aircraft owner, by the immatriculation of the charter, could exonerate himself from all liability for damage done to third parties, that is to say including the charterer's passengers and cargo owners, whether by breach of their contracts of carriage or not, unless fault was established on his part. Yet this scheme, which was drafted to serve the cases of inter-carrier charters,[315] seemed to contravene the provisions of the Convention concerning the carrier's liability. This was safeguarded by Article 23 under which any provisions tending to relieve the carrier of liability were null and void. While this contradiction was noted,[316] the matter was never raised for serious discussion.[317] Possibly, there were good reasons for this silence. First, the relation between the Convention and charters was not thought of at the Warsaw Conference.[318] Secondly, the French lawyers in general, ever since the decision of the

[315] See note 294 at page 194 *supra* and note 300 at page 195.

[316] BALOGH, at p 285, observes: "Man wird diesen Haftungsausschluss als zulässig erachten dürfen, da das Warschauer Abkommen den Vercharterungsvertrag nicht betrifft." This statement, of course, is correct, had the German charter contract notion been involved. It is debatable in relation to the French notion. (See in particular TISSOT *op cit* 152—155). It should be noted that this passage is omitted in the French version of Balogh's article which was published in 1934 3 RGDA 42 sq.

[317] The first and only opinion on the issue seems to be LEGOFF, who submits without any discussion: "Le prêteur est transporteur à l'égard de l'affréteur, mais pas dans le sens de la convention et leurs rapports sont réglés par le droit commun." See *Traité Supplément* 200 no 1660-1.

[318] Aviation writers generally vacillate between the position which I have taken in the text, and the one that the question of the applicability of the Convention to charters was intentionally left open by the Conference. COQUOZ, at 90, and ALTEN, in 9 1 ICAO LC 130, take the former view; AMBROSINI, in *Fletamento y transporte* 3 no 2, DRION, *Limitation* 133 no 118, GRÖNFORS, in *Air Charter* 11, and REBER at 149 § 13, take the latter view. Other authors are too vague on the point to permit definite conclusions. Footnotes to support the positions taken, however, are mainly unsatisfactory. The citing by authors of one another does not add much to clarity. Footnotes referring to the Minutes of the Warsaw Conference shed no light. The absence of any express observations therein on the problem, of course, proves nothing. The information which the Minutes convey, is found at p 97 and in a laconic resolution added at p 216—217. This information relates to a Brazilian proposal to

Court of Cassation in 1911[319] creating the contractual "obligation de sécurité" in passenger carriage, were inclined to think of carriage liability as contractual. But the party likely to assume contractual carriage liability towards third parties in the sense of article 55 of the Air Navigation Act, *i.e.* including the passengers and cargo owners, was the charterer who had entered into direct contracts with same passengers and cargo owners. Thus, there

define the term "transporteur" as used in the Convention. The proposal may be found at p 187. It was moved by the fact that this term was a new one which did not appear in the national legislations in the matter where a number of other terms were used instead. See p 97. At the Conference meeting, Oct 9, GIANNINI then proposed a definition of "transporteur" which he considered generally satisfactory, that is to say, that the "transporteur" was, among other things, the "affréteur" who used the aircraft "individuellement ou solidairement, dans le transport de personnes et de marchandises, au sens de la présente convention, et en conformité de la réglementation nationale". Nevertheless Giannini and the rest of the commission felt prepared to drop the subject: "la commission a estimé que ce problème ne relevait pas de cette convention." The Convention was to be a codification of the law of aviation as aviation until then had developed — "la codification du droit privé aérien se fait progressivement" — and the only anticipation of future developments which the delegates might think permissible had been such as should be made because of problems bound to arise because of the existence of other conventions. "Mais . . . dans ce cas il n'y avait pas lieu de définir le transporteur". — It appears to be a very generous reading of these materials which only lead to the rejection of a definition of "transporteur", to conclude (GRÖNFORS, *Air Charter* 11,) that "the question as to the applicability of the Convention to air charter was . . . intentionally left open." — A better source is RIESE, *Luftrecht* 408, who states that "Die Frage der Anwendbarkeit des Abkommens auf Charterverträge wurde auf der Warschauer Konferenz von der brasilianischen Delegation aufgeworfen" but adds that "leider ist die Ausschusssitzung, in der über den Antrag entschieden wurde, nicht protokolliert worden." *Loc cit* note 9. Riese was a delegate for Germany at the Conference. — However, AMBROSINI, who also was a delegate, supplements this information by the indication (*loc cit*) that the Brazilian delegation proposed to have "transporteur" defined "afin de savoir si la Convention pouvait être applicable au cas de l'affrètement" (I am here relying on a French translation of Ambrosini's article which is available in ITA, Paris). Cf GRÖNFORS, *Air Charter* 62. This is indeed meagre support for conclusions as to the intent of the Conference. I have therefore felt entitled to subscribe to the other opinion, and in doing so I am also relying on the following Report to IATA by BEAUMONT 1932 (17 IATA Inf Bull 42): "Your Reporter has taken up with the British Government authorities, with Mr. SUDRE and Dr. WOLTERBEEK MULLER (through the General Manager) and with the German Government authorities (through Dr. DÖRING) the question as to whether and to what extent the charter of an aircraft by an air transport undertaking, or other aircraft owner or operator, to another party or undertaking would be subject to the provisions of the Warsaw Convention and under what circumstances . . . The replies received to these enquiries in the first instance seemed to indicate that the Government draftsmen responsible for the Warsaw Convention did not contemplate charter contracts coming within the provisions of the Convention at all, though they were unable to quote from the Convention itself any provision which would have the effect of taking such hirings out of the obligations imposed on carriers by the Convention, unless the contract in question could be construed as referring to 'carriage performed in extraordinary circumstances outside the normal scope of the air carrier's business.'"

[319] *Compagnie Générale Transatlantique v Zbidi Hamida ben Mahmoud*, Cass civ 21 nov 1911; 1913 Dalloz Périodique 1 p 249, note Sarrut; 1912 Sirey 1 p 73, note Lyon-Caen.

was nothing to engage the liability of the aircraft owner except his own negligence.[320] Thirdly, at this time the possibility of immatriculation was hardly ever used.[321]

In German-speaking quarters, on the other hand, the new phase of the construction of air charter agreements generated a rather lively discussion. Apart from one early attempt to qualify the contract covered by the Warsaw Convention as a contract *sui generis*[322] the discussion centred around the meaning of contract of carriage — "Beförderungsvertrag" — and its relation to the *Charterung-Vertrag.*

The Convention's regulation was adapted to apply to that type of the contract of carriage which was evidenced by a ticket or an airwaybill. Such contracts may be termed *typical Warsaw contracts.* Besides this category were the charter contracts. Among charter contracts were singled out, first, such contracts as were not contracts of carriage, or *typical charters* as they have been termed in German legal scholarship.[323] The residue, in theory, must be such charters as were contracts of carriage and to which the Convention should apply. It had been pointed out by Goedhuis, however, that under certain forms of charter the Convention could not possibly be complied with.[324] Unless you were prepared to accept that carriers were subject to the severe penalty provisions of the Convention, establishing a stricter liability than the general law without any possibility of mitigating their lot except giving up business, a distinction must be accepted in this category between *Warsaw charters* and *non-Warsaw charters.* The latter would be characterized by this impossibility of compliance with the Convention and relieved from the necessity of such compliance.[325]

This structure of distinctions was not born with the Convention. It has been developed in substance, if not in terminology, in the course of a continuous German scholarly discussion.

The discussion was initiated by Kaiser in 1935.[326] He indicated

[320] Under the interpretation advanced by Coquoz (*infra* page 291), of course, the difficulties must have been considerable although, as it appears, Coquoz himself did not notice that.

[321] See information supplied in note 302, *in fine, supra* page 195.

[322] Döring, 1932 2 AfL 5.

[323] Hürzeler *op cit* 24, 29. Also used by Kaiser, Reemts, Ruckriegel, Reber, see exposition *infra.*

[324] 1932 RDILC 687 sq.

[325] A detailed account of these aspects will be given in Chapter 4.

[326] *Der Personenbeförderungsvertrag im Luftrecht,* diss Erlangen 1936.

that the "Charterungsvertrag" as opposed to the "Personenbeförderungsvertrag" involved "die Ueberlassung des Luftfahrzeugs zur Verwendung nach eigenem Gutdünken".[327] Under the contrasting category, "[d]er Vertragswille geht nicht auf Gebrauchsüberlassung, sondern Beförderung".[328] Kaiser found the distinguishing line between the two contract types to be the holder of the right of direction — "die Leitungsbefugnis".[329] Since he classified the air taxi contract as a contract of carriage and not as a charter contract[330] the true meaning of this "Leitungsbefugnis" seems somewhat obscure.

Kaiser's classification was followed in 1939, by that of Riese who made a short statement to the effect that a charter contract meant that "nicht die Beförderung als solche, sondern die Überlassung des Luftfahrzeugs ... mit ... Besatzung ... geschuldet wird".[331]

Thereafter, in 1948, Hürzeler modified the definitions, so that in the place of "Überlassung" — whether of the "Gebrauch" of the aircraft or of the aircraft itself — the following performance was proposed: "eine Sache [the aircraft] zu bedienen oder bedienen zu lassen und deren Betrieb in eigenen Namen, auf eigene oder fremde Rechnung, so aufrecht zu erhalten oder aufrecht erhalten zu lassen, wie der Charterer es ausbedungen hat oder bestimmen wird".[332] Furthermore Hürzeler — who was not unmindful of the sudden and tremendous increase in air chartering which had been spurred on by the advent of the irregulars[333] — advanced the discussion with the recognition that there were not only the typical charters but also charters under which there was no typical performance, but which were in fact "Raumfrachtverträge".[334] By this refusal to accept the idea that there existed insuperable difficulties of compliance[335] Hürzeler was able to maintain a trichotomy of contracts, typical Warsaw

[327] KAISER *op cit* 32.
[328] KAISER *op cit* 34.
[329] KAISER *op cit* 33.
[330] KAISER *op cit* 34.
[331] 1939 9 AfL 137—138.
[332] *Probleme* 29.
[333] HÜRZELER mentions his correspondence with the British Air Charter Association at p 7 of his dissertation.
[334] *Probleme* 24, 27—29.
[335] HÜRZELER advanced the argument that the documents of carriage—the stumbling block in the discussion of compliance — could always be issued, if not in advance, in the course of the execution of the charter contract. See *Probleme* 28.

contracts, typical charters, and Warsaw charters.[336] Aligning himself with the Continental tradition he sought to classify the typical charter contract and characterized it as a sample of the "innominate contracts"[337] which would mean the equivalent of a classification as a contract *sui generis*.[338]

Later German authors proceeded along the same road although they retreated on the issue of the autonomy of the air charter contract. Reemts inaugurated a new terminology in 1951: "Soweit ein Chartervertrag ... als Transportvertrag anzusprechen ist, sollte er als 'Transportchartervertrag' bezeichnet werden ... Diejenigen Charterverträge, die ihrem Wesen nach Gebrauchsüberlassungsverträge sind, sollten ganz allgemein als 'Mietcharterverträge' bezeichnet werden."[339] The distinction between "Mietcharter" and "Transportcharter" was accepted by subsequent writers[340] although they did not concur as to how to distinguish between them. The discussion moved closer to its maritime counterpart. The *Mietcharter* was qualified as lease combined with "Dienstverschaffungsvertrag"[341]. Reber found the dividing line between the *Mietcharter* and the *Transportcharter* in the charterer's assuming the status of a "Lufttransportunternehmer" as against passenger/shippers under the former but not under the latter.[342] In Reber's opinion, the charterer could never be a *Lufttransportunternehmer, i.e.* an air transport undertaking, unless he exercised the factual control — "die tatsächliche Gewalt" — over the aircraft, and this control was not established unless the crew was placed under his general command — "allgemeine Befehlsgewalt".[343] Thus we are thrown back to the surroundings of the

[336] RIESE explains in *Luftrecht* 408 note 7, that Hürzeler's result "deckt sich im wesentlichen mit unserer ... Auffassung."

[337] As to the Continental law distinction commonly made between "nominate" and "innominate" contracts, see *supra* page 136.

[338] This is the understanding of RUCKRIEGEL, *Der luftrechtliche Chartervertrag* 11 note 2.

[339] REEMTS, *Rechtsprobleme des Luftfrachtvertrages*, diss Hamburg 1951 (typewritten) at p 44.

[340] REBER, *Beitrag* 114, 69, 117; RUCKRIEGEL, *Chartervertrag* 21; STAEHELIN, *Der Chartervertrag*, at p 93 in *Einführungskurs ins Luftrecht*. ABRAHAM divided charter contracts into "Mietverträge" and "echte Beförderungsverträge", see *Luftbeförderungsvertrag* 26.

[341] See REEMTS *op cit* 44; RUCKRIEGEL *op cit* 12—14; REBER *op cit* 115.

[342] REBER *op cit* 115. At p 113 he states "dass das Kriterium darin zu finden ist, wer nach den Umständen und nach dem Vertragsinhalt der Transportunternehmer sein soll."

[343] REBER *op cit* 115.

Employment Clause and Reber's argumentation resembles the French one in relation to time chartering.[344]

Despite the affiliation between German and Scandinavian law, the German discussion failed to find endorsement in Scandinavia. The points of departure for Scandinavian law were different because the charter contract in maritime law had never been more than a formal category. The term "charterparty" as used in the Scandinavian Maritime Codes included "every agreement in writing about the carrying of goods"[345] and it was envisaged that shipowners, by requiring the establishment of charterparties also as to the carriage of particular goods, could avoid the application of the Hague Rules prohibiting negligence clauses.[346] As a result, the *Ausrüstervertrag* was never on the Scandinavian mind in the discussion of air charters and the position was taken that all charters were contracts of carriage.[347] By charterparty, Alten meant the contract under which the aircraft crew remained exclusively under the control of the owner; should the crew be under exclusive control of the charterer-lessee the contract was not a charterparty but a lease.[348]

Furthermore, the systemization of charter contracts in two or more groups, Warsaw charters, non-Warsaw charters and typical charters was avoided by the Italian legislature in 1943, which took a position going to the other extreme. The Codice della Navigazione meant a wholesale amalgamation of the maritime and the aviation law and established a basic distinction between

[344] Cf *supra* page 158. It is noteworthy, however, that in German maritime law, despite some isolated holdings to the contrary (see DUSENDSCHÖN 6 note 12; 1904 Hans GZ No 8, reversed by Reichsgericht in No 66 same volume, and *Just Abilgard v Wittenberg & Voigt*, 1906 Hans GZ 225 No 105) the *locatio navis et operarum magistri et nauticorum*, the prototype of Reber's *Mietcharter*, cannot be reconciled with such a contract under which the charterer becomes *Ausrüster*. See *Protokolle der Kommission* zur *Beratung eines ADHGB* 1656 sq. Cf *The Henry*, 56 RGZ 360, 361.

[345] BAGGE, 1923 SvJT 235: "varje skriftlig avhandling om fraktande av gods". Cf HAMMARSKJÖLD, *Fraktavtalet* 15.

[346] BAGGE *loc cit.*

[347] ALTEN, 9 1 ICAO LC 130. Cf *Ansvaret* 7: "Under forberedelsen av de nordiske lovene i 30-årene ble det ansett for selvsagt at uttrykket '*fraktavtale*' på samme måte som i sjøloven, skulle forståes helt generelt, slik at det omfatter fraktavtaler av enhver art, også reise- og tidsbefraktning og underbefraktning." — The clarity of the pan-Scandinavian Maritime Code as drafted in the 1890's, however, should not be overrated. It was at least not sufficient to prevent the Swedish legislature in 1916 from adopting a terminology in supplementary legislation to the effect that the Scandinavian equivalent to the German *Ausrüstervertrag*, having received its regulation in § 275 of the Code, was considered to be included in the term "time charter". See 1916 KProp nris 43 and 186.

[348] 1 *Hague Conference* 227 sq. Cf 7 ICAO LC 11.

air charters and contracts of carriage by air.[349] The Italian approach meant that the "obligation of performing voyages represents the salient distinction ... between contracts of affreightment and of carriage" and that "in the latter it is not the obligation to navigate which is undertaken, but the most specific obligation of transporting goods from one place to another".[350]

## SECTION 3. THE ANGLOSAXON DILEMMA

### § 1. *The Anglosaxon understanding of contract classification*

Anglosaxon legal technique — demises and non-demises — proposed establishment of the *Schuster v McKellar* doctrine in English air law

The discussion of how to construe the air charter contract made little impact on Anglosaxon legal opinion. Anglosaxon legal technique, basically and historically, was alien to the very idea of deriving rules from an abstract contract type, and neither the contract of carriage, nor the charter contract, was ever understood to be a self-supporting concept capable of such rule-generation. Contract classification in English law, while for a considerable time being affected by Civil law thinking, had returned to the relational obligation after the turn of the century and within the general category of charters a distinction had developed between demises and contracts of affreightment.[351] This distinction, in the main, followed the variations in the bailment situation, so that if the charterer was the bailor of the cargo the contract was one of affreightment, while if he was the bailee of the ship, the contract amounted to a demise.[352] The term "contract of carriage" had no accepted meaning: "Almost any carriage undertaking whether for goods or for persons can be called a contract of carriage", said Robinson.[353]

As a result, facing the problems of deductive construction

[349] MANCA, *The Italian Code of Navigation* 145.
[350] *Ibidem.* Accord: DUTOIT, *La collaboration entre compagnies aériennes,* thèse Lausanne 1957 p 31.
[351] It is noteworthy, however, that in 1893 the Supreme Court of the United States spoke of "the two kinds of affreightment contracts — the one in which there is a demise of the vessel ... and the other in which the owner, retaining the possession and control, contracts simply for service — it may be the entire service of the vessel". *United States v Shee,* 152 US 178, at 188.
[352] For meaning of "contract of affreightment" see also ROBINSON *on Admiralty* 185; STEVENS, *Ocean Carriage,* London 1956 p 8; SPRAGUE & HEALY *Cases on Admiralty* 3rd 389 note 1.
[353] ROBINSON *op cit* 910.

which arose under the Warsaw Convention, Anglosaxon lawyers were at a loss. Their favourite technique, that of microscopic dissection of the cases for statements of the doctrine, was of little avail since the judges had never been conscious of the significance of the problem and any dictum, therefore, would at best be accidentally relevant. The obscurity of the Anglosaxon picture of the problem was definitely not improved by the fact that under American maritime law legal consequences of great importance were attached to the charter contract whatever its status as a contract of carriage. By contrast, in international aviation law, as interpreted on the European Continent, important consequences were attached to the contract of carriage whatever its status as a charter. It is not unnatural that the only Anglosaxon proposition which bordered on the problem of deductive construction was an attempt by the editors of Shawcross and Beaumont to establish the old *Schuster v. McKellar* doctrine in English aviation law.[354]

## § 2. *The American development of the relational obligation*

Aviation and common carriage — private carriage during the twenties — change of industry about 1930 — common carriage during the thirties — sequence of cases — the McNary Bill attempt to avoid the maritime charter doctrine in aviation — common carriage as a problem of regulatory jurisdiction — Civil Aeronautics Act — Civil Aeronautics Act construed by the CAB

The Americans were in an even more peculiar situation than the British owing to the prevalence in the American system of the relational obligations in regard to carriage. The primary American problem was the relation between common carriage and aviation. During the twenties there had been almost no flying in the United States which could be classified as common carrier operation of aircraft.[355] Indeed, there had been cases from 1925 to 1930 indicating private carrier status when an aircraft was used by its owner to take people up for sightseeing trips for hire,[356] and when an aircraft, dispatched to a certain city at the request of a local body, was used for short flights with members

[354] SHAWCROSS & BEAUMONT 2d 313 no 338 note a. See page 174 *supra.*

[355] DAVID, *Federal Regulation of Airplane Common Carriers*, 6 Journal of Land & Public Utility Economics 360.

[356] Insurance policy cases: *North American Accident Insurance Co v Pitts*, 1928 USAvR 178, 1 Avi 67. *Brown v Pacific Mutual Life Insurance Co*, 1928 USAvR 186, 1 Avi 77. Also *Seaman v Curtiss Flying Service Inc*, 1929 USAvR 48, reversed on other grounds, 1931 USAvR 227.

of that body.[357] Towards the end of the twenties, however, a rapid movement towards the establishment of reliable airline services, consolidation of operations generally, and mergers between airlines, resulted in air transportation being dominated by a few large systems.[358] This development was reflected by a corresponding change of legal views. "The appearance of airlines and air-rail travel[359] has definitely introduced the airplane as a common carrier" said Newman in 1929.[360] "In so far as these systems of organized transportation engage in passenger carriage, they are common carriers, in all probability."[361] An attempt to attach common carriage to the concepts of regular operation, fixed routes, and prescribed schedules[362] soon was abandoned under the impact of a sequence of cases after 1930 holding all kinds of air passenger carriers — scheduled transports as well as taxi operators[363] and aircraft flying sightseeing groups[364] — to be common carriers. Already, in 1932, the situation had changed so completely in favour of air carriers being considered common carriers that "the burden now rests upon anyone who would make an assertion to the contrary."[365]

A remarkable attempt to avoid the maritime charter doctrine took place by the introduction of the McNary Bill[366] which — al-

[357] *Conklin v Curtiss Wright Flying Service*, 1930 USAvR 188.
[358] DAVID *op cit* 359. — It may be recalled that simultaneously the first step towards economic regulation of air commerce was taken by the Air Commerce Regulations of 1930, see *supra* page 71 and note 89.
[359] Airlines were competitive with other means of transport mainly in the matter of speed. As long as night flying was no practical possibility, the lead which airlines would gain by day on ships and railways was lost each night. The air-rail service was created to off-set the travel time lost each night. Passengers went by air during the day by rail during the nigh.t As to the air-rail serviceof Transcontinental AirTransport' see SMITH, *Airways*, New York 1942 p 144 sq.
[360] *Damage Liability in Aircraft Cases*, 1929 29 Col LRev 1045.
[361] DAVID *op cit* 360.
[362] WATKINS, *Air Transport Rate-Making*, 1932 3 ALR 127 and note 3.
[363] *Glose v Curtiss-Wright Flying Service*, 1933 USAvR 26, 228. See also *supra* page 7 note 17 and pages 129-130. The case is annotated by BEAUMONT in 1934 13 RAI 310, KINGSLEY in 1934 5 JAL 154, LOGAN in 1934 5 JAL 555. It was argued in the case that the transportation could not be common carriage, first, because it was a charter trip on an anywhere-for-hire basis, and secondly because Glose was the sole customer. Some attention was devoted to the latter argument but it was held to be of no importance that the passenger was the only one riding in the plane. This in itself did not convert the relationship into that of charterer from that of passenger. Cf See FIXEL, *The Law of Aviation* 2d 162 § 180, 3rd 365 § 376. Recently, *Jackson Admr v Stancil Jr*, 1960 USAvR 621.
[364] *Smith v O'Donnell*, 1932 USAvR 145; *Ziser v Colonial Western*, 1933 USAvR 1.
[365] FAGG & FISHMAN, 1932 3 JAL 227.
[366] Senate Bill No 5078, introduced to the Congress by Senator McNary on 3 Dec 1930.

though relying heavily on maritime law in other respects — disregarded the distinction between common and private carriers.[367] The bill came to naught in Federal legislation but was adopted with negligible changes by the State of Maryland.[368] The negative Federal result was mainly due to the fact that its purpose was filled by the Warsaw Convention.

The issue of private or common carriage again moved into the limelight as a problem of regulatory jurisdiction under the Civil Aeronautics Act of 1938. The Act only applied to carriage by aircraft as a common carrier.[369] Under the maritime doctrine this formula must mean that carriage under charter was not affected.[370] However, in the course of the Congressional hearings which preceded the drafting of the Act, it had already been a matter of concern whether this formula really would suffice to exclude non-scheduled charter and contract carriers[370a] from the scope of application. In the light of the above-mentioned sequence of judicial interpretations of common carrier liability for air carriers, in particular the *Glose Case*,[371] it could be inferred that even charter or contract carriers might be construed to be common carriers and therefore subject to the Act.[372] The Act, as eventually promulgated, did little to clarify the issue since it authorized rules to be prescribed for "charter trips"[373] although it could only govern common carriage. As a result, in subsequent years,

[367] KNAUTH, 1931 2 JAL 202.

[368] For text, see 1931 USAvR 365. The bill dealt with both contractual and tortious liability. The regulation of the former contained no proviso excluding charters from the coverage of the legislation. The regulation of the latter meant that "the charterer of any airship . . . in the case he shall man, victual and navigate such airship . . . at his own expense, or by his own procurement, shall be deemed owner . . . within the meaning of the provision of this act relating to the limitations of the liability of the owner". See sec 43, 1931 USAvR 367.

[369] The controlling provision is the definition of "air transportation" see sec 1-10 and 21.

[370] *Supra* pages 176—177.

[370a] The *contract carrier* was believed to avoid common carrier status by his not holding out to the public but to a few large shippers only. Broadly speaking, perhaps one may say that, as contrasted to the non-scheduled service which was not regular but public, the contract service was regular but not public.

[371] See note 363 *supra*.

[372] Hearings before the House Committee on Interstate and Foreign Commerce on H R 5234 and H R 4652, 75th Congress 1st Session, on 7 Apr 1937. The representative of the Department of Commerce, Dennis Mulligan, was particularly concerned about these aspects. See minutes of the Hearings at p 260—261. See generally CRAIG, *A New Look at Section 416 (b) of the Civil Aeronautics Act*, 1954 21 JALC 131—147.

[373] Under sec 401-f the certificated carriers were free to make charter trips and perform any other special service subject to the regulations made by the CAB.

when administering the Act the Civil Aeronautics Board felt free to decree very broad views as to what was common carriage and therefore subject to its own jurisdiction.[374]

## § 3. *Influence of American regulatory law*

Charter contracts in common carriage — sec 403-a — Rules Tariffs — exempted contracts — trend to identify charter and tariff relation — concern of the IATA members — diversion of traffic — 045 Resolution — the charter contract seen as a variety of the ticket contract — the Honolulu view of the charter concept — the charter concept in the course of the work on the Warsaw Revision

The broadening of the common carriage relation having all but wiped out any peculiar effects attached to the notion of charter equivalent to those established in maritime law, the only safe refuge from the Board's asserted jurisdiction was found in the demise.[375] The older notion of charter thus becoming defunct legal interest came to focus on the new use of the term in regulatory language[376] and the developing distinction between "charter trips" and "wet leases".

[374] The principles to be followed by the Board were laid down in a series of Board decisions in 1949—1950, *viz. Standard Airlines Inc Noncertificated Operations*, 10 CAB 486, at 500; *Transocean Airlines Inc Enforcement Proceeding*, 11 CAB 350, at 355; *Investigation of Seaboard & Western Airlines, Inc*, 11 CAB 372, at 381; *Viking Airlines, et al*, 11 CAB 401, at 409. These principles meant that air transportation was common carriage unless it clearly was outside of the carrier's "holding out" to the public of his services. In the Standard decision the Board said: "So-called 'charter' or 'contract' flights including those under long term contract, may constitute common carriage because . . . such flights, when viewed in the light of other common-carrier activities, constitute an inseparable part of such activities." The Transocean decision built upon the foundations established in the *Standard Case:* "Since it [Transocean] has admittedly held out to be a common carrier in all these fields, it will also be concluded to be a common carrier as to passengers in foreign air transportation, unless the transportation of passengers in this field was clearly outside the scope of its holding out." The Seaboard & Western decision completed the structure of common carriage by the conclusion that "The fact that transportation of passengers was not of a specialized nature, and was available to anyone desiring charter service, clearly establishes that Seabord's passenger transportation was in common carriage." Thus, to get outside the scope of this notion of "holding out" an air carrier who engaged in undisputedly common carriage operations as well, must place the charter carriage in a different geographical area from the common carriage, or make the type of operations different from that admitted as common carriage. In practice then, under the CAB interpretation, the common carriage notion was so broad as to include almost everything down to the limits of a demise as that notion was understood in maritime law, that is to say, a case in which the owner had even parted with the possession of his vehicle. Such a result was indeed arrived in *Overseas National Airways, Inc, Enforcement Proceeding*, E-16895, decided 5 Jun 1961, see in particular Examiner's decision at p 10 sq.

[375] As to the demise charterparty, see *supra* page 175.

[376] See pages 53—54 and notes 20—22.

The new notion of charter was closely related to regulatory enactments and procedures. "Charter", as developed in Part 207 and subsequent Board enactments, had implications as to tariff requirements as well as to operational authority. The Act pursued a policy of equality of treatment which involved *inter alia* that air carriers which were subject to the Act must offer their services in common carriage to the public at large without discrimination by laying down the terms of the offer in published tariffs. This requirement, however, was mitigated by an alternative of special exemption. Originally, the tariff requirement appears not to have been enforced. The Board's broadening views of common carriage, however, led to the tariff requirement being extended to charter trips as well,[377] and "charter" as a notion in the American public mind came to be more and more associated with the tariff-type contract.

The American attitude had important repercussions among the views of air charter in international circles, particularly among the legal experts of the IATA group. The main concern of the IATA airlines with charters related to the ability of air carriers operating under charter agreements to divert traffic from the scheduled services of an IATA member airline. Ever since 1948 this competition had meant constant work on the 045 Charter Resolution and a corresponding pressure for governmental regulation of "charter traffic". The IATA interest centred upon those charter agreements which were parallel with ordinary ticket contracts and the scholastic construction of the charter contract received hardly any attention. Instead, the American assimilation of charters to tariff became important to all carriers engaging in American traffic and subjecting themselves to American jurisdiction.[378] It was therefore natural that when the idea of inserting provisions relating to charters into the conditions of carriage was eventually proposed for adoption at Honolulu in 1953, the proposal was merely to the effect that the conditions of carriage should supplement charter contracts.[379] Evidently, this charter contract was seen as nothing but a variety of a contract of carriage in the Continental sense.[380]

[377] The filing of charter tariffs is dealt with at pages 225—226 *infra* and at pages 106 *supra*, and in note 47 at page 12 *supra*.
[378] See pages 106—108 *supra*.
[379] 030 Resolution art 2-3.
[380] The Honolulu provisions being built upon this fundamental notion of the

Parallel with this evolution, the legal circles interested in the revision of the Warsaw Convention developed definitions of the term "charter" which excluded its application to anything but a genuine contract of carriage. This development, however, was closely related to the purpose of the work: there was no need to define any other charters in the Convention than such as were to be subject to same Convention. *De lege lata,* that was the case only with contracts of carriage and Alten, at least, deliberately wished it to remain so.[381]

## SECTION 4. INDUCTIVE CONSTRUCTION

### § 1. *Inquiry into the state of inductive construction.*

Failures of inductive construction as witnessed by the *Junkers* and the *Zone Cases* — florilegium of standardized charter forms — implications thereof as to inductive construction

The *Junkers* and the *Zone Cases,*[382] although far apart in time, both bear witness to the difficulties of arriving at a custom of the trade capable of supplying implied terms of such a stability as to make the air charter contract a structure of inductive construction. Nevertheless it should be investigated how far on its way to such a destination air charter may have gone.

A remarkable feature of air chartering is the florilegium of standardized forms which has developed during its lifetime, the majority after World War II. Were any legislature interested in

charter contract, they were much regretted by some German scholars. See REEMTS, 1955 Deutsche Verkehrs Zeitung No 12 p 5; and RUCKRIEGEL, *op cit* p 47.

[381] The first definition of the term "charter" in the course of the work for a revision of the Warsaw Convention was published in September 1946. The definition was as follows: "Charter of an aircraft means the case when an entire aircraft together with the crew required for its operation, 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)." See 445 Citeja, Draft Convention art 1. The draft was first delivered by Beaumont after his appointment as Rapporteur to the Citeja on the Warsaw Revision, Citeja being charged with the study by PICAO, see 445 Citeja 2. Commencing with a proposal from the Sub-Committee Warsaw to the ICAO Legal Committee in June 1949, however, a new definition was introduced, stating outright: "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)." See 4 ICAO LC 278. It appears that the origin of this definition was a proposal from ALTEN: 4 ICAO LC 278. This definition remained intact for several years — see 1951 session, 8 ICAO LC 197 — and when it was finally discarded, the action was due, not to any change of opinion on this very point, but to a changed view of the usefulness of a wholesale revision of the Convention generally.

[382] *Junkers Luftverkehr AG v Verein Luftverkehr Halberstadt,* 1 ZLR 224, 1931 2 JAL 426. *Zone Redningskorpset v Transair Sweden,* 1 Ark f L 264; 1961 USAvR 212.

precipitating the development — as was the case in Scandinavian maritime law relating to time charters during the thirties — the abundance of stereotyped terms and conditions in these forms would seem sufficient to warrant their transformation into such a structure of implied conditions as may be called a statutory contract. An inquiry into the present state of inductive construction, bearing in mind the economizing function of contract types, must then first focus upon the needs which have brought about this abundance of forms.

### § 2. *Needs generating the adoption of standard charter forms.*

Needs of aircraft operator — previous contracts as models — desire of small operators to clarify their legal situation — organizational needs of big operators — volume business — legal departments — needs of charterer — explanation of origin of the first aircraft charterparty form — speeding of contracting procedures — difficulties involved in the use of forms — drafter's advantage — not assimilable — complexity of operations — competitive practices

The adoption of models and standard forms is closely associated with business needs. Some of these needs relate exclusively to the aircraft operator. The repetitive nature of air chartering as undertaken by the operator allows contract drafters to use contracts previously agreed upon as a model for the new ones instead of tackling the drafting difficulties anew. Once a convenient and safe model is found it easily evolves into a standard form. Considerations of this kind appear to have dominated in the early post-war years. During this period, when air chartering first burst into full activity, the majority of operators were air force veterans of meagre resources. Clear legal opinions as to their rights and duties in relation to the charter flight were hard to obtain.[383] The small operators, therefore, when contracting for loads placed great reliance on generally accepted documents, and in their intense desire to have their legal situation clarified, joined enthusiastically in the drafting projects of the various business organizations.[384]

The bigger operators felt the necessity for models as well, with a special emphasis on the service of their sales departments. Not only was the repetitive nature of contract procedures stressed with volume business, but also the contracting generally was handled by low-grade officials and the procedures had to be

[383] During interviews with French participants of the time I received the impression that the uncertainty had resulted in plenty of "drame et procès juridique" (PARDINEL 2d interview).

[384] The Baltic Exchange, the British Air Charter Association, BIFAP, etc.

simplified to avoid confusion and disturbances.[385] Furthermore, the establishment of legal offices, commonly, with the big operators, worked towards the adoption of standard forms. The lawyers, employed to check all the contracts of the operator, recognized the wisdom of an established standard form with its legal consequences carefully considered at the time of creation.[386]

Although operators' needs and desires, generally, have shaped the development of the standard charter forms, and indeed operator-draftsmen forms dominate the industry, yet charterers' interests have made a definite contribution to this development. The origin of the first aircraft charterparty form has been explained by Sir Samuel Instone as follows: "At certain intervals from about 1925 my firm had been asked upon what conditions aeroplanes could be chartered for a private commercial flight, and knowing that there was no standard basis, nor indeed any basis other than a bargain to be struck, we decided in order that there should be no delay and that both the owner of an aeroplane and the hirer should know exactly for what they were liable, it was time something be done to simplify matters and help to put private hiring of aeroplanes upon a commercial basis. Necessity being the mother of invention gave rise to the birth of the flying charter."[387]

The mutual benefit flowing from the use of standard forms is the speeding of contracting procedures. This, of course, is an essential factor in aviation, particularly in the last-minute negotiations of the contract of airfreight. There may not even be an opportunity to have the contract typewritten, and thus the printed form which only has to be filled in with a few added particulars serves an imperative need. An additional benefit, of

[385] The organization of Pan American Airways may serve as an example. The company sells charters through 411 traffic and sales offices throughout the world. Office managers are authorized to execute charter agreements on behalf of the carrier and its affiliates, and are therefore provided with copies of one Pan American standard charter agreement form, its charter tariff and a traffic manual which outlines in detail the governmental and cartel regulations applicable to charter operations. See *Acta Imata Exch Inv ExD* 45, 22 CAB 801. Similarly, Air France agencies are authorized to execute charter contracts on the Air France standard form. Modifications of any conditions of this form have to be submitted for prior approval to the "bureau de contentieux": information supplied by Air France (LEGREZ interview).

[386] Sometimes underwriters, when extending insurance coverage, may insist on carrier contracting solely by use of one certain form. In *Berufsgenossenschaft v Deruluft*, 161 RGZ 76, it was evidenced that use of the IATA Antwerp conditions of carriage had been made a condition for insurance.

[387] INSTONE, *Early Birds — Air Transport Memories 1919—1924*, Cardiff & London (Western Mail & Echo Ltd) 1938 p 185—186.

course, is that the parties will know in advance the details of the agreement and discussions may concentrate on the more essential issues of routing and price.

On the other hand, it is often revealed that the use of ready-made forms involve certain difficulties. First, too often the parties do not read the form carefully. This works, of course, to the advantage of the party who has drafted it, *i.e.* generally the operator.[388] Secondly, an extensive form may be too long to be assimilable and thus lead to surprise and dispute. Where the form is too brief, disputed points may occur which are not adequately covered by the contract. Most importantly, aircraft chartering may be too complex a business to be adaptable to the use of ready-made forms. With greatly varying operations a standard rule tends to have only limited use and application. Not only are wet lease operations essentially different from special flight operations[389] but also within the latter category great variations are commonplace. In particular, the securing of return loads often involves a combination of flights which is not easily covered by the contents of a standard document.[390] Finally, the competitive practices of charter agreements makes it practically impossible to draw up a standard form which is generally acceptable to a great number of operators.[391]

### § 3. *Name of the standard charter form*

Maritime influence — impact of the Warsaw Convention system — Warsaw documents not able to supplant air charter forms — English reasons — American hybrids

A question of particular interest in its relation to inductive

[388] Perhaps this may explain why operators, also in times of precarious financial weakness, have succeeded in imposing their own legal conditions on their customers. FLETCHER, *The Carrier's Liability* 222—223, submits the following: "Whereas the lawyer is instinctively suspicious, and foresees potential difficulties more or less remote, the merchant has a high proportion of transactions in which nothing in fact goes wrong. Hence he takes chances. It pays him to do so. He assumes that a contract of carriage offered to him is fair. Usually the goods arrive safely. His chief concern is the amount of the freight. Nothing will induce him to read an enormous list of conditions couched in a jargon almost imcomprehensible and printed in the smallest of small print."

[389] *Supra* pages 18—24 and 44—48.

[390] The point may be illustrated by the following charter operation which is believed to be reasonably normal. The operator contracts to fly, first, between points A and B with passengers, then between B and C with freight, then from C back to B empty, then at last, from B to A with freight. Considerable drafting ability is required to find a simple formula which takes care of the hagards of this operation, for instance the freight being delayed at point B.

[391] Cf Minutes of the 5th meeting of the IATA Sub-Committee on Traffic Matters, Paris, Jan 1954, p 154; 12th IATA Annual General Meeting, Minutes 132 p 81.

construction is the name of the contract. How did this contract for the use of an aircraft so generally and uniformly receive the name "charter"?

The answer apparently lies in the maritime influence. Particularly in sea-minded England, people appear to have understood close technical relations between aeroplanes and ships, and accordingly were prone to look to maritime usages as a model. The close connections which existed between aviation and shipping interests certainly were instrumental in this trend.[392] If maritime practice used standard forms it was felt necessary for aviation to use similar forms, if maritime practice termed their forms "charterparties" aviation should do so too.[393]

This terminology survived even the advent of the Warsaw Convention. The Convention based its liability scheme on the documents used and the benefits of the Convention were only conferred upon parties using the particular Warsaw documents. The use of the passenger ticket and the air waybill (not to mention the baggage check) and a document called "charterparty" (or "charter contract"), different from the Warsaw documents, led to confusion as to the extent of the Convention's coverage.[394] However, the adaptation of a Warsaw document to govern such points as

[392] Cf Sir SAMUEL INSTONE's remarks in the Shipping Monthly of April 1922 — as quoted by INSTONE 152 — "At Hamburg — to show which way the wind blows in Germany — the Hamburg-America Line is now constructing a huge harbour solely for ships that fly, while the Zeppelin Company and the German Aero Union all have powerful shipping connections, The Norddeutscher Lloyd, too, is now intimately associated with the big German air concern known as the Deutsche Luftreederei." When Deutsche Aero-Lloyd was founded in 1923 it was privileged to rely on the know-how and the business organization of Norddeutscher Lloyd and the Hamburg-America Line: DIEHL 37. See also INSTONE 186 and SCHNORR, *Participation of Steamship Companies in Air Transportation,* 1949 34 Cornell LQ 588—596.

[393] If it is true, as stated by AUGERON in 1949 L'Avi March no 22 p 8 col 2, that AOA before the war used a printed aircraft charter form — the correctness of this proposition is doubted, however, see note 405 *infra* — the fact that the airline was originally set up as a subsidiary to a steamship company, American Export Lines, was probably most instrumental.

[394] This point came before the American Court of Claims in *Flying Tiger Line v United States,* 1959 USAvR 112, 6 Avi 17.291. The case concerned cargo transportation performed by the airline for the United States Government pursuant to a standard Charter Agreement, a Government Bill of Lading, and the Airfreight Rules Tariff on file with the CAB. The (paramount) Warsaw clause prescribed by art 8-q of the Convention (see further *infra* pages 255—260) only appeared in the Charter Agreement and the Rules Tariff. The Court of Claims found that the Warsaw clause requirement was not complied with, and was prepared to exact the Warsaw penalty in art 9 (see further *infra* pages 302 sq). See at 115. The final holding of the court, however, was based on the application of art 29.

were covered by the charter contract, on the other hand, meant difficulty because the contents of the Warsaw document were prescribed by the Convention in the most stringent manner.[395] Furthermore, the term "charter agreement" was too firmly established and so the issues raised by the Convention apparently resulted in little more than the introduction of a few variations of the name of the form.[396]

In England, the air waybill may have been particularly unsuitable as the document for a charter operation since it could not possibly incorporate the total agreement. Under English maritime law, anyway, the bill of lading — the equivalent of the air waybill — is not the contract itself but merely the best evidence of it.[397] As a result, parole evidence of terms divergent from those expressed in the document may be permissible.[398] In the absence of parole evidence rules, the problem does not arise in other legal systems.

In domestic transportation in the United States there has lately taken place an assimilation of the charter agreement forms and the tickets and waybills. The resulting forms have received the hybrid names of "Charter Ticket" and "Charter Airbill".[399]

[395] An air waybill, for instance, as constructed by the Convention, could not be made out until the cargo was received by the airline. The charterparty served to fix the conduct of the parties long before the goods were ready to be loaded.

[396] BOAC and its offshoot, BEA, have — probably at the example of the Imperial Airways' "special flight vouchers" — discarded the term "charter" and used the term "special flight order agreement" instead. This term, however, has — it would seem — certain inherent limitations. It cannot properly be applied to a contract for only part of the space available in an aircraft. Furthermore an air charter need not involve a "special flight" at all but a quite regular one. Recently however, BOAC changed the name of the form to "Charter Contract", possibly reflecting an increased practice of blocked-off charters (see page 45 *supra*). — Air France in the case equivalent to the special flight order, *i. e.* the case of "des services spéciaux de fret", used only to conclude a simple contract of carriage materialized in an ordinary Warsaw air waybill—this case is illustrated in *Veuve Terrasson v Messageries Nationales* (1951 5 RFDA 440; 1957 11 RFDA 31) relative to the Aéro Cargo services. In the case of a planeload charter, the early Air France practice meant that the conditions of the contract were fixed by a mere exchange of letters. See AUGERON, 1949 L'Avi March 20 p 14. At that time, however, the company did not engage more actively in charter work.

[397] *Sewell v Burdick*, 1884, 10 AC 74. Cf BARTLE, *Shipping Law* 15.

[398] The Parol Evidence rule is called into operation where the agreement of the parties is "integrated". Broadly speaking, the rule means that the "integration" of the parties' agreement (*e. g.* in a single document, apparently complete on its face) operates to exclude all oral agreements relating to the same subject matter. For further information, and as to the qualifications and exceptions to the rule, see Restatement of Contracts §§ 237—244.

[399] As to this practice, I have received the following information by letters of 25 Jan 1961, and 18 Jan 1961, respectively. *American Airlines:* "we have not used charter agreement forms for quite a few years. We use one interline ticket which

## § 4. *Printed air charter forms.*

The first aircraft charterparty form — post-Warsaw forms — British early post-war forms — Baltairvoy — French early post-war forms — TAI 1947 — Chartepartie dite Transair — revision of the Baltairvoy — Baltairvoy 1951 — Baltairpac — IATA group forms — domination of IATA group forms — the IATA clause — the IATA Model

The first printed aircraft charterparty form is believed to have originated in the offices of S. Instone & Co., Ltd. in February 1928. By February 1929 the form was used by Imperial Airways for a flight Croydon-Berlin and return. In all likelihood this is the charterparty of Imperial Airways referred to by Wüstendörfer.[400] This form was highly influenced by maritime charterparties as to disposition and language. Indeed, the drafters stated: "we felt that we could do nothing better than follow the lines of a shipping charter, which had been built up out of experience."[401]

Only a few forms are known to have been used during the period between the Warsaw Conference and World War II.[402] One

covers the cost of the charter plus the applicable tax. For confirmation of the service, the local office involved writes a letter giving the confirmation. For cargo we do about the same thing — only the Air Waybill is used in place of the ticket." *United Airlines:* (In reference to the United Airlines form, the headline of which is Charter Agreement, but with a box appearing under the headline designated Passenger Ticket, and Cargo [and in a new box, originally, Airbill Number], respectively.) "The Charter Agreement becomes a passenger ticket when the appropriate box at the top of the form is marked. The original of the two copies of the passenger list accompanies the Flight Coupon of the passenger ticket, and the duplicate passenger list is forwarded to the Sales office which arranged the charter flight. When used for a Cargo charter, the Cargo box at the top of the form is marked; and the Charter Agreement is an Agreement from the time it is signed by the Charterer until an airbill or air waybill is made out and executed upon arrival of the Charterer's cargo at origin. At that time the Charter Agreement and the airbill (or air waybill) together become the Charter Airbill. The attached airbill (or Air waybill) is completed except for the transportation charges which are shown on the Charter Agreement, with distribution of the copies similar to any other freight shipment so that receipt of the specific Cargo items is given on the Delivery Receipt by the individual taking delivery of the cargo."

[400] See INSTONE *op cit* 185—186 and XXXI; and WÜSTENDÖRFER, *Wege und Ziele des kommenden Weltluftrechts, namentlich im Hinblick auf den überseeischen Luftverkehr*, separate reprint of article originally in 1930 Hansa nris 16—18, at 39—40. It was natural that Imperial Airways used the form prepared by S. Instone & Co Ltd since Sir Samuel Instone was a member of the Board of Imperial Airways. — Strictly speaking, this was a charterer's document; it was printed by S. Instone & Co Ltd which company appeared in the document as "Agents for Charterers". — Copy of form in Annex.

[401] INSTONE *op cit* 186.

[402] MCNAIR, *The Law of the Air* (which contains the Tagore Law Lectures of 1931), says at 152 that "no standard form has yet been evolved." It is difficult to assess whether this is a mere mistake, or a sign that the Instone charterparty form never proved a success. — After the Warsaw Conference it was proposed in IATA that the Association should prepare a standard form for charter agreements, but the project was dropped at the IATA Conference in London in September 1933. See

was the form of the Imperial Airways. After the passing of the Carriage by Air Act, 1932, this company used forms which varied from time to time to incorporate their charter agreements.[403] A German form from 1936 is published in Hürzeler's dissertation.[404] An American form loosely referred to is said to have been adopted by AOA.[405]

It was not until after the war that aircraft charterparty drafting boomed. In England the early steps towards uniform documents appear to have been taken by operators' associations and in circles otherwise associated with aircraft operators. Thus, the British Air Charter Association — an association mainly composed of air taxi operators, founded August 1, 1946 — in December of that same year adopted and recommended adaptations of the two Imperial Airways forms for use by its members.[406] Aircraft brokers and others interested in the development of air charter strove towards the introduction of aircraft chartering in the Baltic Mercantile & Shipping Exchange, and as a result an Air Market was created there in August 1947.[407] Hand in hand with this development went the preparation of standard documents for charter aircraft. A first draft form for air cargo was issued by the Exchange in June 1948 and after prolonged discussions the Documentary Committee of the Exchange finally in June 1949 produced the original *Baltairvoy* which was accepted by other airfreight exchanges of the time as the basis of an international document of carriage by non-scheduled planes.[408] A note at the head of the document announced that it was approved by the Airfreight Advisory Committee — *i.e.* of the Baltic Exchange

DÖRING, *Die juristischen Aufgaben des Internationalen Luftverkehrsverbandes*, 1935 15 RAI 71.

[403] Information supplied by BEAUMONT (letters 24 Jun 1959, 6 Mar 1961). One of these forms was a bare hull charter agreement.

[404] *Probleme* 89—90. Since Hürzeler calls it a "Formular" I conclude that it must have been a form and not only a specimen of a contract.

[405] AUGERON in 1949 L'Avi March 22 p 8 reproduces a reference to a pre-war form adopted by AOA. The correctness of this reference, however, may be doubted. AOA, which inaugurated services as American Export Airlines under a certificate issued in July 1940, engaged in practically no commercial operations prior thereto. Subsequent charter operations were not of a commercial kind but conducted under the aegis of the Army Air Force. Throughout the period of the company's post-war operations it engaged in no charter services. See GATES letter. It is known that no standard form relative to charters existed in pre-war Air France: LEMOINE interview. Nor did it exist in pre-war KLM: WASSENBERGH letter.

[406] Information supplied by BIATA (BLAKEMORE interview); SHAWCROSS & BEAUMONT 2d 471 no 513 C. — Copy of form in Annex.

[407] *Supra* page 26 note 104.

[408] 1949 AC Bull (May 1—Jun 14). — Copy of form in Annex.

— and the Air Charter Association (above).[409] Some time later — in the interval the Airbrokers Association had been officially inaugurated — a companion document to the Baltairvoy was created in the shape of an air consignment note called *Baltairnote* which was approved by the Airbrokers Association and the Air Charter Association. On August 11, 1949, followed the publication of the *Baltaircon — Consecutive Voyages Air Cargo Charterparty*.[409a]

During this period, France experienced a like development. The private airline company TAI was created on June 1, 1946, and in 1947, it adopted a printed form for use in its charter activity which at that time formed the major part of its business. This charter form — hereinafter referred to as the TAI Contrat d'affrètement 1947 — was drafted after consideration of one maritime charterparty form and some aircraft charter forms which had been prepared by other companies.[410] — When in 1947 attempts were made towards the creation of a French air charter exchange the plan soon followed to charge this organization with "l'établissement de tous contrats-types et documents de transport, l'élaboration de tous documents, dans le cadre national ou international en liaison avec le Bureau de la Bourse et tous organismes."[411] BIFAP — the Paris Exchange — started in the latter half of 1948 and it met with a considerable measure of success although most of its business was between Metropolitan France and French North Africa. In May 1949, under the auspices of the International Chamber of Commerce, a meeting was held with the several air freight exchanges then existing and it was decided to undertake the study of an international charter party. The Paris Exchange took the lead in the project by creating a study commission presided over by Garnault. Before the work of the commission was finished, however, the working of the Paris Exchange came to an end, and the participation of the

[409] It is not entirely clear why the latter association participated at all, it having a few years before adopted a form of its own which continuously was recommended to its members for use. BEAUMONT has offered the following comment (letter 6 Mar 1961): "My recollection is that the BIATA . . . never found the Baltic documents satisfactory, and therefore came to me to settle for them forms of bare hull charter agreements and of agreements for charter of aircraft with crew." Furthermore, it is not easy to see why the Baltic brokers insisted on drafting a new document when the Air Charter Association form already existed. Some explanation may perhaps be found in the fact that the latter form did not govern any brokering questions.

[409a] Copy of form in Annex.

[410] TWA, KLM, Sabena (SAINTON interview). Copy of TAI CdA 1947 in Annex.

[411] 1948 L'Avi March May p 13 col 2.

Dutch and the Belgians ceased. The work done was then taken over by TAI and eventually the charterparty draft — "étoffé, complété dans un esprit plus concret" — materialized as the *charte-partie aérienne dite Transair.*[412]

By this time it was apparent that the Baltic documents were not successful. First, experience showed that there was no demand for such a document as the Baltaircon and by 1951 it was out of use. Secondly, the original Baltairvoy suffered from several handicaps. It was lengthy and difficult to handle, being a sheet-type document. It dealt most unsatisfactorily with such an essential question as the application of the Warsaw Convention.[413] As a result it too almost fell in disuse. In order to remedy the situation redrafting of the Baltairvoy began in 1950[414] and in April 1951 the Airbrokers Association decided to discuss the whole charterparty question anew and invited all foreign air carriers interested in the subject to participate. This opportunity was used for the airing of a pointed French criticism supported by Beaumont, of the original Baltairvoy, and in the end a completely new form called *Baltairvoy 1951* was adopted by the Association. The spirit of the new form was rather closer to the French Transair than to the original Baltairvoy.[415] Furthermore, it was somewhat less favourable to the charterers than its predecessor. The Air Charter Association, which in 1951 was reconstituting itself as the BIATA, did not associate itself with the new document although it had endorsed the original Baltairvoy and had been invited to participate in drafting its successor.[416]

From approximately 1950 and onwards, passenger charters which were increasing in number and importance evidenced a need for some suitable form. Efforts were directed to adapt the Baltairvoy for such charters,[417] and these resulted in 1952 in the publication by the Airbrokers Association of the *Baltairpac.*[418] In April 1952 a special gathering was held in London at which

[412] See SAINTON *Rapport le 23 avril 1952 sur la mission T. A. I. á Londres des 17 et 18 avril 1952* p 3. — Copy of Charte-partie aérienne dite Transair in Annex.
[413] See further page 259 *infra.*
[414] Information supplied by the Airbrokers' Association (LOGAN interview).
[415] SAINTON *Rapport* 4. — Copy of form in Annex.
[416] LOGAN interview.
[417] SAINTON *Rapport* 4. The original passenger charterparty litigated in *AIK v Aero Nord,* 1 Ark f L 268, evidences one of the intermediary solutions, namely a digest, compiled by the broker, of the points of primary commercial interest ending with a reference: "all other conditions as per Baltairvoy Charterparty."
[418] LOGAN letter 9 Apr 1959. — Copy of form in Annex.

the new documents received the approval of representatives of the foreign air carriers. [419-420]

One notable feature about these British charter documents has been their widespread adoption outside Great Britain. The BIATA form has been particularly successful in this respect, especially in Germany,[421] but versions of the Baltic documents are used by a number of non-British airlines too.[422]

The Baltic documents were the result of a fairly intensive cooperation between air carriers, brokers, and other parties interested in aviation. Another species of documents, however, developed among the IATA member airlines. The forms belonging to this group were all drafted without participation by any consumer interest, yet they dominate the present business. It has been estimated that approximately 50 per cent of the air charter business on the Baltic Exchange is concluded on these forms.[423] The lead in the IATA group was taken by KLM which could rely on its outstanding experience in air charter operations dating back to the period before the war.[424] The KLM form was almost always considered when other carriers prepared their forms. The Swissair form, for instance, is an almost literal adoption of the KLM form.

The characteristic feature, which singled out IATA forms from others, developed after 1948 when the 045 Resolution was adopted by IATA. Under this resolution the member carriers were bound to abstain from certain types of charter operations. In the 1951 discussions at the Bermuda Conference, it was proposed that the carriers undertake to insert stipulations in their charter agreements in order to carry out the 045 policy. Such a resolution was adopted at the Buenos Aires Conference of 1952. Ever since then the IATA member forms were all drafted with a so-called IATA

[419] SAINTON *Rapport* 4.

[420] Two companion documents were envisaged relative to the two new forms, namely: the *Baltairnote* and the *Balticheck*. The former appeared in print on the last page of the Baltairvoy 1951, the latter never materialized. (LOGAN interview).

[421] For instance, Deutsche Lufttransport GmbH, Karl Herfurtner Luftfartsunternehmen and Trans-Avia in Germany; Braathens SAFE in Norway.

[422] For instance, Condor Luftreederei and Deutsche Flugdienst in Germany; Flying Enterprise in Denmark.

[423] Questions put to airbrokers at the Baltic Exchange resulted in this rough estimate: LOGAN interview.

[424] Cf 1951 Transport (Basel) (10 Aug) 5540. See also *supra* page 12 note 45. The KLM interest in charter work, of course, was intensified when the colonial routes network collapsed. The KLM charter form appears to have been put in print sometime about 1947. — Copy of KLM ACA in Annex.

clause referring to or reproducing the 045 Resolution.

This IATA clause is believed to have been instrumental in extending the use of the IATA forms on the Baltic Exchange as no equivalent clause appeared in the non-IATA forms. In view of his obligation under the 045 Resolution, the IATA carrier would not consider the use of a form other than his own except in the narrow areas where the 045 did not apply.[425] In view of the reasons compelling resort to forms by the operators,[426] however, it was natural that they were reluctant to introduce non-company forms along with the ordinary company documents.

The IATA body itself, furthermore, took steps towards the creation of a unique IATA form.[427] A first draft appeared in the spring of 1954 and was subsequently considered at the meetings of the Legal Committee, the most important work on this form, herein referred to as the IATA Model Air Charter Agreement (IATA Model), taking place in Rome in April 1955. Further drafts followed, but no formal adoption or recommendation has taken place.

## § 5. *Charter tariffs*

Tariff system in the United States and Canada — legal technical explanation of tariff — semi-legislative character — basis of tariff system — Federal Aviation Act — common carriage — "to the extent required" — rejection of tariff — unreasonable tariff provisions — limits to carrier's duty to file tariff — private carriage — Board exemption — reserves inherent in the Act — "points served" and "extent required" — limits to the effects of tariff — tariff provisions without authority in the Act — notice and suit time clauses — illegal provisions made legal by being embodied in a tariff — contesting procedure is administrative not judicial — consolidated publication of tariffs — American uniformity in air carriage law is a result of consolidated publication of tariffs — background to proposition — failure of ticket law — advent of Civil Aeronautics Act — Redfern Rules Tariff — Barrington Rules Tariffs — tariff filing required in charter carriage — attempts towards a consolidated charter tariff — Canadian uniform charter tariff

While inductive construction in Europe found expression in the development of standardized documents, it took a somewhat

[425] Roughly: agreements between air carriers, between an air carrier and a governmental agency for the carriage of immigrants, displaced persons or certain military personnel, and charters relative to certain pilgrim traffic or to traffic in certain Mediterranean areas with certain outmoded equipment.

[426] *Supra* page 213 sq.

[427] The IATA Legal Committee undertook in 1954 to develop a Draft Model Air Charter Agreement, the purpose being to assist small airlines in their charter operations. It was furthermore hoped that as a by-product of the work some light would be shed on the application of the 045 Resolution. See 22 IATA Bull 37.

different path in the United States. The Americans employed a tariff system — one which prevailed in Canada as well[428] — whereby the great number of terms applicable to a charter contract were laid down in *tariffs* filed with governmental authorities. A passenger tariff is defined as an official, legally binding, written statement, by a common carrier or its agent, of fares charged by the carrier and/or of rules governing the relationship between the carrier and its passengers and prospective passengers.[429] *Mutatis mutandis,* this definition applies to a freight tariff too.

The legal technical explanation of the operation of the tariff is said to be that the tariff embodies terms and conditions upon which the carrier offers its services to the public. Since the carrier cannot legally deviate from these terms, the passenger or shipper is bound to accept them when using the carriers' services. Thus, by force of law, the tariff is the sole evidence of the terms of the contract of carriage.[430] On the other hand it is somewhat doubtful whether such obligations as are governed by tariffs should be called *contracts* at all. Williston and Thompson question this in view of the unimportance of the private agreement of the parties if contrary to the tariff.[431] It is at least clear that the tariff system functions as a semi-legislative scheme which is in one sense of a mandatory character. While not enacted in the same way as legislation, the tariff rule operates as legislation. It cannot be excluded by special agreement between the parties but only by the adoption of another tariff provision.[432]

Certain limitations on the tariff system follow from its

[428] It is proper here to note the existence of a German "Tarif für Staatsflüge" in 1921. See 1921 NfL 49—50. This tariff was the result or an agreement between the Reichsverkehrsministerium, on the one hand, and the various air carriers combining in the Verband Deutscher Luftfahrzeug-Industrieller, and was considered to represent a standing offer on the part of those carriers to perform flights under the conditions contained in the tariff.

[429] GROSSMAN, *Air Passenger Traffic* 57.

[430] MARKHAM & BLAIR, 1948 15 JALC 260.

[431] 4 WILLISTON 2d 2997 § 1073: "for one entering into an agreement for a service thus enumerated in the carrier's schedules becomes liable to the carrier, irrespective of the agreement and in spite of any provision therein to the contrary, to pay the rate specified in the schedule."

[432] Cf CAB E-8543 p 11, but MARKHAM & BLAIR, 1948 15 JALC 273. In *United States v Associated Air Transport,* 1960 USAvR 444, it was disputed whether ferry mileage was controlled by the charter agreement or by the charter tariff. The majority of the Circuit Court of Appeals held in favour of the tariff, relying *inter alia* on the argument that the tariff was a device which Congress had adopted in

statutory basis.[433] In the United States the system is founded on the Federal Aviation Act, 1958.[434] The Federal Aviation Act only applies to common carriage.[435] Every air carrier is required to file with the Civil Aeronautics Board tariffs showing "to the extent required by regulations of the Authority" *(i.e.* the Board) all rules and regulations in connection with air transportation between points served by the carrier (sec. 403-a). The tariff shall contain such information as the Board will prescribe and the tariff will be rejected if it fails to meet this requirement (sec. 403-a). Whenever the Board may find any rule or regulation referring to American domestic ("interstate" or "overseas") flying and affecting the value of the services of the carrier to be unjust or unreasonable, it shall determine and prescribe the lawful rule and regulation to be made effective (sec. 1002-d). The Board may suspend a questioned rule or regulation while decision as to its true character is pending (sec. 1002-g).

Notable consequences flow from these statutory fundamentals. On the one hand there are limits to the duty of carriers to file tariffs. Any agreement not relating to common carriage need not be filed: anything that can be classified as private carriage escapes the system. Indeed, after World War II, many air carriers took the position that charters of an entire aircraft were free of tariff regulation because not common carriage.[436] The scope of the system, furthermore, will depend on the use which the Board makes of its authority under section 416-b of the Act to exempt carriers from the filing requirements. Up to August 1, 1947, the irregulars were exempt from the tariff provisions generally.[437] Furthermore, the Board can decide whether a tariff should be established or not, because of the limits contained in the Act that the tariff need only relate to "transportation between points

order to combat discrimination, "enlightened by history and scandals of national proportions." At 459.

[433] A discussion of the limitations of the tariff system is found in KING, JR, *The Effects of Tariff Provisions: Some Further Observations*, 1949 16 JALC 174—184.

[434] The principal section is 403. The Federal Aviation Act is in matters of economic regulation a mere re-enactment of the Civil Aeronautics Act of 1938.

[435] The controlling provision is the definition of "air transportation" in sec 1-21. For a discussion of the meaning of the term "air carrier", see *supra* page 74.

[436] The CAB suggested the filing of charter tariffs on 30 Sep 1947. Discussions between the Board and the reluctant air carriers thereafter continued for almost two years until the Board reached a decision in the matter: GATES letter 30 Sep 1960.

[437] TORGERSON, 1948 15 JALC 52.

served" and need show the rules only "to the extent required by regulations" (sec. 403-a). Not only are there limits to the duty of carriers to file tariffs, there are also limits placed upon the effectiveness of tariffs once filed. Formerly it was well settled that questions of the reasonableness of practices were to be left to the Board in the first instance, and that, accordingly, the provisions of a tariff properly filed with the Board were to be deemed valid until rejected by the Board.[438] From 1952, however, courts commenced to declare that tariff provisions had no validity where they attempted to govern passenger injury and death claims, since the Act which required and authorized the filing of tariffs did not give even the hint of authority to include such extraneous details as notice or suit time clauses,[439] or liability limitations of the carrier for its own negligence in these matters.[440] This pattern of decisions was followed in some cases[441] but discarded in others.[442] The Board avoided the issue by persuading the carriers to cancel from their tariffs such provisions as related to the liability of the carrier concerning personal injury.[443] Limitations by tariff terms of liability as to baggage, on the other hand, were upheld in a long sequence of cases.[444] Furthermore, in other fields of carriage the tariff authority seems to prevail. In 1957, the Circuit Court of Appeals in the Fifth Circuit held a negligence-exoneration clause in an approved tariff to be invalid because such a clause being otherwise illegal, could not be made legal by embodiment in a tariff.[445] The same court, however, later held in a similar case that such a clause, included in a tariff could be invalidated only by resort to the

[438] Cf *Jones v Northwest AL*, 1945 USAvR 57. For comments, see 1945 ASAL 885, 1951 ASAL 530, 1948 JALC 272, 20 Temple LQ 64.

[439] *Shortley v Northwestern AL*, 1952 USAvR 233.

[440] *Thomas v American AL*, 1952 USAvR 240, annotated in 66 Harv LRev 1311—1312 and 38 Cornell LQ 220—228.

[441] *Crowell v Eastern AL*, 1954 USAvR 249; *Turoff v Eastern AL*, 1955 USAvR 354, 4 Avi 17, 649.

[442] *Herman v Northwest AL*, 1955 USAvR 306 and 509; *Kenney v Northeast AL*, 1956 USAvR 205.

[443] The final Order E-8756 of 10 Nov 1954 declared that "no provision of the Board's regulations should be construed to require the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death." — See generally note in 1960, 70 Harv LRev 1282.

[444] *Lichten v Eastern AL*, 1951 USAvR 310; *Wadel v American AL*, 1954 USAvR 167; *Wilkes v Braniff AW*, 1955 USAvR 670, 4 Avi 17, 808; *Toepfer v Braniff AW*, 1956 USAvR 138, 4 Avi 17.900; *Tannenbaum v National AL*, 1958 USAvR 229, 5 Avi 18.136; *Alco Gravure Division v American Airlines*, 1960 USAvR 185.

[445] *Mississippi Valley Barge Line Co v T L James & Co*, 1956 AMC 2186, 1957 AMC 1647.

administrative procedure established to contest the orders of the Interstate Commerce Commission.[446]

The tariff system has established the uniformity of important segments of the American law of air carriage. The instrument of this unification has been the consolidated publication of tariffs. Instead of every air carrier issuing and filing a separate Rules Tariff, carriers cooperated by joining their different tariffs into a single *consolidated tariff*[447] which was published and filed on behalf of all of these carriers.

The benefits bestowed on American air carriage by the consolidated tariffs must be seen against the background of general law. In the early days of American aviation the common law was thought too severe for the carriers and the diversities of common law interpretation added uncertainty to interstate operations. The carriers then attempted to introduce more favourable and certain terms by ticket conditions.[448] The effect of this ticket law, however, was largely whittled away by the courts. In 1940 it was said "that all the contracts which are of any practical effect have already been held invalid, and the type of contract which would be permitted under the decision in the *Conklin* case would be valid in only one state, New York."[449] At this point in time the adoption of the tariff system by the Civil Aeronautics Act, 1938, and the consolidation of tariffs together helped to harmonize the law. The Civil Aeronautics Act in effect meant that, within the scope of application of the tariff, the contents of the contract of carriage were withdrawn from the primary jurisdiction of the courts: tariffs filed with the CAB could not be challenged before the courts. Thus, uniform tariffs could mean uniform law. The preparations for consolidation of tariffs began under the auspices of the Air Traffic Conference of America, reconstituted in 1939, and as a result there was published the first so-called Redfern Passenger Tariff, effective on July 15, 1940, which derived its short name

[446] *River Terminals Corp v Southwestern Sugar & Molasses Co*, 1958 AMC 1531 and 2327.

[447] A "Consolidated Tariff" means — says W. D. BARRINGTON, formerly the IATA Rates and Tariffs Officer — "a compilation published by two or more carriers to show the rules, regulations and conditions of carriage, and the fares, rates and charges for the transportation of passengers, baggage and cargo over such carriers' routes." 9 IATA Bull 101.

[448] FIKE, 1937-38 8 ALR 319.

[449] BUHLER, *Limitation of Air Carrier's Tort Liability*, 1940 11 ALR 286.

from Merill F. Redfern, the Conference's executive secretary.[450]

In the course of the IATA work on the conditions of carriage and the conditions of contract, efforts were also directed towards the creation of a Rules Tariff. The conditions of carriage being accepted as "recommended practices" at the Bermuda Conferences in 1948, the Association undertook the preparation of two rules tariffs associated with these conditions of carriage one for passengers and baggage and the other for cargo. Action to enter the two tariffs into the American system commenced[451] but for various reasons the tariffs failed to receive the Board's approval until in 1950 when the IATA Consolidated Rules Tariff for Cargo became effective,[452] later being followed by a passenger rules tariff.

After some time the tariff filing requirements were extended so as to include charter carriage. The large irregulars became subject to this rule in 1947 and in 1951 the rule was extended to the certificated carriers. Its application to transatlantic flights was established over the protests of the Baltic brokers. The main concern of the brokers was that the tariff system meant a fixed per-mile or per-hour rate and as a result planes making one-way positioning flights were forced to quote round-trip rates.[453] When rules tariffs followed, the result was that a charter agreement relative to a flight subject to tariff rules was subject to all the tariff provisions applicable and that the agreement's drafting needs were reduced to a minor number of particulars such as the date and time of departure and the route to be flown. The standardized documents of the European trade therefore could be replaced by short memos. Attempts towards a consolidated charter tariff have been made, but these have succeeded only on

[450] GROSSMAN, *Air Passenger Traffic* 64. In 1945, the Redfern Tariffs were dissolved into separate Rules and Rates tariffs. See also MAYER, MEYER, AUSTRIAN & PLATT *op cit* 562. A revised version of the passenger rules tariff still exists in J. B. Walker, Local and Joint Passenger Rules Tariff No PR-4.

[451] It appears that in one of the first attempts the CAB was asked to approve of conditions of contract referring to one of these tariffs but without the applicant submitting the tariff itself. See 1949 USAvR 373—374.

[452] 1950 USAvR 310. This tariff is sometimes referred to as the Barrington Tariff, W. D. Barrington having filed it with the Board acting as the agent of some 25 carriers 17 of whom were IATA members. The tariff was approved, it would seem, first as an inter-carrier agreement under sec 412, then as a tariff filed by each carrier under sec 403 and parts 221 and 222 of the Board's Economic Regulations; cf 1949 USAvR 374, 376.

[453] 1951 AC Bull (Oct 19) 33.

a minor scale.[454] Here the Canadian system differs from the American one, for it has developed a uniform charter tariff[455] applicable to all domestic carriers and governing all domestic services. The tariff had a mandatory character and its production was the result of a participation of the whole of the Canadian air industry.[456]

## § 6. *Survey of the state of inductive construction.*

Pattern of contract documents — body of tariffs — Can a reformed contract type be anticipated? — completeness of tariff system — unlikelihood of tariff system developing into a statutory system — unlikelihood of documentary system developing into a statutory system — little advantage to businessmen — conclusion — features of stereotyped air charter contract — operator status — aircraft — demurrage — price

The foregoing survey evidences a pattern of contract documents developed by aircraft operators mainly for reasons of business expediency, and a parallel system of rules of similar contents, contained in a body of tariffs filed with certain governmental agencies. These developments reveal steps taken towards a reformed contract type supplying implied conditions for reasons of business economy. It is doubtful, however, whether any further steps will be taken. The tariff system is in itself complete, its function is legislative and within the jurisdiction of the agencies concerned its effect is unassailed. Thus, the American domestic field of operations, which is strictly delimited from the foreign operations, is covered by tariff regulation encountering no such problems of jurisdiction as may be involved in the foreign operations. The tariff system is rather flexible, and in view of the American carriers' desire for extremely detailed regulation necessitating the present flexible regulation, it is unlikely that it will ever develop into a more rigid statutory system.[457] The documentary system — if we adopt this term for the pattern of similar contract documents — also is not likely to arrive at the status of a statutory contract, or something equivalent thereto;

[454] Barrington filed in 1956 a consolidated charter tariff on behalf of Seaboard & Western AL, Deutsche Lufthansa and VARIG plus a few other airlines.

[455] Canada Gazette Part II, vol. 90 no 8 — SOR/56 127.

[456] *AITA Committee Report to the Transport Council relative to the Ottawa Meeting Jan 13—16, 1955*, p 4.

[457] It may be recalled that the equivalent of the tariff system is formed in Europe by the railway treaties. Owing to the political conditions in Europe the international treaty has been a necessity in order to solve the problems which have been taken care of in the United States by the consolidated publication of tariffs.

but for quite a different reason. The continuing dominating reliance upon documentation in the organization of international commerce[458] renders any change into a contract type one of little advantage to businessmen. This being true, we are forced to remain satisfied with the near uniformity of the present air charter contracts. They represent the current hopes for inductive construction in the field, however slight their prospects in legislative quarters may be. Perhaps they may not properly be considered "a contract type"; but these stereotyped documents form a class of their own, with many distinct features, which is not too far from the meaning of that term.

It may then be proper here to list certain features normally appearing in the stereotyped air charter contracts belonging to this group. They all involve an agreement between, on the one hand, the *carrier,*[459] and, on the other hand, the *charterer.* The traffic and other regulations of the carrier, including his conditions of carriage, are incorporated by reference.[460] From the point of view of operational standard, therefore, the carrier is the operator.[461] The carrier undertakes to supply an aircraft not identified, but specified as to type, and furthermore reserves the right to substitute alternate aircraft.[462] The charterer is obliged to pay demurrage (in the United States, *lay-over)* charges for delay.[463] The routing of the charter flight is outlined by the parties.[464] As to the price, there is a divorce between the documentary contract and the tariff contract. The former provides for a fixed price, while charter agreements subject to tariffs provide for a tentative price only which will be adjusted to the actual operation pursuant to the tariff rules, notwithstanding any agreement to the contrary.[465]

[458] *Supra* page 141.
[459] "Carrier" is not always the term used in the document. A number of British documents, *e. g,* use the term "owners".
[460] See also SHAWCROSS & BEAUMONT 2d 472 no 513E.
[461] See also AMBROSINI, *Fletamento y transporte* 16 no 16-a.
[462] See also SHAWCROSS & BEAUMONT 2d 472 no 513E; AMBROSINI *op cit* 16—18 no 16-b; GRÖNFORS, *Air Charter* 17, 23.
[463] See also SHAWCROSS & BEAUMONT 2d 472 no 513E.
[464] See also GRÖNFORS, *Festschrift Meyer* 52, *Air Charter* 23.
[465] This feature of the tariff contract is thus projected into aircraft charterparties such as those of Pan American which depend on tariff terms. Cf AMBROSINI *op cit* 18—19 no 16-c. Compare *United States v Associated Air Transport,* 1960 USAvR 444.

SECTION 5. TIME CHARTERS

Origin of time charter notion in aviation: writers — Baltic Exchange — meaning of "time charter" — notion based on method of price computation Grönfors — notion based on formal charge — scarcity of time quotations — Zone Case: reasons for scarcity — occurrence of time quotations — Berlin Air Lift contracts — Cost-Plus-a-Fixed-Fee contracts — time quotations counteracted by high utilization necessary — no special documentation features — bare hull charter documents — bare hull charter and lease — characteristics of Baltic Exchange time charters: period of use — moving of responsibilities to charterer — area of operations — evaluation of time charter as a contract category in air law — symptomatic function only — symptomatic function better performed by subcategories

What is then to be found in the field that lies outside that of the stereotyped air charter forms?

Writers have sought to introduce into this field the notion of time charter. Cogliolo put the question of the adoption of the time charter notion before his colleagues in Citeja in 1936.[466] Many subsequent writers have taken the existence of the time charter contract type in aviation for granted.[467] Indeed, the guidance offered by maritime law to legal scholars seems to have been irresistible.

The expression "time charter" is not unknown in air commerce.[468] The first "time charter" fixture[469] reported on the Baltic Exchange was that of a Dove aircraft for the use of business executives, "for one, charterer's option two, charterer's option three month's time charter", in April 1948.[470] In 1950, operators

[466] 288 Citeja No 2, in 297 Citeja 18: "Dans quelle mesure et en quelle partie pouvons nous recourir aux figures du droit maritime, à la Time Charter. . ." But Cogliolo, it is true, was not the first person to discuss time charters in aviation.

[467] The expression "affrètement pour un temps déterminé" was generally used in the IATA and the Citeja discussions during the thirties, see *e. g.* GOEDHUIS, 1932 RDILC 700; SCHONFELD, 313 Citeja 2; COQUOZ 98. In MANIATOPOULOS' draft convention of 1946— art 8 § 3 — this expression was transformed into the term: time charter, see 423 Citeja 8. In the course of BEAUMONT's work on the Warsaw revision he repeatedly used the term "time charter", defining it variously; the first time, it would seem, as the case when an entire aircraft together with the crew required for its operation is *hired out* by the owner or operator thereof to a charterer for a specified period: 445 Citeja — Draft Convention art 1. ALTEN adopted the term, see *e. g.* 4 ICAO LC 278 and 9 1 ICAO LC 130; DRION uses it, see *Limitation* 57 no 53, and similarly CHAUVEAU, see CATE WP No 51 Revised. GAZDIK defines it as the contract "under which the carrier agrees to keep at the disposition of the charterer the equipment, manned with pilot and crew, during a certain period without specifying the place of destination or routing"; see his *Comments of 24 Jun 1955 on the Model Air Charter Agreement* p 2.

[468] "Time charter" is an expression used in the BIATA ACA form, clause 7.

[469] The term "fixture" in this text means generally the closing of the charter so that a binding contract is created fixing the day of departure. The term has another meaning in real property law.

[470] 1948 Air Fr Mark Rep (Apr 30) 10, and 1948 Air Fr Mark Rep 44 (Dec 31 — Annual Review of 1948).

of DC3 equipment frequently quoted for time charters on the Baltic, although in 1951 the business came almost to a standstill.[471]

What is then meant by "time charter"? Since the notion of time charter stems from maritime law, are we entitled to assume that the notion in aviation should be delimited in the same way as in shipping? That would mean accepting a basic distinction between time and voyage charters based on the *method of calculating the charter price.* The salient feature of the time charter in aviation would be that the charter price is computed on a time basis.[472]

Lately, Grönfors[473] has questioned the value of a time charter notion in air law built upon these fundamentals. He brings out that the method of computing the price is a very superficial distinction if applied in aviation. Quotations generally are based on time calculations,[474] and it is a mere matter of sales policy that prices are converted into rates per flight miles.[475] To accept the time price unit as the criterion of the time charter therefore means that the character of the charter would change, depending upon what use is made of the graph of flight hours/flight miles when the quotation is computed. Grönfors' argument on

[471] Information supplied by BEESON (letter 19 Apr 1951 p 3).
[472] See *e. g.*, GRÖNFORS, *Air Charter* 16.
[473] *Festschrift Meyer* 51—52; *Air Charter* 16—19.
[474] Grönfors' views are substantiated by the following information as to pricing when the airline has received an initial enquiry for a flight, in SAUVAGE, *Planning the Eagle's Flight*, Travel Topics — Eagle Supplement 4 col 2: "The destination of the flight and the disposition of the load are immediately passed on to the Operations Department, who have to ascertain the mileage involved. This is then translated into flying hours; for the purpose of costing, details of the route such as stage lengths, number of landings to refuel, points at which night stops will be made — which may involve accommodation expenses — and any other relevant information, is passed on to the Commercial Department. In working out the route details the Operations Department must take into account the established air corridor network over the route to be flown . . . The route and conduct of the flight must also comply with the standards laid down in the Company's Operations Manual."
[475] The pricing system reviewed by PITT, *Eagle's Charter Activities*, in Travel Topics — Eagle Supplement 9 col 2, was based on a differentiation between three classes of charters, *i. e.* inclusive tour charters, closed group charters (series of flights organized by an association, society or club, participation in which is limited to members of the group concerned) and ad hoc charters (compare generally *supra* pages 37 sq, 44 sq). Pitt submits: "It is our policy to quote a basic charter rate for the third type, with a reduction for quantity on the second, and the same reduction, plus a surcharge, on the first type. This surcharge covers our additional risk in holding aircraft while the licence is negotiated, a min. period of three months."

this point would therefore seem to have merit in spite of Alten's attack.[476]

The method of computing the charter price thus is a doubtful basis for a time charter notion in aviation. The *formal charge* presented to the customer, however, is even less helpful in building such a notion because time quotations are very scarce in aviation. The reasons for this phenomenon were discussed in the *Zone Case*[477] where the issue was brought up by the intimation that to quote prices on a trip basis was a custom of the trade and that, accordingly, when the charter agreement did not cover the point, the charterer was entitled, solely on the basis of that custom, to pay the amount agreed upon, per trip rather than per flying hour. The scarcity of time quotations was explained by expert witnesses who gave two main reasons for the phenomenon. On the one hand, charterers were not satisfied with a quotation based on hourly rates. In view of the high costs involved and the possible value of flying hours and flying experience to the operator's personnel — *e.g.* in relation to route training — such a quotation was too great a risk to the charterer.[478] On the other hand, the final costs of the operation depended greatly on the amount of landings and take-offs, and therefore, if one hourly rate was offered relating to a direct flight, another had to be computed when intermediary landings were to take place.[479] Time quotations — it was testified[480] — occurred only in three instances. One was where very small operators lacked the resources to compute mileage rapidly enough to be able to quote per trip. Another concerned certain types of airwork which did not involve any route as such, *e.g.* ore search and target towing. The third occurred in the case of master contracts between air carriers

[476] 1956 TfR 478. — On the other hand, I think it is a mistake to say that this phenomenon of computing rates on a time basis is characteristic of aviation "as distinguished from shipping." I believe that the only cost of transportation which can be measured per mile with any certainty is the one of motor car and railway traffic, and motor car costs as is well known, vary greatly depending on whether the car is running in the traffic regulated streets or on the highways. In maritime carriage the fuel consumption is known only on a time basis and further costs arrange themselves similarly. Prediction of the true costs of a journey remains an elusive matter at best. The necessity to know the number of operating hours therefore is by no means non-existant in shipping and indeed, if we had to penetrate the true price basis, we may well have to desert voyage charters in shipping.

[477] *Zone Redningskorpset v Transair Sweden*, 1961 USAvR 212; 1 Ark f L 264.

[478] Testimonies of Forsmark and Rosén.

[479] Kron's examination of Bille.

[480] Höljfors, Grönlund.

under which the one carrier was to provide extra flights on the routes of the other in the case of some emergency, and the price was assessed on an hourly basis.

The witnesses in the *Zone Case* were unable to indicate whether this scarcity of time quotations was solely a Scandinavian characteristic or one of an international scale. There is reason to believe that the phenomenon exists beyond Scandinavian borders. Even the contracts for the Berlin airlift, which originally were based on a rate per hour, were later changed to provide for payment on the basis of tonnage delivered.[481] In a great number of the early post-war contracts for air movements which involved a flight programme for a certain period, agreement was reached upon a Cost-Plus-a-Fixed-Fee basis.[482] This term meant that the remuneration was determined on the basis of the actual costs — as arising under a budget provided by the air carrier and approved by the charterer — plus a fixed management fee to be mutually agreed.

A new reason for the scarcity of time quotations has developed in connection with the growing size of aircraft. Towards the end of the 1950's there was a rising market for passenger tours in Europe. Nevertheless, operators generally have been unable to quote long-term contract rates sufficiently low to attract charterers engaging in the passenger tours market. Operators were only prepared to quote on the basis of the average flying hours per day computed in light of the per annum total flying hours necessary to make the operation of these large aircraft profitable. Since in tour flying the actual number of flying days often is well below half of the total period that the aircraft would be away from its base, the operators' offers meant prices which effectively deprived charterers of any reasonable chance to make their operation profitable.[483] The high utilization necessary can only be achieved in the service of some other airline, and thus this development tends to restrict the class of possible charterers to other airlines.

The foregoing evidences that whatever view one takes of the time price, it fails to support the building of a time charter notion.

Nor can support be found in *features of documentation*. It may

[481] Rodrigo, *Berlin Air Lift* 191.
[482] See also *supra* page 17.
[483] 1960 AC Bull 20 (Oct 21).

be safely established that there does not exist any contract form, like the Government Form in the shipping world, around which the notion of the time charter can be built. This is not to say that no forms are used. Seaboard & Western Airlines, in 1958, adopted a short form for wet leases which is believed to be relied upon by other airlines as well.[484] The IATA Legal Committee, at its London meeting in October 1960, has introduced a number of standard liability clauses, one set for use in charter agreements between airlines, another set for use between IATA members and persons and institutions other than airlines.[485] At times, even adaptations of the stereotyped air charter forms are used for inter-carrier charters.[486] But these sparsely occurring standardized formulas do not combine into any consistent pattern and cannot be made to render service as the basis of a time charter notion.

There is, however, one field in which forms have developed more abundantly, *i.e.* bare hull charters. Quite a number of forms for such contracts exist. Their existence and their denomination, bare hull *charter* agreements,[487] may have exercised a certain attraction on the language generally and made a contribution towards the acceptance of a bare hull time charter notion as contrasted to the stereotyped air charter contract previously dealt with. At times, this type of agreement has been quite a frequent occurrence.[488] In particular, in the early post-war period, most of the American irregulars had chartered their aircraft on a bare-hull basis from the United States Air Force or another government body.[489]

Nevertheless, the bare hull charter is not likely to succeed in establishing itself as a legal notion, at least not in Continental Europe, inclusive Scandinavia. The reason is simply that this notion brings nothing new when compared with the classic contract type

[484] December 1958: information supplied by FEIGUINE (letter 7 Jan 1959; interview 10 Apr 1961). — Copy of form in Annex.

[485] Sir WILLIAM HILDRED, *Circular letter 30 Nov 1960.*

[486] The Air France Contrat type provisoire passagers & bagages is drafted for such use (see art III, 5⁰, note 2), and instances are known in which the airline charterer was forced to accept the supplier's formula used when dealing with the general public.

[487] In the United States the usual expression is "dry lease".

[488] Compare the following note in 1952 AC Bull (Mar 7) 8: "An Indian owned Dakota is trying to find six months' timecharter in the UK or other places in Europe, but whilst operators here are extremely interested in time-chartering to add to their fleets, they invariably insist on barehull, and this operator is not prepared to hire out the aircraft without crew."

categories already used. The bare hull charter is generally accepted as a sample of the lease contract.[490] Being so disposed of, it cannot help to build a time charter notion.

In the absence of a documentary core for the time charter notion, it remains to consider the features of the agreements which were termed "time charters" on the Baltic Exchange from 1948 *(supra)*. The quotations concerned were generally made on the basis of flying hours, but with a guaranteed minimum amount of paid hours over the charter period. As an alternative the quotations were sometimes based upon mileage rates with a guaranteed minimum of paid miles.[491] In the end a clause was added to the effect that a flat payment should be made in addition to the other rates in order to compensate the owner for his loss of open chartering market. Thus part of the price was a non-adjustable lump sum.[492] Hence, the feature which characterized these time charters on the Baltic Exchange was the period of use rather than any emphasis on a time price. This feature also appears in some of the definitions submitted.

These time charters, furthermore, evidence a moving of responsibilities to the charterer. The charterer could be required to pay all the operating expenses including petrol, oil, hangarage, airport dues and other levies on the aircraft,[494] as well as additional expenses for the crew such as night stop expenses, overseas expenses, flying bonuses etc., provided that he could control what

[489] Cf FREDERICK 4th 91; NETTERVILLE, 1949 16 JALC 429.

[490] See *e. g.* ALTEN, 1956 TfR 477, 1 Ark f L 118; AMBROSINI, *Fletamento y transporte* 5 no 5; COQUOZ 90—91; GRÖNFORS, *Air Charter* 16; KAISER 32; VON DER MÜHLL, *Voraussetzungen und Umfang der Luftfrachtpflicht gegenüber Drittpersonen*, Baseler Studien zur Rechtswissenschaft Heft 30, 1950 p 110—111; SERRAZ, 1949 12 RGA 351; SCHLEICHER-REYMANN-ABRAHAM 3rd 266 Anm 17.

[491] Information supplied by BEESON (letter 19 Apr 1951). — Incidentally, this point was the issue of the first air charter legal dispute known in Sweden, *i. e. Aerotransport v Flygstyrelsen*, which was decided by an arbitration board 28 Dec 1928. When the Swedish Crown chartered Aerotransport's aircraft "Uppland" for the search for General Nobile's airship "Italia" the charge was fixed at Sw Crowns 5: 50 per kilometre flown and the following clause was added to the agreement (§ 4): "compensation however being guaranteed to cover at least 12.000 kilometres during the expedition." The charter period which was fixed to one month with extra weeks at charterer's option, was in fact prolonged one week. Aerotransport claimed extra compensation in the amount of 16.500 Crowns based on a proportion of the guaranty for the extra week. The Crown rejected any adjustment of the guaranty and asserted that it covered the complete charter period even when prolonged. The arbitration board awarded 10,000 Crowns to Aerotransport. — Similar schemes appear in the 1921 Tarif für Staatsflüge, 1921 NfL 49-50.

[492] Information supplied by BEESON (letter 19 Apr 1951).

[494] BEESON 2.

flights which were to be undertaken.[495] Apparently the charterer's duties could even be stretched to include maintenance, crew wages and insurance costs. On the other hand, the operator could be made to retain the duty of paying for petrol and oil without any change in the character of the contract. It was the charterer's responsibility to get the necessary flight clearances and it was up to him to see that the crew had their proper visas and inoculations. The crew worked under the charterer's orders but could override these for reasons of aircraft safety or for other technical reasons.[496]

A third general feature of the Baltic fixtures was that the charterer fixed the areas in which the aircraft was to fly and that the owner excluded certain areas.[497] Charters between carriers as well as between one carrier and the government often specified in definite terms which routes were to be flown, at what frequency, and at what payment per mileage on the different routes.[498]

The time charter concept of the Baltic Exchange thus seems to be mainly based on the period of use, the moving of responsibilities to the charterer, and the fixing of an area of operations. Apparently this time charter notion does not perform the essential function of a legal contract type category (*i.e.* to provide implied terms) for no implied terms exist. It may function to avoid the application of the stereotyped air charter terms when these arrive at sufficient stability to have such application inherent. This function, however, is premature and may just as well be performed by a careful framing of the other contract type. The only present function of this time charter category is therefore of the symptomatic kind. It evidences that the parties, in contrast to the transitory conduct contemplated under the stereotyped air charter contract, have bound their conduct for a certain duration of time. But so broad a symptomatic function does not seem very useful. A better alternative, therefore, appears to rely on the

[495] BEESON 2.
[496] BEESON 3. The question whether the charterer's Operations Manual — if any — should apply to the aircraft is discussed on pages 79 sq *supra*.
[497] BEESON 3.
[498] Gazdik's point in his *Comments of 24 Jun 1955* that a time charter should be characterized by the absence of any specification of "the place of destination or routing" thus excludes a great number of important contracts from the time charter category.

subcategories which are being developed by the industry generally, such as period charters and wet leases.

The period charter means an aircraft chartered with a crew by a charterer for a number of well-defined voyages, these voyages being performed at a defined frequency for a period of say, three or six months.[499] The wet lease operation, as already indicated, is much to the same effect, but the name indicates that two carriers are involved.[500] None of these concepts seem to have reproduced themselves in any original, standard forms.[501]

[499] Information supplied by LEVI-TILLEY (letter 9 Nov 1960).

[500] See *supra* pages 18—24, 57—58. Since the aircraft under a wet lease are chartered for general use in the chartering airline's services, the aircraft's operations cannot be as strictly fixed as under a period charter.

[501] The Baltaircon (*supra* page 220) was one attempt towards such documentation on the part of the period charter, but the document fell into disuse. The wet lease documentation seems to be hampered by the fact that the CAB, as a matter of principle, requires that an airline which engages in air transportation by way of an inter-carrier charter should do so under the terms of its regular tariffs. If wet lease arrangements do not conform to the tariff on file, the explanation is that "where the operation is authorized by the Board, it is usual that an exemption is granted to the 'lessor' carrier from the provisions of section 403 of the Federal Aviation Act": information supplied by CAB (ROSENTHAL letter 19 Jun 1961). Note, however, Seaboard & Western's short form for wet leases, referred to *supra* at page 235 and note 484.

*CHAPTER FOUR*

# AIR CHARTER AND THE WARSAW CONVENTION

SUB-CHAPTER 1.

# DISTRIBUTION OF WARSAW RULES

## SECTION 1. THE WARSAW CONVENTION

Warsaw Convention, standard rules for ticket and air waybill contracts — principles of exposition — Warsaw Convention, Warsaw Acts and Warsaw Clauses — incompleteness of Convention — uniform rules and conflicts rules — Conference hostility to conflicts rules — diverging doctrinal foundations lead to conflicting interpretations — *Holzer v Seaboard* — *Froidevaux v Sabena* — dualistic and monistic theory — French implementing decrees and other such decrees — intent of Conference as to arising conflicts situations — fullest possible use of Convention language — British Hague Protocol legislation — *lex specialis* proposition — reliance on French meaning — support for such reliance in treaty interpretation canons — IIL Resolution — legal meaning of words — Art 36 construed — *reductio ad absurdum* argument — *Greek-Turkish Populations Case* — *Standard Oil Tankers Case* — primacy of French legal system explained — approximation — harmonizing construction — France, *homme de base*

The most important presently existing body of rules affecting air charter is the Warsaw Convention. This Convention provides the standard rules for ticket and air waybill contracts and thus controls most of the regular services operated today. Problems related to the regular services as such, however, are not the subject of this book; only the particular regular service problems which occur in relation to air chartering will be treated. In fact, the numerous treatises on the Warsaw Convention will provide most of the solutions to the general problems of the regular services and, although in certain cases these are vital to traffic under charter as well, it would serve little purpose to recite the arguments of those treatises in this book.

This chapter will deal with the relationship between air charter and the Warsaw Convention. Three aspects of this relationship will be treated. First, the chapter will expose the distribution of Warsaw rules which may build a superstructure of terms on the air charter contract. Secondly, there will be a survey of the line of demarcation between the Convention terms structure and the air charter contract which is free to develop its own terms Thirdly, the chapter will discuss the peculiarity of the stereotyped air charter contract consisting in the fact that the insufficiency of the Convention has deposited terms in the contract which are defensive measures only.

The air charter contract may be a structure of such terms as appear in the Warsaw Rules. By Warsaw Rules are here meant the terms laid down in the Warsaw Convention, whether the Convention is effective *proprio vigore,* or because of domestic legislation which extends the application of the Convention to transportation otherwise unaffected (Warsaw Acts),[1] or because the Convention terms are incorporated into the contract by a contract clause to that effect (Warsaw Clauses). The two latter aspects will be treated in the subsequent sections. The present section will deal with certain difficulties involved when the Convention is applicable *proprio vigore.*

The Warsaw Convention was signed on October 12, 1929. It was the result of a very extensive preparatory work, commencing with the first "Conférence Internationale de Droit Privé Aérien", which assembled in Paris in 1925 at the invitation of the French Government, and was carried into various drafting stages under the aegis of the Citeja.

The Convention is not complete. It does not contain all rules for international carriage by air. This is indicated already in its title. It is a Convention for the unification of *certain* rules relating to international carriage by air. On points not covered by unified rules one would then expect to find conflict of laws rules. The Warsaw Conference, however, agreed upon conflict of laws provisions only in five special cases,[2] although the Minutes show failure of agreement on uniform rules on a number of other points, such as cause of action, *ayants-droit,* identity of carrier, identity of *préposés,* negotiability, of air waybill and liability for hand baggage. The discrepancy is explained by the utter hostility which was displayed by the Conference relating to conflict of laws solutions.

Sir Alfred Dennis had proposed to introduce a reference to national law "qui sauvegarde tous les droits, qui évite tous les

[1] Note the distinction between the decree implementing the Convention and the Warsaw Act. The former legislation only meets the country's international obligation stemming from ratification of the Convention, the latter extends the application of the Convention beyond what is required under this obligation.

[2] Contributory negligence (art 21), periodical payment of damages (art 22), fault equivalent to wilful misconduct (art 25), questions of procedure (art 28-2), method of calculating the period of limitation for actions (art 29-2).

doutes."[3] The reaction of the majority of the delegates was reflected in Ripert's comment on this proposal.[4]

"Nous ferons tous nos efforts pour trouver une formule qui donne satisfaction, mais il est bien entendu, dés maintenant, que nous sommes absolument opposés à une formule qui renverrait à l'application de la loi nationale. C'est la première fois que l'on réclame l'application de la loi nationale et si on l'admettait sur cette question on la réclamerait pour d'autres. A notre point de vue, on arriverait ainsi à détruire la convention, si on établissait le recours à la loi nationale sur chaque article."

"Nous serons aussi conciliants que possible sur la formule à adopter; nous la développerons autant que cela sera possible, mais je supplie les Délégués de ne pas entrer dans cette voie dangereuse qui consisterait à réserver la solution du litige à la loi nationale."

Later comments elaborate the same attitude. Conflict provisions were rejected because of the risk "de négliger les matières sur lesquelles un accord international était susceptible d'aboutir", said Yvonne Blanc.[5] They would make the Convention "plus satisfaisante pour les juristes que pour les intéressés", according to Ripert's unvarying opinion.[6]

Having this basic tenet in mind, we may turn to the interpretation of the Convention when diversity in its application results from differing jurisdictional views which in turn are caused by the different doctrinal foundations of each jurisdiction. The diversity depends upon the manner in which the Convention arrives at importance in the various jurisdictions.

There is a remarkable court dictum in the United States case *Holzer v. Seaboard & Western*[7] saying that "As translated by the United States Department of State, the Warsaw Convention is the law of the land." A striking contrast to this dictum is offered by the Swiss case, *Froidevaux v. Sabena*,[8] in which the court, faced with two doctrinal structures involving different inter-

[3] II *Conférence* 44.
[4] II *Conférence* 44—45. AMBROSINI was no less explicit: "En tous cas, il faut écarter le recours à la loi nationale". *Op cit* 44.
[5] Yvonne BLANC (DANNERY), 1936 5 RGDA 386.
[6] 1932 A RGDA 258.
[7] *Holzer Watch Co v Seaboard & Western*, 1958 USAvR 142. The dictum perhaps is less upsetting in substance than in form since the issue of the case was a mere discrepancy between the British and the American translation.
[8] Superior Court of the Canton Zürich, 1959 8 ZfL 55, 1959 13 RFDA 189.

pretations of Article 29-1 of the Convention, said: "Vielmehr ist überall dort, wo sich aus Übersetzungen in die Amtssprachen der einzelnen Mitgliedstaaten des WA Unklarheiten ergeben, auf den französischen Originaltext dieses internationalen Abkommens zurückzugreifen ... Daher bleibt, wo der französische Text so eindeutig ist wie in Art. 29 Abs. 1 WA hinsichtlich der Natur der Klagefrist, kein Raum zur Anwendung schweizerischer Rechtssätze und Lehren betr. Verjährung und Verwirkung."

Statements like the Holzer dictum, of course, can be explained in countries in which the dualistic theory is adhered to.[9] In such countries the Convention can be internally effectuated only by an implementing domestic legislation. Such legislation results, of course, in the translation of the Convention into the official language. Only the translated version of the Convention text found in the implementing Act will then guide in the interpretation, and this version is not likely to reflect any other conceptualism than that which prevails in the legal system whose language is used for the translation. Apparently, however, even in a system such as that of the United States which adhere to the monistic theory, reliance on a translation is difficult to avoid.[10]

This reliance on translations and implementing decrees thus involves that the Convention can be purely applied only by those countries which use the Convention's official language. As a result, the official text of the Convention being the French text,[11] it is only in countries in which French is the official language

[9] It is beyond the scope of this book to explore the vacillation between a dualistic and a monistic theory in the various countries. Reference is here made to JÄGERSKJÖLD, *Folkrätt och inomstatlig rätt*, Stockholm 1955 and literature there cited. Suffice it to point out the implementing legislation. Germany: Act 15 Dec 1933 "zur Durchführung des Ersten Abkommens zur Vereinheitlichung des Luftprivatrechts." Great Britain; Carriage by Air Act, 1932. United States: Proclamation 29 Oct 1934, 49 Stat 3000, 3013. As to the Scandinavian countries, the implementing legislation is dealt with in section 2 of this sub-chapter

[10] Art 6-2 of the United States Constitution says that treaties are the law of the land. Notwithstanding this monistic *credo* "Treaties may be denied operative effect as domestic law in the absence of implementing legislation" (LISSITZYN, 1950 17 JALC 444). This may occur if the treaty is not self-executing, and such a state of affairs is considered to exist "when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act" because then "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." (United States Supreme Court, 1829, in *Foster v Neilson*, 2 Pet 253, 7 L Ed 415) — The Warsaw Convention, however, has never been denied effect although courts have indicated the absence of implementing legislation (*Garcia v Pan American*, 1945 USAvR 39).

[11] Art 36: "The Convention is drawn up in French in a single copy . . ."

that the Convention text arrives at an immediate normative function, because only the governments of these countries put the Convention into effect by decrees not touching upon the wording of the Convention.[12]

However, it does not appear very satisfactory that a conflict of laws situation should be permitted to establish itself *a posteriori* because of reliance on translations of the Convention which reflect diverging doctrinal foundations and which in turn involve conflicting interpretations. The hostility of the Warsaw Conference to such a situation shows that, as far as the intent of the Conference is concerned, the principles offered by the Convention as it stands should be used as far as possible before the conflict of laws situation is surrendered to.[13] This entails the fullest possible use of the language of the Convention.

It is interesting to note how this is done in the British legislation implementing the Hague Protocol.[14] The *French* text of the Convention, as amended, is there given in the implementing decree and it is furthermore provided that "If there is any inconsistency between the text in English ... and the text in French ... the text in French shall prevail."[15]

There have been several other attempts to make the fullest

[12] See French decree 12 Dec 1932, 1932 JO (27 Dec). — Incidentally, the *Froidevaux v Sabena* case (*supra* note 8) may be seen in the light of the Swiss having French as one of their official languages, and of the present Swiss implementation decree (Lufttransportreglement of 3 Oct 1952) making a mere reference to the Convention (art 3-1). — An extensive Austrian discussion of the status of the translations of treaties under the monistic Austrian Constitution (Bundes-Verfassungsgesetz) will be found in MÉTALL, *Fremdsprachige Staatsverträge*, 1930 9 Zeitschrift für öffentliches Recht (Wien & Berlin) 357—389. Related problems have recently been discussed by DÖLLE, *Eine Vor-Studie zur Erörterung der Problematik mehrsprachiger Gesetzes- und Vertragstexte*, *XXth Century Comparative and Conflicts Law — Legal Essays in Honor of Hessel E. Yntema*, Leiden 1961 p 277—292, and GUTTERIDGE, *The Comparative Interpretation of Statute Law*, Chapter VIII in *Comparative Law* 2d Cambridge 1949 p 101—117, in particular 111 sq. — GRÖNFORS' contribution will be dealt with *infra* pages 246 and 305 sq.

[13] For proposals advanced to secure a uniform interpretation of the Convention, see DRION, 1953 7 RFDA 300, and CHAUVEAU, 1955 9 RFDA 465; but 7 ICAO LC 367. The substantive degree of uniformity of the maritime laws of Sweden, Norway, Denmark and Finland which has been maintained, is certainly partly due to the existence of a common Scandinavian collection of maritime reports. It may therefore perhaps be suggested "that easy accessibility of foreign precedents may be as effective as a common court of appeal" (GILES, 1961 28 The Solicitor 152 col 1). In reference hereto it is interesting to note that the editors of USAvR recently have conceived an international expansion programme. The intended "United States & International Aviation Reports" may well contribute more to uniformity than overoptimistic proposals for the establishment of supra-national courts.

[14] 9 & 10 Eliz 2.

[15] First Schedule, Part II, and sec 1-2.

possible use of the Convention. One trend has been to "derive . . . arguments mainly from the Convention itself . . . [i]n order to obtain a solution that has any chance of being approved by lawyers representing different legal systems".[16] The main attempt in this direction is Grönfors' volume "Air Charter and the Warsaw Convention".[17] This trend, which hereinafter will be referred to as the *lex specialis proposition,* has apparent merit inasmuch as it avoids the divergencies which follow from the reliance on the structures of the national law. Its shortcomings, however, are no less apparent.[18] Like all "écoles de l'exégèse" it tends to become artificial, complicated and theoretical, because it cuts out the natural determination of words and phrases and offers in principle no remedy when doubtful expressions cannot be determined as to their meaning by mere inference from the Convention materials.

The other attempt towards fuller use of the Convention language is to supplement it with the materials offered by the legal system in the language of which is the authoritative text of the Convention, *i.e.* French. Article 36 of the Convention states that the Convention is drawn up in French in a single copy. According to Article XXVII of the Hague Protocol, the Protocol is given three authentic texts, but the text in the French language shall prevail in the case of any inconsistency. These provisions, at the same time as they establish the primacy of the French language, prevent resort to other languages because, owing to these provisions, states cannot claim to be bound only by the Convention text in their own language.[20]

Words used in the Convention thus have to be determined as to their meaning by reference to the French language.

The canons for the interpretation of treaties are becoming more

[16] GRÖNFORS, *Air Charter* 14.

[17] The Hague 1956. The theoretical bases on which GRÖNFORS proceeds in his volume are expounded in his article *Om konventionstolkning,* 1957 SvJT 16—21.

[18] GRÖNFORS, 1957 SvJT 20: "Metoden har naturligtvis sin givna begränsning — endast en del spörsmål, men dock kanske inte så få som man i förstone skulle vilja anta, är så beskaffade att man på detta sätt kan uppnå ett positivt resultat — men så långt den nu verkligen kan användas torde den verksamt bidra till likformighet i rättstillämpningen."

[20] Cf 1 OPPENHEIM 8th 956 no (15) "Unless the contrary is expressly provided, if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts, each party is only bound by the text in its own language." Cf ROUSSEAU, *Principes généraux du droit international public* 1944 p 723 no 7.

and more precise,[21] and while it is still stated in Oppenheim that "[t]here are no precise rules of customary or conventional International Law concerning the interpretation of treaties",[22] this statement must be compared with the confession of the editor of the work, Lauterpacht, that he has retained this opinion "par piété plus que par conviction".[23] The most recent and most authoritative statement of these canons, *i.e.* the Resolution on the Interpretation of Treaties which was adopted by the Institute of International Law at its session in Granada, April 19, 1956, lays down *i.a.* the principles that "it is necessary to take the natural and ordinary meaning of the terms ... as the basis of interpretation"; but that "If ... it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced."[24] The qualification "to take the natural and ordinary meaning of the terms" necessitates consideration. Apparently the Resolution does not exclude a "technical meaning", different from the "popular meaning" of words. Lauterpacht, as Rapporteur, stated that the requirement of "ordinary meaning" had gradually lost its value and that the "technical meaning" may even be contrary to the "popular meaning".[25] Ehrlich submits "que s'il s'agit de termes juridiques, tels que "propriété", "nationalité", "société par actions", on doit prendre en considération la signification juridique et

[21] EHRLICH, *L'interpretation des traités*, 1928 24 4 Recueil 5—145, at 138. See generally MCNAIR, 1933 43 Recueil 251—307; LAUTERPACHT, *De l'interprétation des traités, Rapport et projet de Résolution*, 1950 43 I Annuaire de l'Institut de Droit International 366—434; 1952 44 I & II Annuaire; 1954 45 I Annuaire. Bibliography in 1 OPPENHEIM 8th 950.

[22] 1 OPPENHEIM 8th 950—951 § 553.

[23] LAUTERPACHT, 1950 43 I Annuaire 368.

[24] 1956 46 Annuaire 364—365. The full text of the two articles follows:
*Art 1* (1) The agreement of parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.
(2) If, however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced.
*Art 2* (1) In the case of a dispute brought before an international tribunal it will be for the tribunal, while bearing in mind the provisions of the first article, to consider whether and to what extent there are grounds for making use of other means of interpretation.
(2) Amongst the legitimate means of interpretation are the following:
a) Recourse to preparatory work.
b) The practice followed in the actual application of the treaty.
c) The consideration of the objects of the treaty.

[25] 1950 43 I Annuaire 386—390.

notamment celle qui était vraisemblablement dans la pensée des auteurs du traite."[26]

Under this reasoning, the binding meaning of the terms used in the Warsaw Convention is the French legal meaning. Article 36 is thus a reference to the meaning which the terms of the Convention have acquired in French law.[27]

This conclusion may be supported by the *reductio ad absurdum* argument. If the expressions of Article 36 were to exclude the legal meaning of the terms as used in the French legal system, the binding force of the French text would be reduced almost to nil.

Furthermore, there are international law court holdings relating to other Conventions, which support the result. Thus, in relation to multilingual conventions, where the original draft is in one language only, the meaning under that language prevails. The Permanent Court of International Justice, in the advisory opinion on the *Greek-Turkish Populations Case,* on Feb. 21, 1925, said[28]: "La convention ayant été redigée en français, il est naturel de tenir compte du sens que revêt, dans cette langue, le terme litigieux."[29]

In the *Standard Oil Tankers Case,*[30] an arbitral tribunal sitting in Paris had to decide the meaning of a contractual term which made sense in English legal language but had no sense in French.[31] It was there held: "everything points to the conclusion that the French phrase is merely the translation of the English, in which alone the expression employed has legal sense, and which makes clear the general tenor of the articles." — If this is so

[26] 1928 24 Recueil 107.

[27] Cf *Report on the Warsaw Convention as Amended by the Hague Protocol, prepared by the Association of the Bar of the City of New York, Committee on Aeronautics, presented to the Stated Meeting of the Association on March 10, 1959,* in 1959 26 JALC 255—268, at 263 sq: "Experienced plaintiffs' attorneys have argued . . . that since this is an international treaty, the interpretation of 'dol' made by French courts and other European courts should carry as much weight here in the United States as that of a domestic case." Also CALKINS, 1959 26 JALC 339: "The Convention was drafted primarily by civilians, and their usage should be given the greatest weight; in the absence of any contrary intent, it should prevail." — As to English court views of the interpretation of international commercial agreements, such as the Hague Rules, see *e. g.* SCHMITTHOFF, *Modern Trends in English Commercial Law,* 1957 93 JFFT 349—364, at 354.

[28] In reference to the Convention's term "établis".

[29] *Exchange of Greek and Turkish populations,* (advisory opinion no 10), 21 Feb 1925, PJIC série B- N° 10 p 18. See also DÖLLE *op cit* 292.

[30] *Reparations Commission v United States,* 1928 22 AJIL 404, at 417.

[31] "[A]ny legal or equitable law interests", and "tous droits et intérêts légitimes", respectively.

under a multi-lingual text, it must of course *e fortiori* prevail when there is only one authentic text and the terms used have a legal sense in this language.

Thus, we arrive at the principle of the prevalence of the French legal system when interpreting the Convention.

This principle, of course, cannot be carried to extremes. Each little development in French law cannot be allowed to change the meaning of the Convention. But the principle need not be carried to such extremes. In practice, there is no need for perfect unification of the law, *i.e.* identical meaning of the legal term in all states concerned. The majority of disputes invoking the meaning of a term in different legal systems can be solved by mere approximation. After all, even within one and the same legal system uniformity is seldom complete. A certain margin of imperfection is not necessarily an actual defect so long as it does not invite plaintiffs to go "shopping" for the most generous jurisdiction. Details therefore can be allowed to vary if the basic conceptualism is retained.

The principle of the primacy of the French legal system thus means a harmonizing construction[32] of the Convention rather than the conferring of unreasonable powers upon the French. It may be recalled that the French legal system is an extremely successful one inasmuch as it has been voluntarily imported by a very great number of sovereign states without any pressure from militant colonizers. Within this French legal group there is a considerable degree of conceptualistic uniformity which centers on France. Uniformity is maintained without many futile disputes as to whether, why and when resort to the teachings in Paris should be made.[33] Certainly, if the French system is given the role of "homme de base", the Warsaw Convention can be interpreted harmonizingly in the same way.

[32] See KISCH, *Statutory Construction in a New Key: "Harmonizing Interpretation" XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema*, Leiden 1961 p 262—276.

[33] As far as the Warsaw Convention is concerned it may be proper to observe that the *Zbidi Hamida ben Mahmoud Case* (1913 Dalloz Périodique 1 p 249; 1912 Sirey 1 p 73) is not followed everywhere. This should cause no difficulty, however, since the Convention was drafted by reference to a "contrat de transport" as determined after this case.

SECTION 2. THE WARSAW ACTS

Warsaw Acts exist today in all countries under review except in the United States — general remarks on the history of their adoption — States with and without air legislation relative to air commerce contracts — Great Britain — German wartime conditions — 1943 Amendment to Air Traffic Act, 1922 — *Halter* liable — France — importance of negligence clauses when the Air Navigation Act, 1924, was drafted — application of Air Navigation Act — *Vizioz Case* — 1957 Amendment to Air Navigation Act — Great Britain — breaking up of Empire affects application of Convention — 1952 Order — outline of differences between Convention and the Warsaw Acts

Within the scope of this book's inquiry, Warsaw Acts exist in all countries except the United States.[34] The function of all these enactments has been to extend the application of Warsaw Convention rules to domestic aviation. Neither the motives for enactment nor the results, however, have been uniform. The history of the adoption of these Acts is an extensive and convulsive one, and reflects the differing national considerations.

In the pre-World War II period, only the Scandinavian countries passed Warsaw Acts. During the war, Germany followed by inserting Warsaw rules into its Luftverkehrsgesetz. After the war, Great Britain and France passed such Acts.

Since the Scandinavian States had no domestic air commerce contract legislation when they signed the Convention, they were willing at an early stage to extend the Convention rules to the domestic sphere.[35] Uniformity was supported by considerations of principle and of practice. In the latter respect, it is to be recalled that the Scandinavian Warsaw legislation did not take place until the middle of the thirties. In these days the impact of the IATA Antwerp conditions was felt and their policy of introducing Warsaw principles as *pars contractus* definitely contributed to the Scandinavian course.[36]

[34] CALKINS, *Grand Canyon, Warsaw and The Hague Protocol*, 1956 23 JALC 253—271, proposes in effect the adoption of an American Warsaw Act: "In the writer's opinion the only sensible solution to the legal morass we now are in is a federal law establishing uniform rules for determining liability of air carriers to passengers and shippers" (at 255). "The Warsaw Convention, as amended by The Hague Protocol, is a good approach to this problem, and while the limits of liability set forth therein may be too low for domestic use, in its basic approach is believed best for the traveling public and for air transportation." (at 271). Cf LUREAU, *La responsabilité du transporteur aérien — lois nationales et Convention de Varsovie*, thèse Bordeaux 1959 p 253—254.

[35] Regulation of contracts in air commerce was contemplated in the course of the preparations of the 1922—23 Air Traffic Acts but was excluded before the drafts were finalized. See § 36 in the draft law of 1920, p 42—43 in the Draft and 1922 NJA II p 308—310.

[36] Cf WIKANDER 65—66.

However, those states signatory to the Convention that already had legislation regulating contracts in air commerce were not equally eager to extend the application of the Convention into the domestic domain. Thus, dualism came to prevail in Germany and France where the Air Traffic Act of 1922 and the Air Navigation Act of 1924, respectively, preserved their jurisdiction in domestic matters despite some signs of hesitation.[37]

Great Britain took a half-way position. The provisions of the Convention were to "have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage" and the Government was given the mandate to declare by Order in Council who were Parties to the Convention and furthermore might "by Order in Council apply the provisions . . . to such carriage by air, not being international carriage by air as defined by the [Convention] . . . as may be specified in the Order . . ." But for a considerable period no action of the latter type was taken and the common law rules prevailed in domestic and other non-Warsaw carriage.

Eventually, those countries with dualistic regulation of aviation contracts capitulated. During the war, a change in the German position occurred.[38] As early as in 1937, several German airlines proposed that the Convention rules be extended to internal air traffic. The drafting of a law to this effect was undertaken.[39] It was not until wartime conditions began to be felt, however, that the anticipated legislation materialized. Under wartime conditions, some lines were operated only for courier purposes. Lufthansa performed a so-called "Regierungsdienst" which meant that passengers were often carried with neither a "Beförderungsvertrag" being concluded or even a ticket issued. The Luftwaffe often carried people on their flights who were not in the military

[37] The French and German systems were not even dualist, they were treble since they permitted one regulation governed by private contract terms, and provided another regulation governed by statutory terms derived from the respective Acts, and a third regulation relying on the Convention. — The hesitation will be found in the *Begründung* to the German Act of 15 Dec 1933, 1933 RGBl I p 1079 which said: "Für die innere Rechtseinheit ist es erwünscht, diese Regeln auch auf den Verkehr mit dem Vertragsausland und den rein innerdeutschen Luftverkehr auszudehnen. Doch wird zweckmässig zunächst abzuwarten sein, wie sich die neue Regeln in der Praxis bewähren." Quoted from the German *Denkschrift* 51.

[38] The change was a reflection of a joint effort on the part of Germany, Italy and Spain, see WEGERDT, *Zur Frage der Revision des Warschauer Luft-Privatrechtsabkommens vom 12. Oktober 1929*, 1943 12 AfL 20—33, at 27 sq.

[39] GOEDHUIS, *National* 65—66.

services and had no immediate public law connection with Luftwaffe, *i.e.* no "dienstlicher Beziehung".[40] At the same time Germany was engaged in an intensive air line traffic with its Allies as well as with the neutral European states: "sie alle haben einst das W.A. als gemeinsame Grundlage für das Recht der Luftfahrtbeförderung angenommen."[41] It was thus clear, on the one hand, that no system which sought its foundation only in the contract of carriage, was capable of coping with the difficulties, and on the other hand, that the essence of the Warsaw principles must be upheld. "Eine einseitige Abweichung Deutschlands in seinem innerdeutschen Haftungsrecht, die an sich möglich gewesen wäre, würde den internationalen Luftverkehr somit nicht erleichtert, sondern erschwert haben."[42] In 1943 the Air Traffic Act was amended[43] to the effect that the aircraft operator's liability as to passenger and air cargo damage was withdrawn from the originally all-inclusive liability provision (§ 19) and separately regulated. The change was brought about by the adoption of a sequence of new sections — §§ 29a to 29i — which were gathered under the heading, "Haftung aus dem Beförderungsvertrag", (liability resulting from the contract of carriage). The added sections provided a liability scheme governed by principles equivalent to those of the Convention: "Im Interesse der durch das W.A. nach mühevoller Vorarbeit einst geschaffenen internationalen Rechtseinheit glaubte die Reichsregierung ... nicht, von den damals geschaffenen Grundsätzen abgehen zu dürfen". The result was characterized as meaning that "die Unvollkommenheiten der Haftungsregelung wäre ... für den innerdeutschen Fluglinienverkehr weitgehend ausgeglichen."[44] The difficulties resulting from the relativity of the contract of carriage were counterbalanced by making the *Halter* liable rather than the *Frachtführer*.[45]

[40] See SCHLEICHER, 1943 12 AfL 5.
[41] SCHLEICHER, 1943 12 AfL 9—10.
[42] SCHLEICHER, 1943 12 AfL 10.
[43] Hereinafter referred to as the *1943 Amendment*.
[44] SCHLEICHER, 1943 12 AfL 9—10.
[45] Cf 1943 Deutsche Justiz 123 col 2: "Der kriegsbedingte Sonderluftverkehr verlangte nunmehr dringend eine unabdingbare gesetzliche Festlegung des Luftbeförderungsrechts, da für ihn die vorherige Vereinbarung besonderer Bedingungen unzweckmässig oder überhaupt unmöglich ist." (In the years of the Third Reich, the Deutsche Justiz contained the most authoritative enunciations of the legislator's intent.)

The French Warsaw Act was not brought into existence until 1957.[46] It was a response to an evolution which tended increasingly to show the obsolescence of the system of the 1924 Air Navigation Act and reveal the extent to which it bore the imprint of the days when a journey by air was an adventurous undertaking. The purpose of that Act, among other things, had been to release air commerce from the fetters placed upon it by the uncompromising attitude against exoneration clauses in private contracts adopted by the general law, in permitting airlines to resort to certain types of negligence clauses. The normalization of air commerce after World War II created a general feeling against the customary French exoneration devices. A marked tendency, displayed by the French judiciary, was to allow a direct damages action, one unconnected with the contract of carriage, by the representatives at law — *les ayants-droit* — of the victim of an air accident. This direct action, founded on the "delictual or quasi delictual" liability of French law rather than the carrier's contractual liability, meant that the carrier was exposed to unlimited common law liability, since he was no longer protected by the 1924 law. Perhaps the most important of the cases reflecting this judicial tendency was the *Vizioz Case*.[47] Its importance may be more fully appreciated when one knows that the victim of the accident was the Dean of the Law Faculty of Bordeaux University, a professor with excellent connections with the French legal world. This trend of the courts certainly hastened the enactment of the legislation, but the way had been paved for many years. By the Act of March 2, 1957,[48] articles 41 to 43, and 48 of the 1924 Act were replaced by new articles which introduced a system of mere reference, with certain clarifications, to the Convention scheme of liability.

The British Warsaw Act, which preceded the French by some years appears, by way of contrast to the Continental Acts, to have been the result of the disruption of the British Empire rather than of any deliberate policy towards the unification of law. It is true that during the thirties the air transport industry was consulted as regards the application of the Convention rules to internal traffic,[49] but whatever proposals may have been

[46] See generally LUREAU *op cit* 214—215.
[47] *Air France v Consorts Vizioz*, 1959 13 RFDA 260.
[48] 1957 RFDA 101. Hereinafter referred to as the *1957 Amendment*.
[49] GOEDHUIS, *National* 29 note 2.

received, no government action materialized. By 1952, however, the King in Council had certified that eight of the nine Commonwealth countries then existing had become independent High Contracting Parties to the Convention, thus making the Warsaw Convention apply *proprio vigore* to traffic between their respective areas according to the Convention's principles of application.[50] The force of the Warsaw principles, due to the very fact of their being incorporated in an international Convention thus was demonstrated to the British, and an Order was made by the King in Council which came into force in April 1952, called "Carriage by Air (Non International Carriage) (United Kingdom) Order, 1952."[51] The Order states that the provisions of the First Schedule of the Carriage by Air Act, 1932, which incorporated the Convention, shall apply to all carriage by air which is not "international" as defined by the Schedule. This is subject, however, to certain exceptions and modifications specified in the First Schedule to the order. First, Article 2 of this schedule declares, in effect, that Article 2-1 of the Convention shall not apply;[52] and as a result, such carriage as is undertaken by the State is not covered.[53] Secondly, Article 3 of the Order permits the Minister of Civil Aviation to exempt any carriage or class of carriage from the Order.[54]

The general pattern of the provisions of the Warsaw Acts has been to supplement some of the rules of the Convention, to modify others and to delete some. There is no need here for a detailed study of these divergencies[56] but it should be noted how the documentary chapter of the Convention (Chapter 2) and the articles on delay (Art. 19), some of the Warsaw defences (Art. 20-1) and the multiplicity of actions (Art. 24), have been affected in the course of these legislations. The German, Norwegian and British (as well as the Italian) Acts have excluded the documen-

[50] KNAUTH, 1952 USAvR 146.

[51] For text, see 1952 USAvR 151. Hereinafter referred to as the *1952 Order*. Due to the very complicated constitutional structure of Great Britain there are further Orders of this kind, for instance one for the Isle of Man. Together they seem to establish a set of uniform Warsaw Acts for the British Isles. It serves little purpose in this work to enter on a discussion of these British peculiarities. A Swedish lawyer may perhaps be forgiven if he takes refuge in Pufendorf's words about the German Reich of his time: *irregulare aliquid, monstro simile.* (Cf COHN, 1 *Manual* 11 no 31.)

[52] See 1952 USAvR 155.

[53] Cf MCNAIR (KERR & MCKRINDLE) 2d 149.

[54] 1952 USAvR 153.

[56] For such a study, see LUREAU, *La responsabilité du transporteur — lois nationales et Convention de Varsovie*, 1959 p 210—254.

tary chapter. Thus, the Warsaw penalties attached to non-compliance with the prescriptions of this chapter are deleted.[57] Article 19 on delay is deleted in the German Act and severely modified in the British.[58] Article 20-1 on the Warsaw defences is slightly modified in the British Act.[59] Article 24-1 on the multiplicity of actions, finally, is supplemented in the German, French and British Acts, but deleted in the Scandinavian Acts.[60]

## SECTION 3. THE WARSAW CLAUSES

Warsaw references — three areas of effect — carriage, international carriage, international carriage performed pursuant to a contract of carriage — Warsaw clauses not seeking to extend application of Convention — main forms of Warsaw references — full Warsaw clauses — their limited effect — selection reference — restricted reference — combination of selection and restricted reference — early success of full selecting clauses — restricted clause in original Baltairvoy — domination of clauses of Baltairpac type — IATA reasons therefor — Warsaw references via the General Conditions of Carriage

The third effectuation of the rules of the Convention is achieved by way of Warsaw clauses. Commonly, parties to an air charter contract agree that the Warsaw rules shall apply to the contract. The case thus may be one of incorporation by reference. These references — which may be termed "Warsaw references" — have varying features and serve different purposes.

At this point, however, it becomes necessary, in order to appreciate the function of the Warsaw clauses, to anticipate some of the contents of Sub-chapter 2. The area in which the Warsaw clauses operate can be described as three concentric circles. The largest circle is the generic category of "carriage" (by air). Within this circle there is a lesser one containing "international carriage" in the sense of the Convention. The smallest circle relates to such carriage as is international and is performed pursuant to

[57] As to these penalties, laid down in articles 3-2 and 9, see *infra* pages 301 sq and 380 sq.

[58] 1952 Order 3rd Schedule Art 19. The amount of the award is limited to "the amount of . . . damage which may be proved to have been sustained by reason of such delay or of an amount representing double the sum paid for the carriage, whichever amount may be the smaller". Furthermore the carrier may by special contract in writing "exclude, increase or decrease the limit of his liability".

[59] 1952 Order 3rd Schedule, art 20-1 introduces the phrases "reasonable measures" and "not reasonably possible" to replace the French expressions "mesures nécessaires" and "impossible".

[60] 1943 Amendment § 29c-1, 1959 Air Traffic Act § 48-1; 1957 Amendment art 2, CAvi art 123-2; 1952 Order 4th Schedule, respectively. The Scandinavian deletion only indicates that the drafters of the Acts found art 24-1 redundant.

a "contract of carriage". As will be shown later, the true area of application of the Convention *proprio vigore* is still subject to dispute. The Convention may apply only to the smallest circle, it might also apply fully to the second of these circles, but it certainly does not completely apply to the third and biggest of them. Therefore, it follows that a Warsaw clause seeking to extend application of the Warsaw rules to cover the largest circle (*i.e.* all carriage by air) has meaning. One seeking to cover the second circle (*i.e.* "international" carriage) may have a meaning but this depends upon the scope of the Convention's *proprio vigore* application. A clause which seeks to cover only the smallest circle, however, cannot have meaning as a contract clause in the same sense as the two former types of clauses, for the Convention certainly covers this circle *proprio vigore*, and the clause would seem not to add anything to the scope of application. When such a clause is inserted, however, it is done merely to make the charterparty meet the requirements exacted by the documentary chapter of the Convention relative to tickets and air waybills, *i.e.* that such a document must state that the carriage "is subject to the rules relating to liability established by this Convention."[61] The last mentioned use of the clause is based on the assumption that the Convention does not require that the document carry the name of "passenger ticket" or "air waybill" so that a document called an air charter agreement will suffice equally well, provided that it meets the other necessary requirements.

Warsaw references appear in several main forms. First, there are those which state outright: "Passengers are carried according to the regulations of the Convention of Warsaw."[62] This may seem to be a full Warsaw clause having the widest possible effect. However, this is not so. It may be argued: If you incorporate the

[61] This requirement appears in articles 3-1-c, 4-3-h and 8-q of the Warsaw Convention, articles 3-1-c, 4-1-c and 8-c of the Convention as amended by the Hague Protocol. Under the Convention, non-compliance with articles 4-3-h and 8-q involved the Warsaw penalities, see articles 4-4 and 9. Under the Convention, as amended, same effect always follows from non-compliance with the requirement, see articles 3-2, 4-2 and 9. — The principal reasons for the requirement were that it should serve to notify the carrier's customers that they were subject to a special regime; and that, if suit on the contract was brought in a non-contracting state, the courts of that country could enforce the Convention requirements, even though its government were not a party to the Convention. Cf CALKINS, 1956 23 JALC 259. Compare GUTTERIDGE, 1935 51 LQR 127.

[62] Para 10 in KLM—Raymond-Whitcomb Inc. Agreement 14—15 Mar 1934.

Convention without more, you also incorporate the Convention's conditions for application. As a result, the incorporation clause defeats itself, because it invokes the Convention's application conditions, and then fails to meet them. A full Warsaw reference of this kind, therefore, has no effect unless it is combined with some sort of selecting formula. The *selection reference* most commonly used is that of specifically limiting the reference to the rules of liability.[63] Since the rules relating to the liability of the carrier appear in the special chapter of the Convention which is headed "Liability of the carrier", it seems reasonable to interpret this selection reference as not incorporating the conditions for application found in other parts of the Convention.

A second type of Warsaw reference is the *restricted reference.* "Carriage under this Agreement is subject to the rules relating to liability established by the Convention ... *unless such carriage is not 'international carriage' as defined by the Convention.*"[64]

This type of reference presumably envisages as do its sister references in the general conditions of carriage, the carrier's right to deny all liability in case the carriage falls outside the scope of application of the Convention.[65] The service which the restricted reference should render, thus, should be only to meet the requirements of the Convention itself. But if the clause should merely mean a notification of the latter type, the fact that it almost invariably is combined with a selection reference would serve no purpose. It may well be, however, that the clause — at least outside the stereotyped air charter contract under which

[63] Baltairvoy 1951 clause 12; American Airlines CC (1947) paragraph 10-a; Flying Tigers CTA (1957) 12; UN — Swissair contract 5 Dec 1956, art 10. — Cf GRÖNFORS, *Air Charter* 112. This formula is the one required by the Convention itself, see, *e. g.*, art 3-1-e. IATA originally used the formula "based on" but, due to a proposal from Imperial Airways, switched to the formula "subject to the rules" at the Legal Committee meeting in The Hague 16 Dec 1935, 25 IATA Inf Bull 18. When Imperial Airways stated at the Brussels Session of IATA in August 1935 that "the execution of the provisions of the General Conditions of Carriage is met with difficulties in England" (*ibid.*), the statement was presumably in reference to the dispute which had arisen on account of the air waybill of 5 Mar 1935 and which was finally disposed of by the King's Bench Division in *Westminster Bank v Imperial Airways*, 1936 USAvR 39, disapproving the Warsaw clause of the air waybill.

[64] Emphasis mine. IATA Model Air CA (1954) art 29, same (1957) art 17. Also recommended by IATA for use in charter agreements between IATA Members and charterers other than an air carrier, see HILDRED, *Circular letter 30 nov 1960.* Similar formulas in *e. g.* American Airlines CC (1947) para 10-a, Passenger ACA (1949) para 4; TWA Charter Flight Agreement (1958) clause 6-a; TAI CdA condition 1.

[65] Cf Gazdik 1951 19 JALC 197—201.

the charterer never has operational control — has a function beyond notification. It is possible that charter carriage, even though it be "international carriage" as defined by the Convention, may yet not be covered by the Convention because it does not take place pursuant to a contract of carriage.[66] In this contingency clauses relying on the same formula of restriction as this clause in the Model will have the effect of extending the application of the Convention. The combination with the selection reference is then useful so that the selection takes the liability chapter of the Convention into the charterparty but leaves the documentary conditions chapter outside.[67] In other words, if the Convention applies *proprio vigore,* the documentary requirements cannot be dispensed with by mere selection reference; but if it does not so apply this reference may work such a dispensation.[68]

In the period when the IATA Antwerp conditions prevailed, the purely selecting type of Warsaw clause was only natural since it strove towards the same effect of extending the jurisdiction of the Convention as did the Antwerp conditions themselves. The clause reached its zenith in air chartering when, through the pressure of the French who had inserted such a clause in the "chartepartie dite Transair",[69] it was put into the Baltairvoy 1951.[70] Since then, however, the popularity of this

[66] See *supra* pages 198—199 and note 312.

[67] The proposition may be clarified by an example. Suppose that the American Airlines Passenger ACA (1949) which contains the same clause, was used for a wet lease agreement. It may be disputed that this type of agreement is a contract of carriage satisfying the requirements for the application of the Convention (see *supra* page 198). See *e. g.* AMBROSINI, 1 *Hague Conference* 43: "[T]he carriage of passengers, cargo and baggage for the military authorities by aircraft the whole capacity of which had been reserved by military authorities would not be pursuant to a contract of carriage, but rather pursuant to the charter or hire of the total capacity of the aircraft. It was clear that this case did not fall within the Convention" Similarly ALTEN, 1 *Hague Conference* 39. However, even if the agreement is no contract of carriage, the carriage performed under the agreement may well be "international carriage" in the sense of the Convention. In such a case it may be argued that, in the absence of a proper distinction between the instrumentality contract and the load contract, the Warsaw clause imports the Convention into the instrumentality contract. The IATA Model Air CA may avoid this difficulty by its reliance on an agency clause. For a discussion of the agency clauses and their effect, see *infra* pages 359—368.

[68] Cf GRÖNFORS, *Air Charter* 112.

[69] "Dans tous les cas, la responsabilité du Transporteur est celle définie et limitée par la Convention de Varsovie . . . même en l'absence de documents conformes aux exigences des articles 3 et 8 de ladite Convention": art A-vii.

[70] "In all matters arising out of this Chapter, the carriage hereunder shall be subject to the Rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12th October, 1929, and all the provisions thereof shall apply to the

type of clause has been on the decline. This decline has accompanied the change in the Warsaw references of the IATA general conditions of carriage from unrestricted to restricted references.[71]

References of the restricted variety also appeared early in air chartering. In the original Baltairvoy, it was provided that "OWNERS in all matters arising under this Charter Party shall be entitled to the like privileges and rights and immunities as are contained in the Carriage by Air Act, 1932, and all the provisions thereof shall apply only insofar as the same are applicable to this Charter . . ."[72] This formula was somewhat unfortunate since it did not meet the requirements of the Convention. The clause apparently did not apply to foreign parties not subject to English law, however much the Convention itself applied to their contract. However, the formula was later developed so that the reference directly pointed to the Convention. Thus, it was provided in the Baltairpac that "The Rules relating to liability established by the Convention . . . and all the provisions thereof . . . shall apply to the carriage hereunder insofar as the same is governed thereby; in all other cases Owners accept no liability whatsoever, for death, injury or delay of passengers or loss or damage to or delay of their baggage during the flight or any transport to or from or on Airfields of departure or destination or any intermediate Airfield or elsewhere."[73] The latter part of the clause, of course, explains the reason for the change; and the restricted Warsaw reference of these contents came to be a dominating pattern in subsequent years parallel to that which took place in the IATA conditions of carriage. Attempts to make all carriage subject to the Convention, which had been a feature of the Antwerp conditions of the early thirties,[74] had been partly diverted from their path by the British Disclaimer Clause introduced in 1936, and were finally wrecked

Owners as Carriers whether the carriage is governed by the said Convention or not." Clause 12.

[71] BEBCHICK, *The International Air Transport Association and the Civil Aeronautics Board*, 1958 25 JALC 8—43, at 34, submits that the CAB reacted adversely to Warsaw clauses in the IATA conditions of carriage: "The Board expressed dissatisfaction, declaring that the Warsaw agreement represented a modification of U. S. public policy and the common law duty of the common carrier and that the Treaty was to be strictly construed and to be extended only by formal agreement." See in particular p 34—36. See also LUREAU *op cit* 198—209.

[72] Clause 19.

[73] Clause 10.

[74] GAZDIK, 1952 19 JALC 197—198.

by the Rio de Janeiro conditions of contract of 1947 and the subsequent Bermuda and Honolulu conditions. The Warsaw Convention was left to rule what it could *proprio vigore* but, outside the scope of its application, carriers denied all liability.[75] This trend towards a dualistic system, which contrasts strikingly with the opposite trend of the Warsaw Acts, has been explained by Gazdik as follows: "The apparent lack of a single rule for all air carriage [on the basis of the Warsaw Convention] is not ideal but not without serious justification." This justification was found in the patterns of the domestic law of a number of American States holding negligence clauses[76] invalid, and therefore "Courts interpreting the contract of carriage, if not under the Warsaw Convention, would appear to recognize the presumption of fault on the part of the carrier but ... would ignore the liability limitations for negligence by contract. In other words, the contract would be interpreted to the great disadvantage of the carriers."[78]

The third main type of a Warsaw reference works over the General Conditions of Carriage. The Rio, Bermuda and Honolulu conditions all provide for the application of the Warsaw Convention within limits.[79] In so far as the formulas used include a combined restricted and selection reference the result follows that what has been said about this type of clause will apply equally to the IATA conditions of carriage. The only difference is that the system of reference here is double, not single — one in the charterparty referring to the general conditions of carriage, and another in those conditions referring to the Convention itself — but the result is that the Convention is selectively incorporated into the charterparty.[80]

Thus, under the disguise of mere references to the general conditions of carriage a great many Warsaw clauses appear in aircraft charterparties, and particularly in the IATA[81] and the BIATA groups of charterparty forms.[82]

[75] GAZDIK, 1952 19 JALC 199.

[76] By negligence clauses I mean the bargains referred to in sec 575 of the American Restatement of Contracts. See *supra* page 169.

[78] GAZDIK, 1952 19 JALC 201. — Note, however, GRÖNFORS' submission in *Air Charter* 115: "The tendency nowadays is, undoubtedly, to have an agreement that the Warsaw Rules shall cover all charter operations with the exception of pure bare-hull charter." *Contra*, Note in 1959-60 69 Yale LJ 1015; the charter tariff referred to, however, cannot be identified for lack of the name of the agent filing the tariff.

SUB-CHAPTER 2

# WARSAW CHARTERS AND NON-WARSAW CHARTERS

## SECTION 1. DISTINCTION ESTABLISHED BY PARTICULAR ARTICLES OF THE CONVENTION

### § 1. *Article 34*

The IATA inquiry — answer referring to article 34 — support for view — the break-down case — character of special flights — attempts to establish an extraordinary air line — de Vos — criticism — air taxi flights — Hague Protocol renders question moot

As already indicated,[1] the drafters of the Convention when queried, hesitatingly stated that charter carriage was not intended to be covered by the Convention. However, the only support for this statement found by the informants in the Convention itself was Article 34 which in effect provided that the Convention applied neither "to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation", nor "to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business".[83]

[79] Rio: Resolution 275 clause 2-a, and Resolution 540 clause 2-a. Bermuda: arts 2-1. Honolulu: Resolution 030 GCP art 17, GCC art 13.

[80] Some doubt is thrown upon the effectiveness of a reference system of Warsaw clauses by the case *Flying Tiger Line v United States*, 1959 USAvR 112, 6 Avi 17.291. In this case the United States Court of Claims indicated that Warsaw clauses in the Charter Agreement and the applicable tariff did not satisfy the Convention requirements because the clause did not appear in the air waybill which had been made out by use of a so-called Government Bill of Lading form. — It is noteworthy that the Bermuda Warsaw reference failed to use the selection formula and this may have lead to difficulties because of the requirements in the documentary chapter of the Convention.

[81] BEA SFOA clause 5; BOAC SFOA clause 3; Air France Contrat type provisoire passagers & bagages art VI—1°, Contract 3; UAT CdA art IV—1.

[82] BIATA ACA clause 5. The British Government may unknowingly have imposed this requirement of having the IATA Warsaw reference on all British operators performing associate services, see page 113 *supra*.

[83] 17 IATA Inf Bull 42. Here is a regrettable case of bad English drafting. The French text says "transports effectués dans des circonstances extraordinaires en dehors de toute opération normale de l'exploitation aérienne." The relation is there not to the particular type of business carried on by one carrier, but to the general nature of aerial exploitation. See WILBERFORCE in 1 *Hague Conference* 105; DRION, *Limitation* 51 no 49 note 1, p 63 no 57.

There is something to be said in support of such an interpretation of Article 34. The article was introduced on the motion of the French delegation which sought to demonstrate its usefulness to the Warsaw Conference by the following example: "un appareil d'une ligne régulière est obligé d'atterrir en cours de route; un second appareil est envoyé par le transporteur pour prendre les passagers et les marchandises en panne."[84] This case is often taken care of by inter-carrier master contracts which provide that in the case of a breakdown in the services of the one party to the contract, that party may avail itself of an aircraft belonging to another party, under charter, to attend to the stranded plane and its load. Furthermore, much of the early flying in the special flight category was probably properly processed under Article 34. Even should its factual nature no longer be extraordinary[85] the charter flights were nevertheless classified as representing attempts to establish an extraordinary air line under the attitude prevailing during the pre-war days in relation to the admission of foreign aircraft.[86] De Vos, the rapporteur to the Warsaw Conference, was prepared to discuss the application of Article 34 in the case of a travel agency having arranged for the flight of a party of tourists.[87]

Yet, this interpretation never received recognition. As early as 1933, Blanc-Dannery pointed out that air taxi flights were not properly in the Article 34 category of operations. "Toutes les compagnies aériennes, à la demande d'un client, le font conduire à l'endroit où il désire. On ne peut dire que ce sont des transports réguliers et pourtant ils rentrent bien dans le cadre de l'exploitation aérienne normale."[89] What was true of air taxi flights in 1933 is certainly true of charter flights today. Whatever the type of the air commerce contract, success and volume business exclude the application of Article 34.[90]

[84] *II Conférence* 58.
[85] The extraordinary nature seems indisputable in the case of such special flights as the ABA and Lufthansa flights with money loads for the German and Ukrainian governments during the worst post-war days, and ABA's search for General Nobile's airship "Italia". See *IATA 1919—1929*, The Hague p 20, 47.
[86] See *supra* page 68 and note 71.
[87] *Premier Rapport au sujet de l'aviation de tourisme*, 1932 1 RGDA 586—587.
[89] *La Convention de Varsovie et les règles du transport aérien international*, thèse Paris 1933 p 20. Accord, Coquoz 96. Cf Goedhuis, 1932 RDILC 697.
[90] It may be added that art 34-1 has been fairly narrowly construed in court, *Pauwels v Sabena*, 1950 USAvR 367, 1950 4 RFDA 411, (cf 1951 14 RGA 160).

The whole question of the application of Article 34, furthermore, under the Hague Protocol looses interest. This Protocol provides that as to cases properly fitting under Article 34, it is not the whole of the Convention that is excluded, but only Articles 3 to 9 of the documentary chapter.

### § 2. *Article 2, paragraph 1, and the Additional Protocol*

Article 2 and the Additional Protocol at the Warsaw Conference — the British and the Protocol — United States adherence with reservation — "transportation performed by the United States" — influence of technical developments — When does government service destroy operator identity? — *Jane Froman Case — Gill v Northwest AL*

While wholesale exclusion of charters was not possible, it was at least feasible that some charters could be excluded under the Additional Protocol to Article 2-1 of the Convention. Pursuant to this Protocol, a High Contracting Party desiring "that the first paragraph of Article 2 of this convention shall not apply in international carriage by air performed directly by the state" (and certain equivalents to states) could reserve this right to itself by a declaration to that effect at the time of ratification or adherence. While this Protocol was added to the Convention on the motion of the British Delegation, there was much criticism,[91] and the British never dared to take advantage of their Protocol motion. Most of the European powers intending to ratify were wary lest the British make such a reservation. Indeed, these powers, before ratifying the Convention, actually questioned the British Government as to its position.[92] In the end the British ratified the Convention without any declaration of reservation (Feb. 14, 1933). The reservation allowed by the Protocol, however, was taken by the United States when adhering to the Convention on July 31st, 1934. The United States reservation seems to have had no negative influence on European ratifications.

With regard to the United States, therefore, the law is that the Convention does "not apply to international transportation that may be performed by the United States of America or any territory or possession under its jurisdiction." The question

[91] *II Conférence* 150. Indeed, Soviet Russia declared that if Great Britain were to make a reservation to this effect the Soviet Government "déclare réserver l'application de la convention, aux aéronefs qui dépendent directement de l'Etat" (*II Conférence* 98) but if the British dropped their reservation the Soviet Union would drop its amendment (*ib.*).

[92] SUDRE, 14 IATA Inf Bull 45; cf GOEDHUIS, *National* 139.

remains whether operations by privately owned aircraft chartered by their owners for use in the service of the United States amount to "transportation performed by the United States."

Few cases are known to deal directly with the issue of coverage of a certain operation by the Convention or by the exclusionary Protocol. Technical developments however, have caused the frequent posing of the question as to whether the operation was or was not performed by the State.[93] Military transportation has developed greatly since 1929, and military authorities, particularly in the United States, have been making increasing use of civilian aircraft on a charter basis.[94] In the *Jane Froman Case*[95] it was argued that the carriage was performed by the Government, not by the owner of the plane, Pan American. The facts behind this assertion were that the American War Department tried to furnish the troops in the different war theatres with entertainment by various performers, one of them being Ellen Jane Ross, a performer known as Jane Froman. The War Department arranged with Pan American for the transportation, but such flights were a military secret, and information was not given in advance even to those to be transported. The arrangements were administered by an independent auxiliary agency, the USO Camp Shows. Plaintiff brought suit against Pan American and alleged that the Convention did not apply since the transportation was performed by the United States Government[96] but the Court of Appeals of the New York State found that it was not so performed: "The United States Army, apparently, bought appellant's ticket but her transportation was, as she herself alleged in paragraph Fourth of her complaint here, on an aircraft 'owned, operated and controlled by the defendant.' "[97] Some other cases bear upon the issue whether government service was sufficient

[93] CHENG, in *State Ships and State Aircraft*, 1958 11 Current Legal Problems 225—257, offers a general discussion of the implications of States operating private aircraft but his text sheds little light on the problem here discussed. Compare from the maritime discussion BÖGER, *Die Immunität der Staatsschiffe unter besonderer Berücksichtigung der Staatshandelsschiffe*, diss Kiel 1928 p 28: "Auch jedes vom Staate aus dem Eigentum einer Privatperson gecharterte Schiff muss als Staatsschiff bezeichnet werden, jedoch nur dann, wenn der Staat in ein Ausrüsterverhältnis zu der betreffenden Privatperson tritt." Also *Master of Trinity House v Clark*, 1815, 4 M & S 288, 105 ER 845.

[94] Cf CALKINS, 1 *Hague Conference* 38.

[95] *Ross v Pan American*, 1948 USAvR 47, 541; 1949 USAvR 168; 1953 USAvR 1; 1954 USAvR 400; 1955 USAvR 396.

[96] At 1949 USAvR 177.

[97] At p 178.

to destroy the contracting airline's identity as operator. In *Gill v. Northwest Airlines,*[98] Northwest's participation in the so-called "Northern region operation" was considered, but no safe principle can be deduced from the holdings in the case. In a later litigation of similar operational conditions the independence of the airline was accepted without dispute.[99]

The problem recurs in a simplified form under the Hague Protocol, Article XXVI. This article envisages that certain charters may be excluded from the application of the Convention as amended by States making a reservation. This reservation is made by a notification to the Government of Poland, and can only mean the exclusion of contracts covered by the following language: "the carriage of persons, cargo and baggage for its [the notifying government's] military authorities on aircraft registered in that state, the whole capacity of which has been reserved by or on behalf of such authorities." It is noteworthy that the article avoids the use of the term "charter".

## § 3. *Successive carriage.*

Meaning of successive carriage formulas — assignment of Warsaw contract, vicarious liability on Warsaw contract — difference between passenger and cargo formulas explained — relationship between formulas and charter — Grönfors — Drion — three characteristics of successive carriage — characteristics applied to charter situation — wet lease case — factual partition — complete voyage on chartered flight — partition and integration — assignment and subcontracting — intention of single service — partition contemplated — effect of substitution clause — *Amstelhoedenfabreik v Pan American* — effect of notice in timetable — *Robaver v BOAC and Aden Airways*

The successive carriage formulas as applied in the complicated charter situation entail that the load contract is a Warsaw contract while the instrumentality contract is a non-Warsaw con-

[98] 1949 USAvR 225. The decisive issue was whether there was any triable issue of fact which should be put before a jury. The Court found that the question whether the airline was an independent contractor or not might be such an issue and a new trial was granted. The Court said: "The written agreement between the United States and defendant does not in itself necessarily govern this question. . . there is no one particular test on type of conduct which determines whether a person is an independent contractor. Each case must be decided upon the facts there presented." See 2 Avi 14.892.

[99] *Nolan v Transocean AL,* 1959 USAvR 106, at 107. *Lopez v Resort AL,* 1955 USAvR 476, 1957 USAvR 207, concerned the crash of an aircraft operated by a non-scheduled carrier under charter to the military forces. The soldier victims brought suit against the operator and were found entitled to equal rights as normal passengers.

tract.[100] Translating the effects combined in these formulas into general legal language, they may be explained in relation to passenger carriage in terms of *assignment*. The formula means that the Warsaw contract is assigned successively to each successor carrier in the service. The first carrier steps out of the contract and the next carrier steps in, and each carrier is liable only for events happening during his performance of his part of the carriage. In relation to cargo and baggage carriage the formulas' effects may be explained in terms of *vicarious liability*.[101] The first and the last carrier are liable for any acts or omissions by other participants, the initial carrier towards the consignor and the final carrier towards the consignee. Furthermore, the participating carrier who performed the service during which the liability-creating event took place is liable to both consignor and consignee.[102] The difference between the successive carriage formulas for passenger carriage and for cargo and baggage carriage is explained by the fact that a passenger always knows when the damaging event took place while cargo and baggage only testify about the effect of that event.[103]

What, then, is the relationship between the successive carriage formulas and the regulation of charter situations?

[100] See *e. g.* KOFFKA, BODENSTEIN & KOFFKA 344; COQUOZ 158; CHAUVEAU 224 no 439.

[101] Although each participant is deemed to be carrier party to the contract of carriage (see art 30-1), the formula is not that of "Transportgemeinschaft". See RIPERT, *II Conférence* 89.

[102] As to the discussion whether he is liable to both simultaneously, see *e. g.* GOEDHUIS, *La Convention* 241; SACK, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 1933 4 ALR 345—388, at 381 sq; COQOUZ 158.

[103] Cf BLANC-DANNERY 87—88. — It seems somewhat excentric to allow different formulas to work in passenger and in goods transportation. The carriers were originally prepared to accept a joint and several responsibility of all participating carriers which left the companies "d'effectuer entre elles le réglement de leurs obligations qui existent en vertu des contrats qui les lient" (as reported by DE VOS, *II Conférence* 87). It appears desirable to return to such a system. Certainly, the present one is not much of a help to the passenger. Once a traffic victim, he will not need legal settlement at the very place and moment of the traffic accident as contemplated by the Convention in its present shape, but rather at the place where he is normally prepared to deal with legal matters. An intermediary carrier whose operations never touch the territory in which the passenger is domiciled, offers few venues for suif acceptable to plaintiffs of meagre means. Only if such a passenger is able to bring suit against the first or the last carrier is his remedy effective. Carriers, on the other hand, cannot have any legitimate objections against the cargo scheme being extended to include passenger carriage as well. The problems resulting from the cargo scheme are solved by resort to clearing practices. The main problem in such practices concerns whom to admit to the clearing house. Participants who have passed the scrutiny as to solvency and business policies as to cargo, cannot reasonably be objectionable as to passenger carriage.

It has been indicated at times that the successive carriage formulas cannot be applied to charter situations. Grönfors submits most emphatically that charter situations "cannot be regarded as examples of successive carriage as they do not concern the distinguishing of different parts of a transport, each part being performed by a separate carrier."[104] Drion submits that "the exercise by the carrier who issued the ticket or air waybill, of some contractual right to have all or part of the carriage performed by other carriers, would not bring the carriage under Article 30."[105]

This opposition relies on the three characteristics of the successive carriage situation. They are as follows: There must be a factual, chronological partition of the service.[106] There must be intention of one single service on the part of the parties contracting for it.[107] Finally, the parties must know when contracting that the service is partitioned.[108]

How do these characteristics apply to charter situations?

In inter-carrier charters of the wet lease type the situation is quite often that one carrier is oversold on a certain flight, or underequipped for a certain service, and therefore engages another air carrier to make the flight, or fly the service. In the case of a service run by another airline on the principal airline's behalf for some period of time, it is usual for the principal airline to indicate this fact by entering the other airline's name in brackets, or with an adequate note, in the timetable for the service concerned.[109]

Does this situation satisfy the requirements for classification as a case of successive carriage? The answer may be found by application of the three characteristics of successive carriage.

As far as the *factual partition* of the service is concerned certain difficulties arise in two directions. First, there is the problem whether the service is partitioned at all when the pas-

[104] *Air Charter* 61—62.
[105] *Limitation* 245 no 202.
[106] See art 30-1: ". . . carriage to be performed by various successive carriers . . ."
[107] See art 1-3: ". . . if it has been regarded by the parties as a single operation . . ."
[108] The expression used in art 1-3 as well as 30-1 is: "carriage *to be* performed by . . . successive . . . carriers" (emphasis mine). — Drion submits that "The carriage must have been contemplated by the parties *to be* completed by various successive carriers": *Limitation* 245 no 202. But see Boulos, *Transport aérien international*, 1960 14 RFDA 33—59, at 40.
[109] For instance, when SAGETA performed services under charter to Air France, this fact was indicated in the Air France timetables. Similar practices were followed in the Lufthansa-Sabena charters during the winter season 1960—1961.

senger/shipper only uses the chartered flight and is not involved in any further flying preceding or succeeding this flight. Certainly, in the case of a passenger it is questionable whether the mere fact that the principal airline provides the services for embarkation and disembarkation is sufficient to establish a partition of service. As to cargo and baggage, on the other hand, the period of air carriage is more extensive. Services performed in receiving the goods in the carrier's charge and delivering them to the chartered aircraft, as well as unloading and storing at the airport of destination, seem clearly distinct from the carriage performed by this aircraft. While the argument of partition may here be more favourable received its success seems likely to bring the case rather under Art. 31-1 than under Art. 30.[109a] Neither of these difficulties, however, is serious since the more common case is probably that the chartered aircraft performs only part of a more extensive carriage programme of the passenger/shipper.

The second aspect is the relationship between partition and integration. The notion of partition requires that the supplier of aircraft and crew retains his identity as carrier; if he does not retain this identity, the two services are integrated into one service performed by the charterer-carrier. In order to retain such identity, he must at least remain operator of the service from the point of view of operational standard. Probably it is not necessary, however, that he be operator from the point of view of operational authority. Partition and integration approach the distinction between assignment and sub-contracting.[110] Since this distinction will be treated at another point, it will suffice here that we accept the proposition that partition of service exists at least in all cases of assignment of the contract with the passenger/shipper.[111]

The *intention of a single service* offers little difficulty. It is apparent that the passenger/shipper has no reason to regard the

[109a] Note that in United States domestic transportation the forwarder is not considered a connecting carrier. See Anonymous Note in 1959-60 69 Yale LJ 1013 note 144.

[110] See in particular DRION, *Limitation* 244—246 no 202.

[111] Assignment is the minimum limit of the ambit of the successive carriage notion, not the maximum. Indications are that you can assume the status of a successive carrier without being the assignee of the contract with the passenger/shipper. The successor railway is considered by GERSTNER, *Internationales Eisenbahn-Frachtrecht* 323 to be *Erfüllungsgehilfe* of the first railway, rather than assignee of the contract of carriage. — Incidentally, it should be noted that the proposition here advanced has important consequences to those who argue that charter situations generally involve *cession* and not subcontracting. — The problems of substitution will be treated further *infra* pages 369 sq.

prior single service as more than one operation merely because the airline hires another airline to help in the operation. Subsequent action cannot change the fact that the intention originally referred to a single service, in particular since it is irrelevant that "legally, the operations may remain clearly distinct."[112]

The requirement that *partition be contemplated* remains. It clearly is satisfied if the carriage document (air waybill, ticket, baggage check) indicates that a second carrier is charged with part of the transportation.[113] In the absence of such an indication two questions call for an answer before the range of the requirement as applied in charter situations can be determined. Firstly, is the requirement satisfied by a mere carrier's substitution clause[114] in the contract with the passenger/shipper under which it rests with the carrier to decide whether or not he is going to substitute by use of chartered aircraft? Secondly, if the mere existence of such a clause is not sufficient, is the requirement satisfied by the chartered service being advertised in the principal carrier's timetables?

An affirmative answer to the first question is supported by the holding of the District Court of Amsterdam in *Amstelhoedenfabriek N.V. v. Pan American World Airways Inc.*,[115] in which case the court from the mere fact of Pan American's substitution of KLM for part of the itinerary concluded the existence of successive carriage.[116] This holding, of course, has a very considerable

[112] GOEDHUIS, *National* 296.

[113] This proposition results from art 8-e of the Convention: "The air consignment note shall contain . . . the name and address of the *first* carrier;" and from art 4-3-c of the Convention: "The luggage ticket shall contain . . . the name and address of the carrier *or carriers;*". . . (emphasis mine). But compare the discussion of stamping carrier's name in *via carrier* box in ticket, *infra* pages 375 sq.

[114] The substitution clause is discussed *infra* at pages 369 sq. It is a standard clause in most regular transportation by air and makes the contract with the passenger/shipper almost negotiable between the airlines, inasmuch as the passenger/shipper's assent to the substitution is exacted in advance

[115] IATA Law Reporter No 14; also noted in DRION, *Limitation* 245 no 202 note 3.

[116] Pan American had undertaken to carry two boxes of ladies' and children's hats from Amsterdam to Johannesburg. The airline performed the carriage to Frankfurt am Main and there turned the shipment over to KLM for transportation to Dakar. In the course of the KLM transportation damage arose. Although the air waybill did not mention KLM as second carrier, the Court held Pan American liable pursuant to art 30 as first carrier. — A similar effect, but in the opposite direction, was conferred upon the substitution clause in the American case *Orlove v Philippine Air Lines and Flying Tiger Line*, 1958 USAvR 611, 617; 5 Avi 17.621; 358 US 909 (certiorari denied), in which a Warsaw carrier was held to have substituted an American domestic carrier with the result that a Warsaw relationship was changed into a domestic law relationship. The courts offered no explanation of their reasoning on the point.

range which does not seem fully appreciated.[117] It is submitted, however, that it cannot be authoritative since the court's attention apparently was not called to the aspects here discussed.[118]

It thus seems proper to retreat to the second question: Will indication of chartered services in the timetables satisfy the successive carriage requirements? An answer in the affirmative receives some support from the British case *Rotterdamsche Bank v. BOAC and Aden Airways*[119] in which a substitute carrier was held to be a successive carrier because its name appeared in the timetables.[120] If the timetables themselves are given decisive importance, apparently the required contemplation of partition must often be deemed to be present in those inter-carrier charter cases where the parties have been careful to make a note about the charter in the timetables. Thus, the charters falling outside the scope of the successive carriage formulas would mainly be incidental inter-carrier charters.[121]

[117] Compare the discussion of stamping tickets with name of substitute carrier in *via carrier* box in ticket, accounted for *infra* pages 375 sq. This discussion is irrelevant if the Amstelhoedenfabriek holding represents the law, except in so far as the partition requirement fails to be completed. Compare further SCHWEICKHARDT 80.

[118] Cf DRION's notes in IATA Law Reporter No 14 and *Limitation* 245 no 202 note 3.

[119] *Rotterdamsche Bank N.V. and Banque de l'Indo-Chine v BOAC and Aden Airways Ltd*, 1953 USAvR 163, 1953 1 Lloyd's List LR 154.

[120] One principal issue of this case was whether the carriage was subject to the Warsaw Convention or not. The carriage concerned a gold shipment stolen while carried by Aden Airways who were not mentioned in the air waybill. If the Convention was applicable, Aden Airways were sued in the wrong jurisdiction and it was too late to sue them in the correct one. It was then argued that the carriage performed by Aden Airways was a carriage separate from the Warsaw carriage otherwise involved. The court found that it was not separate. In so holding the court relied on the test whether Aden Airways were mentioned in any way in the contract between the consignor and the carrier. From the mention made in the timetables of the second carrier, BOAC, that Aden Airways operated part of the service involved, the court concluded that Aden Airways' service was in successive carriage. For United States cases in which the courts have incorporated the contents of the timetables into the air waybill, see *Kraus v KLM*, 1949 USAvR 306, 2 Avi 15.017; aff'd 278 App Div 811, 105 NYS 2d 351. — It may be noted that the court also indicated reliance on the air waybill definition of "carrier" under which this term included all "air carriers that carry the goods hereunder or perform any other services related to such air carriage." This reliance, however, cannot be given much authority. Apparently it is always, as put by *Drion*, "questionable whether a definition of 'carrier', incorporated in the carrier's conditions of carriage for the purpose of the interpretation of these conditions, can be construed to apply also to the meaning of 'carrier' for the application of the Convention". See *Limitation* 142 no 123.

[121] Cf DRION, *Limitation* 142 no 123.

## SECTION 2. DISTINCTION ESTABLISHED BY DOCTRINAL CONSIDERATIONS

### § 1. *Leases.*

Premises — lease and contract of carriage mutually exclusive terms — massive Continental legal opinion behind principle — Continental doctrine built on test of essential performance — contrast between limited number of contract types and unlimited number of contractual combinations in everyday life — ends made to meet by principle of unity of contractual performance — variations in principle — *Absorptionstheorie* and *gemischter Vertrag* — essentiality test as guide in subsumption process — name of contract and conduct under contract — problem of finding language which correctly connotes the essential performance — *Gebrauchsüberlassung* — boundaries fortified by other tests — intervention of human services — essential services and ancillary services — effects of the adding of human services — possession — civil liability — reaction of airlines — Anglosaxon legal opinion — few statements of the type encountered in Continental law — cautious language — reasons therefor — particular contracts in Anglosaxon and in Continental law — sources of law for contract classification in Anglosaxon law — bailment — law of ownership, not of contract — ownership and possession in Anglosaxon law — bailment defined — bailment pattern follows how owner parts with the possession of his goods — ownership and possession in Anglosaxon law, notions of degree — "special property" — private and common carriage — maritime law — Anglosaxon commercial law — coating of Latin terms — the notions and their essence — question to the Anglosaxon court: Which one of the parties is the owner? — possession marks the line of distinction between contracts for transportation — line of reverse — demises and non-demises — Anglosaxon and Continental law arrive at similar tests in making the distinctions — bailment relations and master and servant relations — decisive impact of the latter in contract classification — Warsaw Convention and the line of reverse—proposition of contract category

The discussion in the present sub-section proceeds from two premises, which have their foundations in Chapter 3. First in that chapter, it was shown that legal opinion, for the most part, did not feel prepared to desert the classical categories of contracts as far as bare hull charters were concerned.[122] The notion of bare hull charters was equivalent to a lease contract and there was no impelling reason why the former should replace the latter. This is the first premise for the reasoning of this section. The second premise is the rule that the Convention applies only to contracts of carriage.[123]

It follows from the very structure of the Continental system of contract types that leases and contracts of carriage are contrasting and mutually exclusive terms. Accordingly, what is a lease cannot be a contract of carriage. The lease then cannot

[122] See *supra* pages 235 sq.
[123] Page 199 sq.

be covered by the Convention. Behind this view is assembled a solid Continental legal opinion:[124] leases are automatically excluded from Warsaw coverage. That is the principle. What does it mean?

The prevailing Continental doctrine concerning the distinctions between the contract types is, on the whole, built on the test of essential performance.[125] The essential performance is the basis of classification. The system of contract law is simple and works

[124] See *e. g.* GOEDHUIS, 1932 RDILC 701, *La Convention* 97, *National* 136; COQUOZ 91; CHAUVEAU 234 no 457; LITVINE, *Précis* 133 no 178; SCHLEICHER-REYMANN-ABRAHAM 3rd 262 Anm 13; KAISER 30; REBER 83; RIESE, *Luftrecht* 408; RUCK-RIEGEL 11, 21; ALTEN, 1956 TfR 477; GRÖNFORS, *Air Charter* 16.

[125] On classification of contracts, see generally *e. g.*, *French law:* JOSSERAND, 2 *Cours de droit civil positif français* 2d Paris 1933 p 10—12 nris 18—19; AUBRY & RAU, 4 *Cours de droit civil français d'après la méthode de Zachariae* 6th Paris p 419 § 341. The matter is generally considered from either of two aspects. It is at times discussed as the question of "contrats nommés et contrats innomés" in which case the conclusion normally follows that "à l'heure actuelle la distinction n'a plus d'intérêt"; see JULLIOT DE LA MORANDIÈRE, 2 *Traité de droit civil de Ambroise Colin et Henri Capitant*, Paris 1959 p 317 no 576; also ESMEIN, 6 *Traité pratique de droit civil français par Marcel Planiol & Georges Ripert* (1 *Obligations*), Paris 1952 p 44—46 nris 42—43. The other aspect entails to treat the classification as a matter of "qualification" which may have "un grand intérêt pratique"; see RIPERT & BOULANGER, 2 *Traité de droit civil d'après le traité de Planiol*, Paris 1958 p 37—38 nris 87—91 and (quotation) 3 same *Traité* p 439 no 1286. Cf G. MORIN, *La révolte du droit contre le Code — La révision nécessaire des concepts juridiques* (*Contrat, responsabilité, propriété*), Paris 1945 p 20—24, and generally, TERRÉ, *L'influence de la volonté individuelle sur les qualifications*, thèse Paris 1957. HÉBRAUD, *Rôle respectif de la volonté et des éléments objectifs dans les actes juridiques*, in 2 *Mélanges offerts à Jacques Maury*, Paris 1960 (?) p 419—476, at 435—442. PLANIOL thought the matter to contain "une difficulté doctrinale d'un grand intérêt, dont les conséquences pratiques peuvent être très importantes": see his note to *Bouet v Peneau et autres*, Cass Civ 18 Oct 1911, 1912 Dalloz 1 p 113, and further his paper "*Classification synthétique des contrats*", 1904 30 Revue critique de législation et de jurisprudence 70, 473—476; and 2 *Traité* 7th 447—448 no 1352 bis. Recently RODIÈRE in his note to *Thiéry v Coopération pharmaceutique française*, Nancy 23 Dec 1959, 1960 Dalloz Jurisprudence 563, at 564: (in reference to the classification of a contract for the use of a motor-truck with driver) "Les litiges de cet ordre sont assez fréquents pour que l'on rappelle les principes qui fondent cette solution. Il s'agit d'une façon générale de rechercher quelle est la qualification du contrat aux termes duquel un déplacement de marchandises est assuré au moyen d'un vehicule qui n'appartient pas à celui qui est intéressé au transport. Est-ce un contrat de location du vehicule? Est-ce un contrat de transport de marchandises?" — *German law:* STAUDINGER-WEBER, 2 *Kommentar zum bürgerlichen Gesetzbuch und dem Einführungsgesetze — Recht der Schuldverhältnisse* 9th 1930 note to § 241 Anm 362 and literature there cited. ENNECCERUS—LEHMANN, *Recht der Schuldverhältnisse*, in 2 ENNECCERUS-KIPP-WOLFF 15th Tübingen 1958 p 393—402 § 100. Also KRAHMER, *Gegenseitigen Verträge*, Halle 1904; OERTMANN, *Entgeltliche Geschäfte*, 1912; WIEACKER, *Zum System des deutschen Vermögensrechts*, Leipziger rechtswissenschaftlichen Studien Heft 126, 1941; JUNG, *Einteilung der Schuldverhältnisse*, 1920 69 JhJ 68—81; HOENIGER, *Die gemischten Verträge in ihren Grundformen*, 1910; HECK, *Grundriss des Schuldrechts*, Tübingen 1929 p 243—249 § 80, and *Grundriss des Sachenrechts*, Tübingen 1930 p 84—91 § 22 d-e; ESSER, *Schuldrecht*, 1st Karlsruhe 1949 p 53—57 §§ 16—17. Compare literature cited *supra* page 137 note 29. — *Scandinavian law:* see J. SUNDBERG, 1961 SvJT 11 sq and literature there cited.

with a small number of contract types. But the needs of everyday life and the contracts made to meet these needs represent an infinite number of variations and combinations. To make ends meet, Continental jurisprudence is required to subsume, as far as possible all the contracts actually made, under the existing contract type structures.[126] The law of each type is made to apply *in toto,* as a unit, undisturbed if possible by competition with the law of neighbouring types. Generally, this principle is maintained by use of the test of essential purpose or essential performance of the contract. Each contract type has a central performance, and whenever the actual contract is found to centre on the same performance in the contemplation of the parties, subsumption under the available contract type will follow. The essentiality test thus establishes the principle of the unity of the contractual performance. Sometimes it is carried into the extreme, as under Lotmar's version of the German *Absorptionstheorie.*[127] Sometimes it is mitigated by the introduction of intermediary structures such as the "gemischter Vertrag", "le contrat mixte" (or "contrat complexe"). Whenever the unity of the contract regulation is desired, however, "c'est du but de l'opération que doit s'inspirer l'interprète pour assurer la prédominance de l'une de ces règles [spéciales à chaque contrat] . . ."[128] The reliance on the essentiality test is well brought out by the French attempts towards the distinction between contracts containing "une obligation de résultat" and those containing "une obligation de moyens".

The next problem, then, is to find language which connotes the essential performance characterizing each contract type. Parties cannot be left to indicate, solely by catchwords, the conduct they intend to follow and perhaps, by the adoption of special clauses, engage themselves for quite another conduct than that indicated by the catchword.[129] Language must be found defining

[126] I have discussed this problem on pages 130—139, *supra.*

[127] LOTMAR, 1 *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches,* Leipzig 1902 p 177—178 and 201—206 (*Das Zusammentreffen von Arbeit und Gebrauchsüberlassung*). Compare COSTES, *Essai sur la nature juridique du contrat d'entreprise, thèse* Toulouse 1913 p 116: "pour nous, en général le contrat mixte doit être écarté autant que possible dans notre législation; . . ."

[128] PLANIOL-RIPERT-ESMEIN, *op cit* 46 no 43.

[129] Cf *e. g.* the Cour d'Appel de Nancy, in *Thiéry v Coopération pharmaceutique française,* 1960 Dalloz Jurisprudence 563: "à bon droit, les premiers juges ont posé le principe que la dénonciation d'une convention par les contractants ne lie jamais

and describing what they actually will do. In the case of the lease contract type, the essential performance is variously described, yet it always centers on the use of the property leased (cf page 144 sq). In German, this performance is termed "Gebrauchsüberlassung" — transfer of use —, in French "fourniture d'un appareil."[130] Of course, there are difficulties in finding out whether the conduct of the parties prescribed by a contract conforms to this idea of use, particularly when the contract is a complex one contemplating the exchange of many kinds of services between the parties. In order to fortify the boundaries between the contract types, attempts have then been made to render more precise the distinctions which are broadly hinted at by the essentiality test. In the making of these attempts resort has been had to such notions as independence of contractor, control,[131] possession.[132]

Under the doctrine of essential performance as applied to lease contracts, there is nothing *per se* to prevent the combination of a grant of the use of the property with an undertaking to perform some ancillary services, personally, or by means of some servant. As long as the grant of the use of the property remains the essential performance, the contract is a lease.

Sometimes legal opinion seeks to establish a basic line of distinction between contracts with and without human services added. Generally, this reflects either of two situations. Either, it is a matter of convenience to distinguish in this way because of the many extra legal consequences which follow with the grant of human services. Or, the proposition is a distorted reflection of the resort to notions of control or possession for the distinction between contract types.

The importance of the human services can be seen in many ways. If the grantor does not supply services he can hardly be said

le juge, qui demeure libre, au vu des éléments de la cause, de restituer à l'accord des volontés sa véritable qualification juridique . . ."

[130] On the French *louage*, see generally GIVORD & TUNC, *Le louage*, in PLANIOL-RIPERT, *10 Traité pratique de droit civil* 2d nris 722—732; BRETHE DE LA GRESSAYE, in BEUDANT, 11 *Cours de droit civil* 2d nris 647—649. On German *Miete*, see generally CROME, *Die juristische Natur der Miete nach dem BGB*, 1897 37 Jh J 45; HESSE, *Die rechtliche Natur der Miete im deutschen bürgerlichen Recht*, 1902; MITTELSTEIN, *Die Miete nach dem Rechte des Deutschen Reiches*, 4th 1932.

[131] RODIÈRE, 1960 Dalloz Jurisprudence 564 col 2: "le fait unique que le déplacement était dirigé par l'utilisateur . . . est suffisant. Le contrat de transport comporte la maîtrise du déplacement . . . Cet élément permet précisement de distinguer le contrat de transport du contrat de louage de choses . . ."

[132] Cf REBER 88.

to be in possession of the property; on the other hand, if the grantor's servant is acting in relation to the property the question immediately arises whether the grantor has really parted with possession. If no personal services are supplied it is difficult to charge the grantor with liability arising from the use of the property leased; but when a servant goes with the property it is possible to make the grantor liable, either by reason of his responsibilities to the grantee under the contract or by reason of his vicarious (tort) liability. When personal services are supplied, the way leading to the grantor's liability is opened. The significance of these considerations, of course, is particularly felt in trades such as aviation where the human services — in particular those of the pilot and the technical services personnel — are so important that error in their execution is likely often to have disastrous results.

As a result of the importance of the human services airlines have been very conscious of the legal dangers of adding human services to a contracted performance. It appears that at times they hesitate to let services such as the services of the pilot and crew, go with the aircraft and prefer to discharge the personnel concerned, have them employed separately by the party who is to have the use of the aircraft, and at the same time promise to re-employ the same personnel when the term of the contract has expired. This complicated scheme, with all the difficulties arising thereunder as to social benefits (pension, workmen's compensation, etc.), thus has been more attractive than the formal adding of human services to the undertaking under the contract.[133]

These observations, however, while leading to an appreciation of the role of the human services in air chartering, do not change the basic method of classification. Whether the grantor or the grantee of the human services has the possession or the control of the property, obviously, cannot be answered in any simple way, and when such detailed tests fail to provide a distinct answer, the guiding principle must remain the basic essential performance test.[134] The addition of human services, however,

[133] Information supplied by TAI (SAINTON interview).

[134] The essential performance test prevails in Continental legal literature. CHAUVEAU 235 no 458 note 1 submits: "En général, il y aura simple louage de chose et de service [as to the "contrat mixte", see *supra* pages 137 sq and page 273] si le fréteur promet seulement d'assurer la manoeuvre ou conduite de l'appareil

need not have greater importance than the adding of some extra appliances to a leased machine in order to make it work automatically. This makes it clear that the essential performance test does not necessarily involve a basic line of distinction being drawn between contracts with and without human services. Such a line of distinction, therefore, does not belong to the Continental notion of the lease contract.

A striking contrast in language and certainty is found if one turns from Continental to Anglosaxon legal opinion. The rash propositions encountered in Continental law that leases are not subject to the Convention are nowhere to be found. The cautious language is most remarkable. In the first edition of their treatise on Air Law, Shawcross and Beaumont submit that as to the hire of aircraft "[n]o general rules can usefully be laid down".[135] In their second edition they have been prepared to commit themselves to a more definite view, but even then a qualification is thought necessary: "*Normally* under a 'Bare Hull' Charter Contract the charterer would be liable as carrier"; the authors are dealing at this place with the question of the party liable towards the passenger/shipper.[136]

There seem to be good reasons for this timidity. The Anglosaxon lawyer cannot build upon a closed system of contract types as can the Continental jurist. It is natural for the Continental lawyer to think in terms of particular contracts surrounded by other particular contracts, each having its particular area of application and none overlapping another. It is not natural for the Anglosaxon lawyer to think thus.[137] While contracts may have names in his legal system and certainly these names have some meaning, they have, as it were, no boundaries equivalent to those existing in Continental law.

par l'intermédiaire de son équipage. Il y aura entreprise s'il assume une obligation commerciale, agricole ou technique définie." RIESE, *Luftrecht* 408, comments (in reference to the Convention being applicable only to contracts of carriage, not leases): "Sofern nur die Überlassung eines lufttüchtigen Flugzeug nebst geeigneter Besatzung wom Verfrachter geschuldet wird, ist u. E. die Anwendbarkeit des Abkommens zu verneinen. Wird aber . . . eine Beförderung zugesagt, so ist das Abkommen anzuwenden."

[135] SHAWCROSS & BEAUMONT 1st 294 no 508.

[136] SHAWCROSS & BEAUMONT 2d 471 no 513 C. Italics added. NATHAN & BARROWCLOUGH, *Civil Aviation*, in 5 *Halsbury's Laws of England* 3rd 214 note e, seem more definite in their submissions on the point.

[137] Cf LAWSON, *The Rational Strength* 49—50, and *A Common Lawyer* 134.

In this context, such a system of contract classification as exists in Anglosaxon law would seem to be derived from three sources, namely, the common law of bailment, the common law of carriage, and the maritime law.

As to the law of bailment, it is remarkable to a Continental lawyer that, fundamentally — despite its coating of Roman terms (to which I will revert) — it is law of ownership and possession much more than law of contract.[138] Bailment is the relation between an owner of a chattel and its rightful possessor.[139] The rules of bailment fall into the pattern of the owner parting with the possession of his goods. The proper concepts of the law of bailment are ownership and possession. Both of these, in Anglosaxon law, are notions of degree: the bailee is the typical possessor (*infra*), yet he has a "special property" in the goods, at times he will be named "owner *pro hac vice*". This ownership by degree can probably explain the peculiar notion of sub-bailment which otherwise would seem to be a contradiction in terms. The liability of each of the parties to the other, under a bailment, is laid down by the law, unless expressly altered by agreement.[140]

The next body of law is that of private and common carriage. It has already been extensively dealt with.[141] It suffices here to point out that while the body of law clearly bases itself on the status of carrier — status being something basically opposed to a quality established by contract — it has no bearing on the law which stands unaffected by such status.

[138] WINFIELD, *Province of the Law of Tort* p 101—102: "The salient feature of bailment is . . . the element of possession. Bailment is not only one of the modes of transferring possession, but while the bailment lasts it connotes possession. As between bailor and bailee that was recognized very early in our law."

[139] WILLISTON defines it as "the rightful possession of goods by one who is not the owner." 4 WILLISTON 2d 2888 § 1032. WRIGHT, in Part III of his and POLLOCK's *Essay on Possession in the Common Law*, Oxford 1888, says at p 163 (in reference to *Reg v McDonald*, 1885, 15 QBD 323) "Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person." The latter definition is endorsed by PATON, *Bailment in the Common Law*, 1952 p 4—5.

[140] POLLOCK defines 'A special property' as "a right to possess, which is founded on possession and custody", see POLLOCK & WRIGHT *op cit* 40 note 1. WRIGHT, in the same work p 165, advises that "it has long been settled that . . . the bailor may, it is said, even be guilty of theft of his own goods from the bailee"; see also p 165 (special property) and 168 sq (sub-bailment.) — See also 1 WILLISTON 3rd 90 § 32 A; 4 WILLISTON 2d 2908 § 1041 note 15.

[141] *Supra* pages 163 sq.

The third source of law referred to is maritime law, which has already also been dealt with.

Together, these three bodies of law form part of what is sometimes called the commercial law. The Anglosaxon commercial law is the international Law Merchant after having been swept during two centuries by a number of conflicting currents all of which have made substantial deposits in it. On the one hand the Civil law has impressed it with notions and terminology; on the other hand, the Common Law has permeated its institutions and in the end, it is believed, ousted much of the Civil law contents.[142] The first current is evidenced by the influx of Latin terms. Ever since Lord Holt, in *Coggs v. Bernard*,[143] reviewed the English law of bailment in terms of the Continental doctrine of contracts, the contracts of bailment have been characterized by a number of the names of the Latin contract types.[144] Furthermore, the maritime law of the mid-19th century accepted the 18th century Continental nomenclature.[145] But the essence of the commercial law was not the superficial reception of Latin names. Its essence seems rather to be a deposit left by the Common Law of ownership and possession.[146] This law was quite different from anything prevailing on the Continent. Between ownership and possession there was no sharp distinction.[147] The classical Common Law

[142] Compare PATON, *op cit* 3: ". . . the common law has a curious power of warping borrowed doctrines to its particular bent . . ."

[143] 2 Lord Raym 909.

[144] Lord Holt in *Coggs v Bernard* mentions in rapid sequence *depositum, commodatum, locatio et conductio* and *vadium.*

[145] See *supra* pages 173 sq.

[146] STREET, 2 *Foundations of Legal Liability. A presentation of the theory and development of the Common Law*, Northport, Long Island, N Y (Edward Thompson Co) 1906 p 318—319: "Our law of bailments is English law, glossed over, it may be, with a coating of Roman terms and framed in a form resembling that of the foreign system; but still it is of truly English origin, somewhat tediously and unsystematically wrought out by the builders of the common law." (Cf PATON 3—4). FIFOOT's appreciation of the impact of Lord Mansfield on English commercial law brings the other dimension into the picture: "It was his generalization upon the rules of Assumpsit which established Contract as a unique conception and revealed its roots in the intention of the parties. He weaned the practitioners from their reliance upon technical solutions, and set the design for systematic study. His knowledge and application of continental analogies introduced the English law into the comity of nations, and inspired the native experiments in comparative jurisprudence." FIFOOT, *Lord Mansfield* 243

[147] It appears from ISAAC's text in 1917—18 27 Yale LJ 43 that this peculiarity of the Anglosaxon law is due to the Royal jurisdiction in mediaeval England being based on the King's peace. "It was not so easy to extend the fiction [that the King's peace was involved] to cases involving questions of ownership as distinguished from possession. Consequently, possession has always been nine points of the law, the triumphant royal law of England." FLETCHER, *The Carrier's Liability* 4,

contained "a hierarchy of actions, a sort of descending scale from the purely proprietary to the purely possessory. 'Possessoriness' has become a matter of degree . . ."[148] To this feature the Common Law added another peculiarity. "The question was never simply which of these two is owner, but which has the better right of the two, which has *maius ius*. 'No one is ever called on to demonstrate an ownership good against all men; he does enough even in a proprietary action if he proves an older right than that of the person whom he attacks.' It is a relative ownership: 'I own it more than you do'."[149] With this background it was but natural that the question of construction put to the English court was not, Is this a lease or a contract for work, a lease or a contract of carriage? but, Which one of the parties to the contract is the owner, which the possessor?

At times the influence of this law of ownership and possession on contract law has been striking. Anglosaxon law draws a fundamental distinction between the hiring of personal property and the lease of real property.[150] The latter does not come under the heading of contract,[151] but is considered as part of the relational obligations arising from the status notions of landlord and tenant.[152] At the same time real property law is the stronghold of the notions of ownership and possessoriness by degree. Sometimes these real estate notions as applied in real property law, have been allowed to react upon contract notions. Wright, in 1923, characterizes the maritime time charterer's participation in the chartered ship as "his leasehold estate". Accordingly, when the ship is requisitioned by the government, the question whether the charterer still has to pay the charter price to the shipowner is argued in favour of the shipowner by resort to the ownership by degree: "A court may . . . believe that what is leased is the

submits in reference to the object of the early law being to protect possesion, that "The use of the word owner does not in fact occur until as late as 1340."

[148] BUCKLAND & MCNAIR 2d 67.

[149] BUCKLAND & MCNAIR 2d 67 with supporting footnotes referring to POLLOCK & MAITLAND, 2 *History of English Law* 77, and HOLDSWORTH, 3 *History of English Law* 7. See also LAWSON, *The Law of Absolute Ownership and Division of Ownership*, in *British Legal Papers presented to the Fifth International Congress of Comparative Law, Palace of Justice, Brussels 4th—9th August, 1958* (General editor: Dr A K R Kiralfy) p 3—24.

[150] PATON, *Bailment* 52.

[151] SIMPSON, *Handbook of the Law of Contracts*, St Paul (West Publ) 1954 p 436 sec 119.

[152] This observation is made by OLIVIER-MARTIN, 1936 15 Rev hist dr frçs & étr 4th series 429 note 3.

ship herself, and what is taken away by the requisition is the privilege of using her in a certain way."[153] The English Privy Council decision in *Lord Strathcona Steamship Company v. Dominion Coal Company,*[154] in 1926, led Gutteridge to explain the position of the purchaser of a ship under charter to be "analogous to that of the assignee of the reversion to a lease and that in both cases the property is acquired subject to any pre-existing interest, whether in the form of a lease or a charter-party."[155]

This is all very far from Continental legal thinking, especially from the French canons.[156]

When the classification of contracts relative to vehicles for transportation is founded on the law of bailment it is easy to see that there is an important line of distinction to be drawn depending upon whether the owner of the vehicle passes the possession of the vehicle to the owner of the cargo for the purpose of transportation, or the owner of the cargo passes the possession of the cargo to the owner of the vehicle for the purpose of transportation. This, indeed, is a much more important distinction to make than the classification of your contract as a *locatio rei*

[153] *Supervening Impossibility of Performing Conditions in Admiralty*, 1923 23 Col LRev 45.

[154] 1926 AC 108.

[155] 1935 51 LQR 98. But this reasoning is sharply criticised in CHESHIRE & FIFOOT, *The Law of Contract* 1st London 1946 p 290 sq: "it is well established that a charter-party creates no right of property in the ship." (at 291) same in 5th 381.

[156] Under Continental theory, whether the carrier is owner or merely lessee of the instrumentality of transport is just as irrelevant as whether the shipper owns the cargo or not. If hesitation on this point ever stemmed from the Roman *receptum* liability of Dig 4,9 — *Nautae Caupones Stabularii*, it was definitely overcome in the 19th century. As to German law, see *infra* page 286, as to French law, see *e. g.*, 2 RODIÈRE 204 sq nris 569—570. — The encounters between the Continental and the Anglosaxon systems are sometimes illustrative of the point. Under the Rome Convention of 1933 the "operator" was the bearer of liability. Whatever was meant by this replica of the German "Halter" notion (see *infra* page 328) it definitely did not mean the owner as such in the Continental sense. But when the British were prepared to implement the Convention in preparation of ratification they made the "owner" bearer of liability. An amendment to the bill to make the operator liable was proposed in the House of Commons. "It was resisted by the Attorney General, whose contention was that there was very little practical difference whether the one word was used or the other. There was no need, he held, to adopt the *ipsissima verba* of the Rome Convention in the event of our ratifying it; we could use our own legal phraseology in applying the Convention, provided it produced substantially the same effect." See SPAIGHT, *Third Party Damage by Aircraft: British Legislation and the Rome Convention*, 1939 10 ALR 265. In view of what has been said about the basic Anglosaxon views as to hiring, it is submitted that there was more merit in the Attorney General's words than Spaight was prepared to believe taking the view that His Majesty's Government were not observing the terms of the Convention. *Loc cit.*

or a *locatio operis*. In short, is there a bailment of the vehicle or a bailment of the cargo? This important line of distinction may be termed the line of reversing bailments or the *line of reverse* for short. This very line is the one which has generally been adopted in Anglosaxon maritime law by accepting the distinction between contracts which are *demises* and those which are not.

It is only natural that people accustomed to these ways of thinking have difficulty when facing the Continental system of contract types, however ironical it is that much of what England has of commercial law is otherwise derived from Continental sources.[157] The fact that the English could receive Continental nomenclature without assimilating the principles behind it has produced much misunderstanding. Nevertheless, the Anglosaxon way of reasoning ends in tests to distinguish between contracts which are very similar to those prevailing in Continental law.

Accepting the line of reverse as the line of demarcation the boundary between different kinds of contracts rests squarely on the principles of possession. In the law of possession, however, a wide variety of considerations come into play, and notably the principles of master and servant. The English bailee was the possessor *par excellence*.[158] He was the typical possessor because he did not purport to act as owner.[159] In this law the rules of master and servant came to intervene. After early hesitation time made it clear that, where a master left his goods in the charge of a servant, it was the master and not the servant who could bring trespass against a third party.[160] The rule developed that a bailment cannot exist coextensively with a master and servant relation.[161] As a result, where the personnel operating the vehicle

[157] Note for instance WRIGHT in 1923 23 Col LRev 43, where he says: "The topic just discussed is primarily one of contract. The agreement to carry goods for freight from one place to another is generally so regarded, although on the Continent some maritime writers seem to look at it as a lease."

[158] HOLMES, *The Common Law* 175.

[159] FIFOOT, *Judge and Jurist* 89—91.

[160] As late as in the 17th century the servant was denied possession as long as he remained in his master's house but not longer. Once he passed into the street the master's possession passed with him. The rule of the text, however, was made clear by the development since *Bertie v Beaumont*, 1812, 16 East Rep 33, 104 ER 1001. See further FIFOOT, *Judge and Jurist* 93—94, and literature there cited.

[161] This principle is sometimes discussed in taxi-cab cases, such as *Fowler v Lock*, 1872, LR 7 CP 272; 1874, LR 10 CP 90 (coachman injured, found to be bailee); and *Venables v Smith*, 1877, 2 QB 279 (third party injured, coachman found to be proprietor's servant). The matter however is complicated by a number of statutes and

were the servants of its owner, there was no bailment of the vehicle. Such a bailment could not exist unless the same personnel became the servants of the shipper or charterer. If there was no bailment of the vehicle, then there must be a bailment of the cargo. Thus, the master and servant relation has a decisive impact on the classification of the contract. The strength of this impact is accentuated by considerations similar to those of the Continental law *(supra* pages 274 sq), in particular the result that the owner of the vehicle might become liable for damage incidental to the use of the vehicle by operation of the rules of vicarious liability in case the personnel were found to be his servants, but avoided such liability if they were not.

It then remains to consider whether the line of reverse as a line of demarcation affects the interpretation of the Warsaw Convention. The survey of the legal structures surrounding bare hull charters points to a line of demarcation to be drawn by the law of possession and the law of employment. With such fortunate unity on a matter of broad principle between the legal systems within the scope of this inquiry, it may seem convenient to carry the settlement of the matter as far as possible. This would involve the staking out of a category of contracts for the use of aircraft undisputedly falling outside the ambit of the Convention, by use of the principles of possession and employment, and without regard to the names and systematical context of these principles in the various legal systems. This category would then include Anglosaxon demises as well as Continental leases. The proposition seems worthy of support. It should be kept in mind, however, that the proposition is mainly theoretical since it relies on intermediate legal notions (possession, employment) which sometimes fail to provide an answer, rather than on the direct facts in air commerce.

PATON submits that it is not easy to find a satisfactory decision on the common law. See *Bailment in the Common Law* 287. It appears that statutory intervention is necessary if the bailor is to be held answerable as master. Cf LUNDSTEDT, *Strikt ansvar, Förberedande undersökningar,* Uppsala 1944 p 475.

## § 2. *Charters as contracts sui generis*

Contracts classified otherwise than as contracts of carriage on the Continent — classification and tradition — tradition opposes and does not support the autonomy of charter contracts in relation to contracts of carriage — *ius cogens* aspect adds weight to trend — German-Italian attempts towards autonomy of charter contract — Italian success — German failure

The doctrinal method, which was reviewed in the preceding subsection can, apparently, be extended so as to exclude from Convention coverage of other contracts, (apart from leases), which can be classified otherwise than as contracts of carriage. Examples of such exclusion are the contract of employment and the freight forwarding contract as conceived on the European Continent and in Scandinavia.[162] Both of these contract types derive support for their stability and consequential separation from other types from a longstanding tradition. If charter contracts were contracts *sui generis* the result would be the same. However, for the proposition that charter contracts are contracts *sui generis* little support can be found in tradition. Indeed, the charter contract may be contrasted with the contract of employment — *locatio operarum* — whose roots were separate from those of the contract of carriage as early as in Roman times.[163] The problem with the charter contract is that it can be seen as a derivative of either of two ancient roots — *locatio operis* or *locatio rei* — but it cannot be seen as an off-shoot of a separate root. In its evolution, it must liberate itself from either or both of its roots. Its autonomy thus is opposed and not supported by tradition. Considering, furthermore, that as far as air law is concerned, the one root, the contract for work, in the form of the contract of carriage, has found itself transferred into the domains of *ius cogens*, it is no wonder that the attempts to establish the charter contract as an autonomous contract not subject to mandatory terms, meet with difficulty. Such attempts are found mainly in the German-Italian area. In Italian law, notably, they have been successful, probably due to the fact that when the Convention was ratified (Feb. 14, 1933) there was an already existing stable doctrine distinguishing between contracts of carriage and charter contracts and accepting the latter as contracts *sui generis*.[164] In German

[162] *Contrat de commission*, *Speditions-Vertrag*, *speditionsavtal*.

[163] *Supra* page 143.

[164] See here *e. g.* BELARDINELLI's paper in 1933 Rivista di diritto aeronautico 129 sq and reflections of this doctrine in the positions taken by COGLIOLO, 336 Citeja 7, 12, 16, 18, and AMBROSINI, 9 1 ICAO LC 43.

law the evolution towards autonomy eventually failed. Most of the German discussion has already been reviewed;[165] it will suffice here to mention the milestones of the development.

In 1927 von Tschudi declared as to air chartering: "Zwischen chartern und mieten einen Unterschied zu machen empfielt sich nicht ... in den den Luftrat interessierenden Fällen muss Charterung und Miete als ein und dasselbe, nämlich Erwerbung des Rechts der Benutzung des Flugzeugs auf Rechnung des betreffenden Erwerbers angesehen werden."[166] Kaiser moved the contract into the no man's land between the contract types and found the essence of it to be "die Ueberlassung des Luftfahrzeugs zur Verwendung nach eigenem Gutdünken"[167] clearly distinguished from both *Miete* and *Beförderungsvertrag*.[168] Riese, in 1939, supplied authority for this move, with attention focusing on a threatening assimilation of the charter contract to the contract of carriage at that time. Riese stated that under the charter contract "nicht die Beförderung als solche sondern die Überlassung des Luftfahrzeugs ... mit ... Besatzung ... geschuldet wird".[169] Hürzeler started to dissolve the charter contract notion: there are typical charters and there are Warsaw charters;[170] and eventually Reemts, Abraham, Ruckriegel, Reber and Stahaelin fell back onto a dichotomy of *Miet-Charter* and *Transport-Charter*.[171]

As a practical matter then, to German lawyers there is no longer any question of the *Charterung* contract as a contract *sui generis* and doctrinal considerations can obtain no exclusion of charter contracts from Warsaw coverage in this manner in spite of the contrary development in Italy. In German law, thus, either the considerations dealt with in the preceding sub-section on lease contracts apply, or the contract falls under the Convention. As will be seen shortly, however, other principles may intervene.

[165] *Supra* pages 202—206.
[166] 1927 Der Luftweg, Heft 6 p 80.
[167] KAISER 32.
[168] *Op cit* 31, 32.
[169] 1939 9 AfL 137—138.
[170] HÜRZELER 24 sq, 29 sq. The terminology is explained on page 202 *supra*.
[171] See *supra* pages 203 sq.

## § 3. *Complications of doctrinal method*

Doctrinal method and the two party situation — essential performance test in three party situation and situations further complicated — retreat from essential performance to status — search for the carrier — Who is the bearer of carriage liability? — German tradition as to the identity of the *Frachtführer* — *Norddeutsche Paketbeförderungs Case* — *Frachtführer* and the *receptum* liability — *Luftfrachtführer* — Riese's definition — de Vos' definition — Swiss Lufttransportreglement — multi-party situation under the Continental school — proposition that Convention apply to both instrumentality and load contracts — desired advantages only follow if documentation is identical — consolidation example — proposition that Convention only apply to load contract — cases in which Convention only applies to instrumentality contract — agreement *de lege lata* — retreat to passenger/shipper status — When can a charterer be passenger or shipper? — consequences — reaction against Continental shool — Brazilian Air Code of 1938 — Coquoz — German Warsaw Act, 1943 — the Warsaw revision work — appreciation of Coquoz — Anglosaxon deviation in Convention interpretation — Warsaw carrier selected by tort rules — Kean's statement — reasons for deviation: comparison between Continental and Anglosaxon law — not radically different on contract remedies in carriage — not radically different on tort remedies in carriage — English explanation: privity of contract — statutory classification of action — American explanation: conflict of laws problem guiding — *lex loci delicti* — wrongful death situation — limitations on awards — *ordre public* — New York — domestic pattern applied to international air commerce — defects in Anglosaxon approach — different carriers in freight and passenger carriage — USSCt decision to solve diversity situation — decision likely to follow canons for the interpretation of international treaties — remedy for English situation: repeal of statutory classification

It has already been indicated[172] that the doctrinal method of working with contract types is at its best when only two parties are involved. In a complicated situation difficulties accrue. The Warsaw Convention does little to improve the matter.

First, in a three-party complicated situation there are the three distinct relations between the parties. Two of these relations are normally covered by contract. One or both or neither of these contracts can be such as to deserve being classified as contracts of carriage; since carriage is involved they all relate to it. In the same way, then, one or both or neither can satisfy the requirements for the applicability of the Convention. The doctrinal method would entail a consideration of the essential performance of each of the two contracts. In many quarters, however, lawyers have taken the other approach *i.e.* to search for the identity of the "carrier".[173] Thus, the test for the applicability of the Convention usually appears in the form: Who is the Warsaw carrier, the operator or the charterer?

[172] See *supra* pages 177 sq.
[173] *E. g.* RIESE, 336 Citeja 11.

It has already been shown that redrafting the doctrinal problem into terms of, Who is the bearer of carrier liability? is a device, well-known in the general law of carriage.[174] In this guise, similar problems had been settled in Germany as early as during the period immediately following the unification and codification of the pan-German commercial law. The existing tradition, however, supported a solution of the carrier identity problem which relied exclusively on the contract of carriage, *i.e.* on the fact of contracting rather than on the fact of carrying. In the *Norddeutsche Paketbeförderungs Case*[175] the Reichs-Oberhandelsgericht settled the matter by holding that it was the express company, hiring its own cars from the railroad company, which was liable as to the consignor for the loss of an express packet, and not the railroad itself.[176] The Court said: "es kann Jemand Frachtführer sein, ohne selbst oder durch seine Leute den Transport auszuführen, vielmehr genügt es zum Begriff des Frachtgeschäfts, dass Jemand den T r a n s p o r t gegen bestimmte Frachtsätze gewerbemässig übernimmt, gleichviel welcher Transportmittel er sich bei der Ausführung bedient".[177] This decision put an end to speculations over the character of the Roman *receptum* liability[178] and legal opinion united in holding that even if *receptum* principles had permeated the ADHGB regulation of the contract of carriage, the "Frachtführer" meant the carrier party to the "deutschrechtlichen Frachtvertrag"[179] and the definition of *Frachtführer* in ADHGB Article 390 could be understood in no other sense.[180]

[174] See on this point *supra* pages 181.
[175] *Norddeutsche Paketbeförderungsgesellschaft Valette, Reinecke, Randel & Co v Hanns*, 9 Entscheidungen des Reichs-Oberhandelsgerichts 89.
[176] Decision 22 Feb 1873.
[177] 9 Entscheidungen des Reichs-Oberhandelsgerichts 90.
[178] *Supra* page 148.
[179] HÄBLER, *Die Haftpflicht ex recepto*, Leipzig 1884 p 37 sq: "Wenn nun also gesagt worden ist, dass das Handelsgesetzbuch die Grundsätze über das receptum auf das Transportgeschäft ausgedehnt habe und dass die unter und 2 aufgeführten Rechtssubjekte ex recepto haften, so besteht doch, was den juristischen Charakter der Haftung und ihre Stellung zu dem begleitenden Vertrage anlangt, eine principale Verschiedenheit des deutschen Rechts von dem römischen Rechte insofern, als die Receptumsgrundsätze nicht mehr Modificationen gewisser civiler Vertragsverhältnisse sind, sondern integrirende Bestandtheile eines Vertrages, des Frachtvertrages".
[180] See *e. g.* GOLDSCHMIDT, *Handbuch des Handelsrechts* 2d 613 § 54; KEYSSNER, *ADHBG nach Rechtsprechung und Wissenschaft*, Stuttgart 1878 p 436. Article 390 of ADHBG read as follows: "Frachtführer ist derjenige, welcher gewerbemässig den Transport von Gütern zu Lande oder auf Flüssen und Binnengewassern ausführt."

This development was consecrated in the imperial federal HGB of 1897.[181]

In preparation for the ratification of the Warsaw Convention Germany, Austria and Switzerland, working in common, established a German translation of the Convention.[182] In this translation the "transporteur" was called *Luftfrachtführer*. On the authority of the tradition from the *Norddeutsche Paketbeförderungs Case*, Riese was then able to proclaim in 1933 "dass Luftfrachtführer i.S. des Abkommens stets derjenige ist, der es vertraglich übernimmt, Reisende, Gepäck oder Frachtgut mit einem Luftfahrzeug zu befördern."[183] His definition has been endorsed by most of his countrymen.[184]

When making this statement, Riese indicated that his opinion was shared by de Vos, the Rapporteur to the Warsaw Conference. Indeed, in 1932, de Vos had stated most emphatically: "Que faut-il entendre par transporteur: dans la Convention de Varsovie, aucune indication n'était nécessaire puisque ce mot vise évidemment la personne qui conclut le contrat de transport et en assume les charges."[185] If French endorsements of this definition are hard to find, this probably does not indicate hesitation on their part, but rather that the matter has been considered self-evident.[186] Indeed, the carrier's liability under the general French

[181] In conformity with this development emphasis was shifted in the definition of "Frachtführer" when the federal imperial HGB was drafted. The HGB definition reads: "wer es gewerbsmässig *übernimmt*, die Beförderung von Gütern . . . auszuführen." (§ 425). (Emphasis mine). Compare note 180 *supra*.

[182] See German *Denkschrift* 27.

[183] 1933 7 ZAIP 979, reprinted in 1934 4 AfL 47.

[184] Döring, *Luftverkehrsgesetz und Verordnung über Luftverkehr*, München & Berlin 1937 p 342; Koffka, Bodenstein & Koffka, *Luftverkehrsgesetz und Warschauer Abkommen*, Berlin 1937 p 268 no II-1-A-1; Ruckriegel 40; Schleicher-Reymann-Abraham 3rd 268, 273. Cf Schweickhardt 42. It has furthermore received the support of the Reichsgericht inasmuch as this court in *Berufsgenossenschaft v Deruluft*, see 1938 8 AfL 295; 1939 9 AfL 172, 161 RGZ 76, stressed the contractual character of claims arising under the Convention: "Das Warschauer Abkommen . . . gelangt immer nur auf Grund eines Vertrages . . . zur Anwendung. Die Ersatzansprüche die es gewährt, können stets nur auf Grund dieses Vertrages erhoben werden." At 174.

[185] 1932 1 RGDA 592. See also 336 Citeja 8.

[186] Compare Georgiades, *Quelques réflexions sur l'affrètement des aéronefs et le projet de convention de Tokio*, 1959 13 RFDA 113—147, at 118—119: "Il est . . . incontestable . . . que les rédacteurs de la Convention de Varsovie n'ont eu en vue, en parlant du transporteur aérien, que celui qui professionellement s'engage à transporter par ses propres aéronefs des passagers ou des marchandises et conclut à cet effet un contrat avec les passagers ou les expéditeurs, contrat ayant pour objet le transport dont il assume la charge. Un transporteur aérien, pour le Doyen Ripert (qui, avec d'autres éminents juristes, a présidé à la rédaction de cette Convention) est l'équivalent, dans le transport par air, de l'armateur, transporteur sur mer. La

law, ever since 1911 when the matter was settled as to passenger injury,[187] has been squarely placed on contract and notions deviating from this viewpoint have therefore had difficulty gaining a foothold.[188]

The force of the definition has received extra impetus by its reception in the Swiss Lufttransportreglement of October 3rd, 1952.[189]

The definition has furthermore been able to enrol the support of the editors of Shawcross and Beaumont who submit that "In view of the decisive importance given by Art. 1(2) to 'the contract made by the parties' ... 'the carrier' means the person who has contracted with him for the carriage."[190]

Under the canons for interpretation of the Convention adopted in this volume the Continental school definition is inevitable and authoritative. But the success of this Continental school *per se* is not very helpful in the multi-party situation. There still remains the problem of how many of the contracts involved are Warsaw contracts.

The Convention may apply to the instrumentality contract and to the load contract: this some authors find desirable[191] possibly because it makes carrier liability a fixed onus which moves to the carrier performing the flight and carrying the insurance. To arrive at a symmetrical regulation, however, it is necessary to have identical documentation in the two contracts as well. When that is not the case, as indeed is the actual situation in consolidation, and disaster occurs, each consignor will bring a claim against the consolidator and collect damages based upon the air waybill which was issued by the consolidator to the

clarté et la précision rédactionelle de la Convention de Varsovie, rédigée à une époque ou, dans les concerts internationaux, l'expression de la doctrine juridique française avait un poids et une autorité incontestés, excluent toute ambiguité et équivoque à ce sujet."

[187] *Cie Générale Transatlantique v Zbidi Hamida ben Mahmoud*, 1913 Dalloz Périodique 1 p 249; 1912 Sirey 1 p 73.

[188] Cf LEMOINE 541 no 813; VAN HOUTTE 57—58 no 23; DRION *Limitation* 134 no 118 invoking "the weight of arguments".

[189] Art 1-f defines the *Luftfrachtführer* as "wer gegen Entgelt die Beförderung von Personen, Reisegepäck oder Gütern mit Luftfahrzeugen übernimmt."

[190] SHAWCROSS & BEAUMONT 2d 343 no 362 note a. The editors conclude that if the supplier issues a ticket in his own name to the passenger before the flight starts, both supplier and middleman are "the carrier" on the strength of this definition.

[191] GOEDHUIS, *La Convention* 97—98, *National* 136—137. Compare CHAUVEAU, *Droit Aérien* 241 no 472: "Il faut que le propriétaire ait la qualité de transporteur vis-à-vis de l'affréteur sans quoi il est clair qu'il ne peut l'avoir vis-à-vis du sous-affréteur."

consignor. The consolidator, in turn, will file a claim against the aircraft operator, and will collect damages upon the airway-bill issued by the operator to the consolidator. The recovery of the consolidator is based upon the amount of damage to the goods shipped by him, and not upon the amount recovered by the consignor from the consolidator. Other authors find the application of the Convention to both contracts regrettable and want the Convention to apply only to the load contract.[192] The third conceivable solution is that the Convention only applies to the instrumentality contract and not to the load contract; this is the situation when the air cargo consolidator charters in his own name but as a representative of and on the behalf of the shipper owning the cargo. If in this situation, as is usual in France, the charterer agrees with the shipper that his liability to the latter will be the same as the operator's liability to the charterer,[193] the result will be that the shipper is subject to the Warsaw scheme as to his remedies but receives no Warsaw documents. Some are critical of this.[194]

*De lege lata,* however, it is generally envisaged that the several contracts involved in a complicated situation may have separate regulations.[195]

A retreat from essential performance to *status*[196] appeared to offer a solution when dealing with the complicated charter situation. It was said that the contract of carriage as envisaged by the Convention was attached to passenger/shipper status. As stated by Goedhuis, "la Convention de Varsovie ne peut pas être appliquée aux transports effectués sous un tel contrat [de

[192] LeGoff, *Traité Supplément* 200 no 1660-1; Alten, 9 1 ICAO LC 130. Similarly but *de lege lata,* Coquoz 93. The position seems to be the late target of Goedhuis' 1933 statement: "Il est évident qu'une telle situation n'est point désirable": *La Convention* 98, repeated in *National* 137. — Possibly the symmetrical regulation is intended to be covered by the expression "reconsignment". It must be recalled, however, that it is only the IATA consolidator who is forced to deal with the airlines on airway bill terms, *i. e.* to "reconsign" the shipments. Other consolidators can charter aircraft, see *supra* pages 39 sq. Note that in European railway groupage, the word "Chartern" sometimes means generally the "Ausnützen eines von einem Dritten (der Eisenbahn) zur Verfügung gestellten Laderaumes." See Leumann, *Die Rechtstellung des schweizerischen Sammelladungsspediteurs,* Bern diss 1950 p 33 note 5, and Becker, 2 *Kommentar zum Obligationenrecht,* Bern 1934 p 653.

[193] See Rabut, 1952 6 RFDA 257—258; Bailly, *La commission de transport,* in *Le contrat de commission - Etudes de Droit Commercial* (sous la direction . . . de Hamel), Paris 1949 p 267.

[194] See Note to *La Neuchâteloise v Aéro Cargo,* 1951 5 RFDA 440, at 447—448.

[195] Drion, *Limitation* 138—139 no 121.

[196] Compare *supra* page 131.

charte] à moins que l'affréteur ne puisse être considéré comme voyageur ou expéditeur".[197] Passenger and shipper were both well defined notions to the general public, and they could be used as tests for a finding whether the contract satisfied the conditions for the application of the Convention. Was the charterer a passenger or a shipper? — if not, his contract with the operator of the aircraft was not a Warsaw contract! Apparently no juridical person can be a "passenger", and the contract by which such a person charters an aircraft for passenger carriage cannot be a Warsaw contract. The status proposition therefore certainly merits supports as applied to passenger carriage. It is not so in relation to cargo, however. "Shipper", "expéditeur" is not an equally precise status term, and the status test therefore will generally offer slight guidance as applied to cargo charters in determining the ambit of the Warsaw Convention.

It should be noted, however, that the result of this status test was to restrict Warsaw coverage most peculiarly: if the charterer wanted the aircraft to fly his cargo or himself, he could — although hesitatingly[198] — be accepted as passenger/shipper; but the very moment he decided to sub-contract the flight he was stripped of this status and it descended to the ultimate passenger/shipper.[199] To the carrier this meant that the legal regime of the charter contract could change at the will of the charterer unless special precautions were taken by the insertion of no-resale clauses in the charterparty.

In the face of such peculiarities connected with their teachings, the general Continental school could not expect universal success. Indeed, unity was not complete.[200] In the 1938 Brazilian Air Code, which had been drafted by the Citeja, the carrier notion was otherwise defined.[201] Article 67 provided: "Carrier, for the effects of the present Code, is the natural or juristic person who performs air transportation for the purpose of profit".[202] In 1938,

[197] 1932 RDILC 697 cf 701. Partisans of this status view also KOFFKA, BODENSTEIN & KOFFKA, *op cit* 268; DE VOS, 336 Citeja 8; SCHLEICHER & REYMANN 2d 348.

[198] See *contra*: COGLIOLO, 336 Citeja 18 — charters to Mr. Lowenstein; RIPERT, 336 Citeja 15.

[199] GOEDHUIS, 1932 RDILC 701.

[200] As to the attempts to retain the contract of carriage aspect but avoid the implications of insisting on passenger/shipper status in determining the parties to the contract, see *infra* relative to contracts in the favour of third parties, pages 354 sq.

[201] Decree-Law no 483 of 8 Jun 1938.

[202] "Transportador, para os efeitos do presente Código, é a pessoa natural ou juridica que efetuar transporte aéreo com intuito de lucro." It may be noted that

furthermore, Coquoz attached the status of Warsaw carrier to the *fact* of carriage rather than to the contract of it. Referring to Articles 1 and 17 to 20, inclusive, of the Warsaw Convention he says: "D'après sa teneur ... le transporteur n'est pas nécessairement la personne qui a participé au contrat, mais plutôt celle qui effectue le transport".[203] While Coquoz has not received much support from legal scholars[204] his reasoning has been reflected in legislative quarters. During the period 1943—1959 the German Warsaw Act placed Warsaw liability in domestic carriage with the airline operating the aircraft, the "Halter". The work on the revision of the Warsaw Convention at times reflected the same view. In 1947 and 1948, Beaumont proposed in his drafts that "In the case of a charter, the operator of a chartered aircraft is deemed to be the carrier for all purposes of this Convention" and "operator" meant "the party who has the right to control movement of the aircraft from place to place ..."[205]

Despite the lack of numbers arrayed behind Coquoz, his approach had theoretical merit. Unlike the general school he did not repose upon the general law of liability. He sought to find the answers by viewing the Convention as *lex specialis* only, as imposing "une obligation légale".[206] The very liberation of considerations from the rules concerning contract which were upheld by the general law by necessity shifted the focus from *lex inter partes* to contract as symptom. But once the importance of the contract was reduced from rule-making to that of being a mere symptom of something to rule (rules being supplied by the Convention), among the facts of which the contract is a symptom, it must be accepted that the fact of carrying was much more important than the fact of contracting. Consequently, it was impressively clear that the rule identifying the Warsaw

this article reflects the spirit of the Brazilian proposition to the Warsaw Conference that the "carrier means he who, either as proprietor, charterer or conductor of the aircraft, uses it individually or jointly, for the carriage of persons and goods, within the meaning of the Convention, and in conformity with the national regulations" see *II Conférence* 97, translation as per GOEDHUIS, *National* 132.

[203] *Le droit privé* 92.

[204] Only, it appears LITVINE 134 no 180.

[205] See ICAO doc:s 5102 LC/83 22/1/48 p 42—43 and 6022 LC/119 6/12/48 art 1-b. It may be added that Beaumont's argumentation relative to the former of these drafts was inserted in an almost literal translation in DE JUGLART's treatise, *Traité* 325 sq. The text is introduced with a reference to Beaumont but the absence of further references to him have led readers to believe that de Juglart wished to express any personal opinion in the matter. I doubt whether this was his intention.

[206] COQUOZ 69 and LITVINE 131.

carrier should be taken from this fact of carriage rather than from the fact of contracting.

Lately, Continental legal opinion has been impressed by the Anglosaxon proposition that the Warsaw carrier should be selected on the basis of the tort liability rules.[207] This proposition works to the same effect as Coquoz' teachings but altogether lacks their theoretical merits. The Anglosaxon proposition stems from attempts to make the Convention fit into a domestic law pattern which has been fashioned to meet certain shortcomings of the Common Law.

This Anglosaxon eccentricity in the interpretation of the Convention (which, incidentally, contravenes the submission in Shawcross and Beaumont[208] as well as the views of Sir Alfred Dennis at the Warsaw Conference[209]) was brought into focus by a statement at the Tokyo session of the ICAO Legal Committee by the British delegate, Kean. As reported in the Minutes he said: "He had been brought up in English law and had thought of the Warsaw Convention primarily as regulating liability in tort or delict of the carrier; consequently the action could only be brought against the person who had actually performed the carriage."[210]

The reasons for the proposed interpretation of the Convention will not immediately appear. The Anglosaxon system does not hold a view of the dichotomy of tort and contract in carriage radically different from that prevailing in Continental law. English law, no less than the American law, is not devoid of contract remedies against the carrier. On the contrary, Viscount Haldane said in the *Robinson Case* that "it cannot be accurate to speak . . . of a right to be carried without negligence, as if such a right existed independently of the contract . . . The only right to be carried will be one which arises under the terms of the contract itself . . ."[211] Even in the United States where the relational

[207] RIESE, 1958 7 ZfL 5; GEORGIADES, 1959 13 RFDA 120 sq.

[208] SHAWCROSS & BEAUMONT 2d 343 no 362 note a. See *supra* note 190.

[209] "In the Convention we propose to replace the system of freedom of contract by a system of rights, rules, and by-laws. My Government believes that these rules should be of such nature that they may be incorporated in a fair and equitable contract between parties equally situated." See *II Conférence* 29. In view of the speaker's nationality I have thought it preferable to give his statement in the re-translation to his own language rather than in the elegant French of the Minutes.

[210] 11 1 ICAO LC 14.

[211] *Grand Trunk Railway of Canada v Robinson*, 113 The Law Times 353 col 1. As to the English situation, the following information is supplied by WINFIELD, *The*

obligation[212] has been developed in quite another way than in England, the identity of the bearer of this obligation has come to be attached more and more to contract. Overriding carriers, *i.e.* such undertakings as express companies[213] and freight forwarders[214] which contract with members of the public about transportation but do not themselves perform the transportation — employing instead the facilities and vehicles of other carriers — have since long been recognized as common carriers. The definition of the common carrier has developed an increasing

*Province of the Law of Tort*, (Tagore Law Lectures delivered in 1930), Cambridge at the University Press 1931 p 71—72 "The law, past and present, was clearly put by Lord Esher in *Kelly* v. *Metropolitan R. Co.*,'In old times the question of injury to a passenger through something done by the servants of a railway company gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or in tort. In the former case he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract; and on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent that was a matter on which an action of tort could be brought. At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure. The question to be tried is the same in either case. The plaintiff must rely on and prove negligence, and whether that negligence is active or passive seems to me to be immaterial'. The principle is not limited to railway companies. In *Dalyell* v. *Tyrer*, a passenger who had a season ticket with X, a ferryman, was negligently injured while being ferried by Y on Y's boat, which X had hired in order to deal with extra traffic. The passenger sued Y successfully. Erle J. regarded him as a passenger for hire because he had hired X, who in turn had hired Y; but both Erle J. and the other judge, Hill J., thought it immaterial whether there were hire of Y, or not, by the plaintiff; it was enough that the plaintiff was on board Y's ship with Y's consent." Citations given are 1895 1 QB 944, at 946, and 1858, E. B. & E. 899, respectively. As to American law, DOBIE, *Bailments and Carriers*, St Paul 1914 p 667 no 204, submits that "the carrier of passengers negligently injuring a passenger may be sued either in an action of assumpsit, based on the contract to carry, or in action of trespass on the case, based on the breach of duty imposed by the relation of carrier and passenger." For a recent restatement of the law, see 13 CJS 1235 § 663: "a passenger . . . ordinarily has a choice of remedies, and may sue either on the contract of transportation, or in tort for the breach of duty imposed by law, although under some circumstances the action must be in contract, and under other in tort." — In relation to goods, KAHN-FREUND submits that under English law "The relationship between the consignor and the carrier, from which the wide liability of the latter arises, depends on contract . . .": *The Law of Inland Transport* 3rd 199. The American law offers alternate remedies in contract and in tort, see DOBIE *op cit* 501 no 155, and 13 CJS 269 § 134 and p 1200—1201 § 639.

[212] See *supra* pages 168—170.

[213] *Hooper v Wells Fargo & Co*, 1864, 27 Cal 11 at 29; *Bank of Kentucky v Adams Express Co*, 1876, 93 US 174; *Buckland v Adams Express Co*, 1867, 97 Mass 124.

[214] *Fairchild v Slocum*, NY SCt 1838, 19 Wend 329; *J H Cownie Glove Co v Merchants' Dispatch Transportation Co*, 1906, 130 Iowa 327, 106 NW 749. In the latter the court said: "If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends." (At p 329 and 750 respectively). *Ingram v The American Forwarding Co*, 1911, 162 Ill. App Court 476.

emphasis upon the undertaking to carry, and less upon the fact of carriage.[215] — The possibility of attacking the carrier in tort is not peculiar to the Anglosaxon legal system and would seem *per se* not to warrant any Anglosaxon eccentricity in the interpretation of the Convention. This possibility exists in all legal systems here dealt with. Only when such action is brought against the Warsaw carrier must it conform to the Warsaw framework. If it is brought against somebody other than the Warsaw carrier, this latter requirement does not apply unless other legal doctrines intervene to make it apply. That is the law, as far as can be seen, in France,[216] Germany,[217] and Italy,[218] as well as the law in England and the United States.[219] Under these circumstances it may be difficult to see why the Anglosaxon lawyers should feel compelled to use the legal remedies offered in their system to arrive at exactly the opposite result to that generally prevailing in Europe. The explanation, however, would seem to be as follows.

Kean's statement reflects English law. The eccentricity appears to stem from two peculiarities of English law. First, the doctrine of privity of contract[220] entails that the liability of the one party to a contract as against the dependants of the other party to the contract, arising from the death of the latter party in the execution of the contract, cannot be liability in contract since the dependants were not privies to that contract. Secondly, statutory provisions classify the action of the dependants as tort

[215] See for a general review AHEARN, *Freight Forwarders and Common Carriage*, 1946, 15 Fordham LRev 248—267. See also *supra* page 184 and note 257. Note also the implications of the tariff system. As put by the Anonymous Note in 1959—60 69 Yale LJ 1013: "He [the shipper] must sue the forwarder subject to the latter's tariff, a tariff similar to that of the airlines, which the forwarder is required to file with the CAB. Should the shipper attempt to escape the limitations in the forwarder's tariff by suing the airline directly, his suit will be governed by the airline's tariff; the forwarder, considered a shipper as against the airline, is deemed an agent for his client and therefore the tariff-regulated forwarder-airline contract should bind the individual shipper."

[216] See *infra* page 325 and note 395 on pages 339-340.

[217] See *infra* page 329 and note 395 on pages 339-340.

[218] See *infra* page 319 note 295.

[219] There is some dispute as to whether art 24 of the Convention recognizes or excludes multiplicity of actions. LUREAU *op cit* 147, argues the latter alternative. The Article "veut signifier que toute action exercée à titre de victime, de parent, de tiers, . . . doit l'être dans le cadre de la Convention, c'est-à-dire sur la base contractuelle." In view of the legal history of the Article, in particular the discussion in the Citeja in Madrid, 28 May 1928, (extracts are given by CALKINS, 1959 26 JALC 327) it appears that Lureau's view cannot be accepted.

[220] *Tweddle v Atkinson*, 1861, 1 Best & S 393; *Dunlop Pneumatic Tyre Co v Selfridge & Co*, 1915 AC 847.

actions. While the Carriage by Air Act, 1932, only imposed a scheme of substitution of actions which in effect amounted to the providing of a statutory cause of action but did not classify it as arising in tort or contract,[221] the Carriage by Air Act, 1961, declares that liability under Article 17 of the Convention as Amended, is to be treated as liability under Lord Campbell's Act.[222] Under English law this is believed to mean classification as liability in tort. Since air commerce at present involves mainly passenger traffic and aircraft accidents are mostly fatal, Article 17 has become the principal section of the Convention. Hence, it may have been felt that reliance on tort is inevitable in the construction of the Convention.

The United States situation is not precisely similar. The doctrine of privity of contract is not equally rigid as in England. It is possible, at least in some states, that the dependants' action can be founded in contract.[223] When the Americans insist on suing the carrier in tort, therefore, this is understood to reflect an entrenched problem relating to conflict of laws. The American legal system being dominated by the mass of different jurisdictions, established conflict rules have a strong grip over the private law. The fundamental American rule of conflict of laws in passenger injury and death cases involving diverse jurisdictions is to follow the *lex loci delicti*.[224] Indeed, "No actions may be brought for injuries resulting in the death of a human being unless an action is given by the law of the State where the injury occurred".[225] "It is not enough that there is such a statute at the forum allowing recovery for death by wrongful act."[226] This rule should be seen against the fact that at Common Law no action for damages could be maintained against a defendant for causing the death of a human being.[227] To relieve this harshness, Lord Campbell's Act was passed in England, in 1846,

[221] Cf *Calkins*, 1959 26 JALC 324—325.

[222] 9 & 10 Eliz c 2. See clause 3. As to Lord Campbell's Act, see further *infra* page 296; but see page 298 note 236.

[223] *E. g.* New Jersey, see *Patterson v American AL*, 1953 USAvR 301. See generally, PROSSER 2d 711 § 105, and p 493—494 § 83.

[224] GOODRICH, *Conflict of Laws* 3rd St Paul 1949 p 295—296 sec 102.

[225] GOODRICH 295 sec 102.

[226] GOODRICH 296 sec 102.

[227] *Baker v Bolton*, 1 Camp 493, 170 ER 1033. The maxim "death is the composer of strife" is sometimes used to characterize the Common Law philosophy. On the European Continent the opposite rule has prevailed since the Glossators, see FEENSTRA, *La responsabilité civile avant Grotius*, in *Etudes d'histoire du droit privé offerts à Pierre Petot*, Paris 1959 p 157—171, at 162, and literature there cited.

"for compensating the families of persons killed in accidents".[228] New York enacted legislation for the same purpose in 1847 and such statutes were thereafter adopted in most Anglosaxon legislative units, to be known as wrongful death acts. Liability under these statutes in the United States, however, varies considerably, from $10.000 (until recently[229]) in New Mexico to an unlimited amount in New York. These variations not only add importance to the conflict of laws rule applied to a death, but furthermore the limitations set introduce *ordre public* aspects. It is unlikely that a plaintiff will succeed in avoiding a wrongful death statute limit which would apply under the conflict of laws rule, merely by suing in contract and invoking, on that basis, another conflict of laws rule.[230] In certain jurisdictions, in particular the great international gateway state of New York, this state of affairs seems to have so impressed the courts that they will not allow a plaintiff to sue on the breach of contract as a wrongful act within the meaning of Lord Campbell's Act.[231]

With such points of departure, the American view of the Warsaw Convention has been rather singular. As applied to international air commerce, the American system has entailed that the rights of the international flight passenger's dependants shifted with the territory overflown by the aircraft and were not settled until the unfortunate passenger was killed over some particular jurisdiction. Thus in one case, the American courts applied Indian law to the American dependants of an American journalist, employed by Time, traversing Indian territory as the guest of the Dutch government on a KLM aircraft when killed;[232] and Portuguese law to the American dependants of a New York resident, returning from Paris to New York on an Air France aircraft, when killed in a crash on the Azores.[233] Under the Convention, neither India, nor Portugal, respectively, could

[228] Fatal Accidents Act, 1846, 9 & 10 Vict c 93.
[229] Cf *Schloss v Matteucci*, 1958 USAvR 595; PROMINSKI, *Wrongful Death in Aviation: State, Federal, and Warsaw*, 1960 15 Univ Miami LRev 59—83, at 63 note 20. A recent survey of limits is given in 1959 26 JALC 256.
[230] In *Kilberg v Northeast AL*, the New York Appellate Division indicated that the limit on recovery for wrongful death set by statute cannot be avoided by suing under statute of another state, alleging a breach of contract of safe carriage; 1960 USAvR 294.
[231] PROMINSKI *op cit* 65 and cases cited in notes 39—44. See also Prominski's submissions in note 44 a at 66.
[232] *Werkley v KLM*, 1953 USAvR 194.
[233] *Supine v Air France*, 1951 USAvR 448.

even offer a *forum*. Although, in international air commerce, the various wrongful death limits of the American states are not involved, the domestic pattern has come to colour even the cases arising under the Warsaw Convention. In domestic carriage, plaintiffs who for conflict of laws reasons are judicially restricted from suing in contract may feel obliged to proceed in tort even under the Warsaw Convention against the carrier who is the proper defendant to that action. No cases are known, however, in which an action was successfully brought against the operator of the aircraft rather than against the middleman.

Certain defects of this Anglosaxon approach become immediately apparent. The approach includes only the wrongful death cases. As to mere passenger injury and cargo damage it is normal to proceed in contract. Whether the approach entails that there will be one Warsaw carrier in freight transportation[234] and another in passenger transportation, or further possible distinctions, we do not know. The wrongful death action system has not been unchallenged.[235]

In view of these defects, however, the present potential American deviation from a uniform interpretation of the Convention as to the identity of the Warsaw carrier appears not very disturbing. The diversity of interpretation which involves one freight carrier and another passenger carrier must most probably eventually lead to a consideration of the matter by the supreme domestic court, *i.e.* the United States Supreme Court. Its decision is binding upon all courts in the United States when construing a United States treaty. It appears reasonable to assume that this court will rely on the normal canons of interpretation of treaties and thus arrive at the same result as the general Continental school. The Warsaw Convention is drawn up in French. It relies upon the contract of carriage. This expression makes sense in

[234] The common carrier notion, as developed in freight transportation, may even lead to this diversity without the intervention of actions in contract, see *supra* page 184 and note 257.

[235] The challenge consisted in the proposition that there was no room for resort to wrongful death statutes under the Convention because it supplied itself with the cause of action. This theory has been argued by CALKINS, 1959 26 JALC 217—236, 323—343, and PROMINSKI, 1960 15 Univ Miami LRev 59—81, at 81, as well as ROSEVEAR, *Wrongful Death Actions under the Canadian Carriage by Air Act*, 1960 38 The Canadian Bar Review 216—225, also in 1961 39 same review 153—154. (Opposing, PATERSON, 1960 38 same review 635—643, and 1961 39 same review 155—156.); and finds support in certain court dicta, see *Komlos v Air France*, 1952 USAvR 310, at 321. It may have difficulty in prevailing over the solid body of judicial opinion to the contrary; in New York, see *Wyman v Pan American*,

French and Continental law generally but has little significance in Anglosaxon law. French and Continental legal opinion today is almost unanimous in determining the identity of the Warsaw carrier by the use of this notion. The Convention was created to avoid reliance on conflict of laws. In the face of this it cannot be legitimate to destroy, because of the extreme resort to conflict rules in domestic American commerce the uniformity once arrived at.

The English position needs but little comment. If it is true that the position is taken because the Carriage by Air Act, 1961, classifies the dependants' action as an action in tort,[236] the reasonable way to restore uniformity in interpretation perhaps would be for the English legislator to repeal this statutory classification.

## SECTION 3. DISTINCTION ESTABLISHED BY PRACTICAL CONSIDERATIONS

### § 1. *Article 1 paragraph 2*

> "International carriage" — arrangements which do not permit advance determination whether or not the geographical requirements of the Convention will be satisfied — contracts for carriage leaving points of departure and destination undetermined — determination of destinations left to charterer — Kaiser's *Leitungsbefugnis* — contract of flight as the basis of the application of the Convention? — Goedhuis' voyage and time charter distinction — circular flights contracts and inter-carrier contracts — Van Lear Black charter — charterer exercising business of carrier — Coquoz' distinctions built on the decreasing certainty as to itinerary — circular flights contracts — one-way flight contracts without itinerary being settled as to exact points — time charter flights — pleasure flying

In the foggy atmosphere of the complicated situation the beauty and simplicity of the contract type system offer little satisfaction. Other approaches have been in command and in particular consi-

1943 USAvR 1; *Choy v Pan American* 1942 USAvR 93; *Supine v Air France*, 1951 USAvR 448; and *Noel v Linea Aeropostal Venezolana*, 1957 USAvR 274, decided by the Court of Appeals of the 2d Circuit; in particular since, after all, the minutes of the Warsaw Conference clearly show that the Convention was not intended to fill voids in the national systems. As GIANNINI put the matter in a reply to Sir Alfred Dennis: "Il y a un quatrième cas, celui où il n'y a rien dans la loi nationale: où il n'y a rien la convention ne s'applique pas. S'il n'y a rien dans votre loi nationale, ce n'est pas ma faute. La convention ne s'applique qu'autant qu'on peut faire le renvoi à la loi nationale." See *II Conférence* 137

[236] In *Grein v Imperial Airways*, the court said: "In my judgment a liberal interpretation should be given to the Act [Lord Campbell's Act], and the words 'act, neglect, or default' should be held wide enough to include a negligent breach of contract." See 1936 USAvR 211, at 232.

derations of a purely practical kind have tended to dominate.

Article 1 of the Warsaw Convention purports to subject all "international carriage" to the rules of the Convention. It is common understanding that this Article cannot be read literally. Certain types of contractual arrangements commonly found in charter carriage must be outside the Convention because they do not permit a determination of whether or not the geographical requirements necessary for its application will be satisfied. Where the point of departure and the point of destination are left undetermined, there can be no assurance that the carriage under the contract will be international in the sense of the Convention: and thus the Convention cannot apply.[237]

The natural conclusion to this reasoning would seem to be that all charter contracts which leave to the charterer to decide which flights are to be performed are non-Warsaw charters. — Such a conclusion fits in nicely with the distinction between charters and contracts of carriage proposed by Kaiser, namely, that when the "Leitungsbefugnis" passed the charterer a contract of carriage was no longer present.[238] As it appears, however, this coincidence has not been generally considered by the pragmatists. The explanation may be that — at least outside the German-Italian area — the contract of carriage has been a concept wide enough to include any contract under which the airline was obliged to make a number of journeys for the account of the charterer.[239]

A closer scrutiny of this proposition, however, reveals that very different conclusions may follow depending upon a basic split in the views of the Convention. Under the general Continental school the *contract* is placed as the basis of the Convention's system. But an opposing contention rejects this assumption and prefers to find the basis of the Convention system in the actual *flights* to be performed.

The typical exponent for the *contract* school of argumentation is Goedhuis. In his first writing in the matter, in 1932, he made a basic distinction between voyage and time charters in this

[237] See *e. g.* RIPERT, 297 Citeja 11; GOEDHUIS, *National* 135; KOFFKA, BODENSTEIN & KOFFKA, *op cit* 269; cf COQUOZ 98.

[238] *Supra* page 203. BEAUMONT's somewhat more nebulous distinction between charters involving the passing of the "control" to the charterer and other charter contracts also seems to coincide with this line of argumentation, see BEAUMONT, 20 IATA Inf Bull 20, 1934 3 RGDA 114.

[239] Cf GOEDHUIS, *National* 135.

respect and felt prepared to restrict the application of the Convention to the former. Time charters, *i.e.* contracts under which "Le fréteur met a la disposition de l'affréteur un avion équipé pendant un temps déterminé", were subdivided in two classes which for the sake of convenience will here be termed *circular flight contracts* and *inter-carrier contracts.* The prototype of the first category was the then famous trip from Europe to Djakartha undertaken by the American millionaire Van Lear Black with an aircraft chartered from KLM.[240] The characteristics of this category were that the charterer wished to make an undetermined circular journey.[241] The second category covered contracts with a charterer "who wishes to exercise the business of carrier and concludes contracts with passengers or consignors".[242] Both classes of contracts were characterized by the absence of any definite route and therefore did not permit determination whether or not "the place of departure and the place of destination" and any "agreed stopping place" were so situated as to make the flying "international" in the sense of the Convention. Accordingly neither was subject to its provisions.

On abandoning the contractual approach, however, the practical problems of determining route prove to be less insurmountable. By using the flight as the unit rather than the contract Coquoz arrived at results where the contractual method was only at a loss. There were cases, however, in which the distinction between contract and flight was not appreciable. Coquoz used a division based on a decreasing certainty as to the itinerary. The first class contained the circular flight contract. This class was found subject to the Convention as soon as the parties contemplated that any flight was to touch foreign territory so that, when flights thus

[240] See GOEDHUIS, *La Convention* 96 and *supra* page 5.

[241] Under the Van Lear Black Agreement, however, "The KLM will let and Hirer will hire a "Fokker" Aeroplane, type FVII-a for a voyage from Amsterdam to Batavia and return . . .". The routing clause ran as follows: "12. The Aeroplane will start from Schiphol aerodrome. . . . The following route will be taken: Amsterdam-Budapest-Constantinople-Aleppo-Baghdad-BenderAbbas-Karachi-Ambala (Delhi)-Alahabad-Calcutta-Rangoon-Bankok-Sengora-Medan (Singapore)-Batavia. Other aerodromes for landing may be chosen at the option of the Chief Pilot. The Hirer is allowed to interrupt the voyage at one of the official aerodromes mentioned heretofore." This routing clause does not correspond very well to the description "voyage circulaire indéterminé". This may be the reason why Goedhuis withdrew the reference to Van Lear Black in his 1937 commentary to the Convention; see *National.*

[242] GOEDHUIS, *National* 135. As to the relation between the terms "carrier" and "air transport undertaking" see page 513.

contemplated were performed, the geographical requirements of the Convention were satisfied. The second class related to one-way flight contract *i.e.* contracts for flying whenever the point of departure and the point of destination were agreed upon and were so situated as to satisfy said requirements whatever the itinerary between these two points. The third class, eventually, contained affreightment contracts for a fixed time only, equal to the maritime "time charter", in which nothing but points of delivery and redelivery were specified in respect of itinerary to be flown. While this contract *per se* could not serve to determine whether the flying was international or not in the sense of the Convention, the particular flights which were performed under the contract were more serviceable. Each of these, taken separately, could permit determination of whether the Convention applied or not, and, accordingly, immediately before take-off it would be clear whether the flight was to be a Warsaw flight or not. Only pleasure flying remained outside the Convention.[243]

## § 2. *Burden imposed by the documentary chapter*

Relation between routing and traffic documents — impossibility of meeting Convention requirements as to traffic documents — guidance offered by onus — support in Warsaw Minutes for allowing effect to onus considerations — Ripert — Pittard — contents of onus — mitigation by Hague Protocol — Is the inference permissible that the mitigation changes the scope of application of the Convention? — Beaumont's indications as to onus — off-route operations by regular airlines — charterer as dilettante carrier — What conclusions can be derived from Beaumont's indications? — normal use of the pragmatic approach — Goedhuis — Coquoz — Hürzeler — Grönfors — onus more inconvenient than oppressive — onus in service of status proposition — direct contact between Warsaw carrier and passenger/shipper — it follows that instrumentality contract is not a Warsaw contract — Coquoz

If one is unable to say with assurance whether the carriage is international or not, in the sense of the Convention, one certainly cannot issue traffic documents with all the detail prescribed by the second chapter of the Convention titled "Documents of carriage". In contracts in which it was left to the charterer to decide which flights were to be performed it was apparently impossible for his counterpart to predict at the time of the contracting which decisions the charterer would make and to issue Warsaw documents on the force of these predictions. Therefore, consideration for the burden thrown upon the airlines by this chapter and the

[243] Coquoz 98.

severe penalties attached to non-compliance, particularly those relative to the air waybill (Art. 9), duplicates the conclusions which were drawn in the preceding sub-section from Article 1-2. Such consideration, furthermore, may serve to reinforce the status proposition (mentioned *supra* at page 289) the argument of which is that from the finding of status you may infer the scope of the contract which is subject to the Convention. Such consideration, finally, once accepted as operative *per se* towards the exclusion of Warsaw coverage, may arrive at a wider significance than that which may follow from Article 1-2 alone. This principle therefore should first be scrutinized as to its force and the guidance it offers.

Concern for the burden thrown upon carriers by the documentation requirements of the Convention finds support in the very minutes of the Warsaw Conference. When advocating the French proposal for the adoption of what was later to be known as Article 34 relating to exceptional transportation, Ripert questioned whether it was not necessary to "prévoir par un texte ces transports exceptionels auxquels la convention est inapplicable. La convention prévoit la remise de documents avant le départ et toute une série de dispositions qui ne pourraient pas être observées."[244] And Pittard, in the same discussion, made known his adherence "au principe ... que nous ne pouvons pas exiger les formalités de la convention dans certains cas que nous qualifions d'exceptionels."[245]

The weight of the burden is indeed considerable. The Warsaw carrier is bound to deliver a ticket containing the following particulars: the place and date of issue, the places of departure and destination, the name and address of the carrier or carriers, the name of the passenger and the amount of the fare, and the agreed stopping places, together with a statement that the carriage is subject to the rules established by the Convention. As regards freight, the provisions are even more complex. No fewer than seventeen separate particulars are laid down in the Convention as being required for every cargo consignment.

The rigour of the documentary chapter may now be mitigated by the entry into force of the Hague Protocol which has limited the number of required particulars to three for cargo as well as

[244] *II Conférence* 58.
[245] *Ib* 59.

for passengers and postponed the time at which the air waybill particulars must be complete to that of loading the cargo into the aircraft. But then a weakness inherent in the pragmatic approach is encountered. How can it be accepted that the scope of application of the Convention changes without any intention to that effect being imputable to the drafters?

Permitting the distinction between Warsaw charters and non-Warsaw charters to be based on purely practical grounds has important consequences. Beaumont at one time showed a remarkable concern for the burden involved in documentation. He thought that the documentary requirements could be complied with only within the framework of the *regular* air transportation system: as soon as flights ran off-route the requirements became too burdensome. It was "clear that air transport undertakings will be placed in serious difficulties ... in connection with their aircraft ... on time or tour charters away from their regular air routes and away from aerodromes at which traffic staff is available for complying with formalities".[246] On such flights the operating airline would have to rely on its own flying personnel "who do not normally deal with this kind of work" and mistakes were bound to happen "when the charterer requires to undertake journeys all over the place with different passengers and different cargoes from time to time".[247] Furthermore, "in ... case of charterer being placed in control of the aircraft, personnel, etc., and accepting full responsibility for operation as the 'carrier', he cannot normally be expected to be able to deal with the regulations of the Convention which would be necessary if he carries for hire or reward."[248] While Beaumont failed to draw any conclusions as to the Warsaw coverage there is no difficulty in finding them. They fit into the pattern which Grönfors has summarized as follows: "the Warsaw Rules cannot apply if, because of their construction, they do not fit properly into the charter situation in question..."[249] Accordingly, only on-route charters were normally Warsaw charters; in the case of inter-carrier charters, serving as instrumentality contracts, which passed the control of the aircraft to the charterer, the charterer could not enter into Warsaw char-

[246] 17 IATA Inf Bull 42—43.
[247] 20 IATA Inf Bull 19, 1934 3 RGDA 114.
[248] 20 IATA Inf Bull 19, 1934 3 RGDA 114.
[249] See *Air Charter* 44.

ters serving as load contracts unless he had the status of an "air transport undertaking" and the charter was over his route.

The normal use of the pragmatic approach has been less concerned with the general organization of business and more with the Warsaw penalties attached to non-compliance with certain details in the documentation prescribed by the Convention. Accordingly, it has been less sweeping in its effects. Goedhuis uses it to support the results of his construction of Article 1-2.[250] Coquoz, liberated from the fetters of contract, of course, could reject the importance of the arguments which Goedhuis had put forth on this point.[251] Later writers, such as Hürzeler, have taken the view that the contract of carriage stands without documents added, and that therefore such documents can be delivered to the passenger/shipper before each take-off when the itinerary is settled.[252] Grönfors has added information about some of the devices actually practised by airlines to comply with the Convention,[253] and indeed, it appears that to day when the Hague Protocol is coming into force, the whole matter can hardly be discussed as anything more than an uneconomic inconvenience to the airlines. To charterers not having the status of an air transport undertaking, the problem may remain a stiffer one. Coquoz had no reason to show solicitude on this point since he did not accept the charterer as a Warsaw carrier.[254] Under the general Continental school, however, this problem remains, although the no-resale rule[255] certainly has done much to reduce its scope.

The documentary chapter furthermore has been pressed to serve the status proposition. The argument made has been that the filling in of the traffic documents requires a direct contact between the Warsaw carrier and the passenger/shipper.[256] Any person who does not enter into this direct relation to the ultimate passenger/shipper cannot be a Warsaw carrier, and hence the contract of carriage in the sense of the Warsaw Convention is confined to existing coextensively with this direct relation. As a

[250] GOEDHUIS, 1932 RDILC 701, *La Convention* 96.
[251] COQUOZ 98.
[252] HÜRZELER 28. Approving, GRÖNFORS, *Air Charter* 46—47.
[253] *Air Charter* 45.
[254] *Supra* page 291.
[255] *Supra* pages 36 and 103 sq.
[256] Argument by GOEDHUIS first time in *La Convention* 96. Further SCHONFELD, 313 Citeja 3.

result the instrumentality contract can never be a Warsaw charter.

To Coquoz and others of his persuasion this argument is no real objection.[257] His own bases in this regard are most helpful. The direct relation exists naturally between the airline operating the aircraft and the passengers inside it and the shippers of the cargo put in it. To Coquoz, ticketing and waybilling are reduced to purely formal acts in the setting of the Convention; but to the general Continental school they are fundamental acts, prima facie evidence of the contract which puts the whole of the Conventional system into effect.

### § 3. *Assembling the Warsaw carrier from the details of the Convention.*

Grönfors — Warsaw carrier built by use of Warsaw pattern — Warsaw carrier's relation with passenger/shipper is covered by Convention, other relations are not — merit of proposition — *lex specialis basis* — points of departure — characteristics of Warsaw carrier — difference between Grönfors' Warsaw carrier and the Warsaw carrier of the Continental school — complete Warsaw carriers and incomplete ones — Warsaw carrier functions split between several persons — three possible solutions — solution advocated by Grönfors — return to documentary onus aspect — criticism

A fundamentally new approach to the problem has been offered by Grönfors. He has sought to assemble a complete Warsaw carrier from the various details of the Convention, from the "Warsaw pattern" to speak arrestingly.[258] Departing from the party clad with this Warsaw carrier status he arrives at the result that the Convention applies to the relation between this carrier and the passenger/shipper, leaving all other relations involved to remain outside the Convention. This is, broadly speaking, the inverse of the status proposition discussed in relation to the notions of passenger and shipper (*supra* pages 289—290). In effect, Grönfors submits that the contract of carriage as envisaged by the Convention is attached to Warsaw carrier status.

This approach has the same merit as that of Coquoz, namely, that is moves entirely within the framework of the Convention itself and declines to repose itself on the concepts which are imported

[257] Coquoz 98.

[258] See Grönfors, *Air Charter* 87: "It has been the aim of this analysis to concentrate on the "Warsaw pattern": circumstances directly mentioned in or at least appearing as consequences from the Convention itself and the construction of the rules therein."

from the general national law. This line of interpreting the Convention, in a vacuum as it were, is referred to as the *lex specialis proposition.*

Grönfors' point of departure is as follows: A person deemed to be a carrier within the meaning of the Convention must also have a practical possibility of acting as described in the same Convention; on the other hand a person satisfying the requirements for a carrier must, in view of the mandatory character of the Warsaw Rules, be subject to same rules.[259] Proceeding, Grönfors seeks a definition of the Warsaw carrier and believes to find one by combining all the functions envisaged by the Convention to be performed by the "carrier".[260]

The Warsaw carrier, as he materializes under the hands of Grönfors, has the following characteristics: He is a party to the transport agreement (the other party being the passenger/shipper); he issues the documents of carriage (tickets, baggage checks, and air waybills); he has the possibility of checking the consignor's statements relating to the quantity, volume and conditions of the cargo; he performs the carriage; he is able to carry out the orders of the consignor when the latter exercises his right to dispose of the cargo; he has sufficient operational control to be able to alter agreed stopping places in case of necessity; he has sufficient technical control to be able to take such measures as will avoid damage; he has sufficient commercial control to be able to prevent damage to cargo due to bad organization; he has access to all materials necessary to prove that neither he, nor his agents, have been negligent; he delivers the goods to the consignee; and he receives complaints of damage done to baggage or cargo.

Already at this point it is apparent that Grönfors' Warsaw carrier, when complete, is not that of the general Continental school. In particular, the requirement that the Warsaw carrier shall perform the carriage is a radical deviation from the prevailing views.

But the break is less radical in the practical application than in the theory. The complete Warsaw carrier, arrived at in this way is, of course, a rather utopian figure in air chartering. In general practice, when the Warsaw carrier functions are split

[259] *Air Charter* 62.
[260] As to this definition see *Air Charter* 64—69.

between several persons, this approach would boil down to an attempt to fill this frame in the best possible way. This situation, conceivably, offers at least three possible solutions. All people exercising Warsaw carrier functions may be Warsaw carriers because of such exercise. The one who exercises most of these functions may be the Warsaw carrier. Or, the one who exercises the most important of these functions may have that status. — Here Grönfors reduces the impetus of his attack on other doctrines by taking the last solution, and considers in his interpretation that the possibility to issue transportation documents is the most important function in view of the severe penalties attached to non-compliance.[261]

But of that is the essence of the thesis, it has been felt to be a method more complicated than is necessary to arrive at the same test as the pragmatists sharing the persuasion of Goedhuis.[262]

SECTION 4. THE JUDICATURE

Passenger attack on the supplier of aircraft and crew — *Aigle Azur Case* — inference of decision — shipper attacks on the middleman — defective Warsaw documents — *Jonker v Nordisk Transport* — split of functions no defence — *Style v Braun* — impact of Swiss Warsaw Act — passenger attack on the middleman — *Jacquet v Club neuchâtelois* — consignor attack on freight forwarder, freight forwarder impleads operator — *Air Algérie v Fuller Fréres* and *Veuve Terrasson v Messageries Nationales* — complications arising through air waybill — appreciation of cases — judicature not indicative of Warsaw carrier's identity — none of candidates ever deprived of Warsaw defences

Few cases shed any light on this much debated problem of how the Warsaw Convention applies to carriage under air charter contracts. In only one inter-carrier charter case, *Trésor Public v. Aigle Azur*,[263] decided by a French district court, have the passengers (acting through the government which was subrogated into their rights) attacked the airline who owned the aircraft and whose personal were in charge of it.[264] It was held that the

[261] *Air Charter* 91: "if the aircraft owner would in any case really have no practical possibility of issuing transportation documents, the Convention can no longer apply."

[262] See RUCKRIEGEL 40—41.

[263] Tribunal de grande instance de la Seine, 1e Chambre, 3e Section, 1 Feb 1960; 1960 14 RFDA 214.

[264] The report tells that the aircraft was "affecté" to Air Laos for use on its regular services, but the original judgment, correctly reproduced in the note in RFDA, says that it was "affreté"; it seems proper to infer that the owner's personnel remained in charge of it, otherwise the term "loué" would have been the natural one. It seems likely that this is the contract details of which are given in DUTOIT, *La collaboration*

time for suit had elapsed and that this airline therefore was protected pursuant to the Warsaw Convention. The proper inference would seem to be that the Convention applied to the relation between the passenger and the supplier of aircraft and crew, Aigle Azur.[265] In two cases the consignor (acting through the underwriters which were subrogated into his rights) has attacked the middleman who combined the load with the instrumentality of carriage. In both cases, *Jonker v. Nordisk Transport*[266] and *Style v. Braun*,[267] the Warsaw documents were defective and not directly indicative of the carrier party to the very contract for which they were evidence. In the first case, the name was ambiguous and could mean both supplier and middleman; in the second case, only the aircraft and not the carrier was indicated. In both cases the middleman was held liable. In *Jonker v. Nordisk Transport,* decided by the City Court in Stockholm,[268] the court relied on the following argument: "in this case the circumstances have been such that the duties which regularly

*entre compagnies aériennes* 108—109 and which was circulated to members of the ICAO LC Subcommittee on the hire, charter and interchange of aircraft, meeting in Madrid in April 1957 (copy supplied by the Government of Laos), see ICAO document LC/SC/CHA WD No. 41—1/2/57, Appx B-3. If that is correct, the Aigle Azur aircraft were put at the disposal of Air Laos "with a crew which will ensure operation thereof, to the exclusion of all other persons, such crew being composed as a maximum of: — a Commander — a radio-navigator — a flight engineer." Art 1 para 2.

[265] It may be convenient here to list the cases dealing with the liability under the Convention of other auxiliaries in the operation of air transport, other than the supplier of aircraft and crew in a complicated charter situation. Actions have been brought against the operator of certain ground installations and the suppliers of airfield ramps for embarkation and disembarkation. The Warsaw defence of the suit time limit was extended to the ramp company in one case, *Chutter v KLM and Allied Aviation Service International Corp,* 1955 USAvR 250, but withheld in the other case, *Scarf v TWA and Allied Aviation Service Corp,* 1956 USAvR 28, in which the ramp company failed to have the action dismissed for want of Warsaw venue. In the third case, *Wanderer v Sabena and Pan American,* 1949 USAvR 25, the New York Supreme Court extended the Warsaw suit time limit to an airline which had — as far as can be gathered from the findings of the Belgian court in the sister case in Brussels see 1950 USAvR 367, cf 1950 4 RFDA 411 and 1951 14 RGA 160 — nothing to do with the flight but received a letter from the operator of the flight that it should not divert flights to Goose Bay because of the poor passenger facilities there. The Wanderer case may be an interesting one but it is definitely unorthodox. Critical to the decision: SHAWCROSS & BEAUMONT 2d 344 no 362 note a; LACOMBE, 1949 12 RGA 823; ABRAHAM, 1953 2 ZfL 90; LEGOFF, 1957 20 RGA 355.

[266] 1961 USAvR 230, 1 Ark f L 273.

[267] 1959 13 RFDA 405, 1961 24 RGA 284; 1959 8 ZfL 382.

[268] Appeal was taken but the Court of Appeal found that the action was brought on behalf, not of the consignor as alleged in the lower court, but of the consignee, who had entered into a charter agreement with the middleman containing an arbitration clause. As a result, the Court rejected the action for lack of jurisdiction because the arbitration clause was valid whether or not the Convention was applicable. See 1961 USAvR 238, 1 Ark f L 279.

ought to fall upon the carrier, have not, in their entirety, rested with either Aero Nord or the transport company [Nordisk Transport & Spedition, the intermediary]. The City Court, however, because of the intent underlying the 1937 Act [= the Warsaw Act], considers it to be impossible to exclude on that ground both Aero Nord and the transport company from the position of carrier. Considering the circumstances now accounted for the City Court holds that the transport company must be regarded as carrier." In *Stule v. Braun,* decided by a Swiss district court,[268a] the matter was solved by the court finding that the middleman had issued an air waybill, signed "as agent", to be sure, but at a time when there was no principal to the alleged agency, the later disclosed principal having subsequently adhered to the operation on terms not known to the court. The court found that the contract of carriage was concluded between the middleman and the consignor. On this basis the court held the middleman to be the Warsaw carrier since the general Continental doctrine in the matter had been incorporated into the applicable Warsaw Act. These same factors were active in *Jacquet v. Club neuchâtelois,*[269] decided by the Swiss Tribunal Fédéral, a passenger case in which similarly, the middleman, having concluded the contract of carriage, was held liable as Warsaw carrier.

In two French cases, *Air Algérie v. Fuller Frères*[270] and *Veuve Terrasson v. Messageries Nationales,*[271] in which the freight forwarders had chartered[272] aircraft for the transportation of the cargo from French aerodromes to London and the cargo was damaged during carriage, the consignors attacked the freight forwarders and the forwarders impleaded — per *actions en garantie* — the operators. The impleaded operators were found liable to indemnify the middleman for the amount which the latter were to pay to the consignors provided that the operators could not rely on any of the Warsaw defences. In the second of these cases, however, matters were complicated by the operator having made out air waybills to the middleman.

[268a] 1961 24 RGA 284, at 291—292; 1959 13 RFDA 405; 1959 8 ZfL 382.
[269] 1958 12 RFDA 82, 1958 7 ZfL 259, 1958 25 JALC 344.
[270] 1951 5 RFDA 433, 437; 1951 14 RGA 393, 535; further proceedings 1956 10 RFDA 220, 1956 5 ZfL 315, 1956 23 JALC 347.
[271] 1951 5 RFDA 440, 1957 11 RFDA 31.
[272] In the *Air Algérie Case,* the charter was the result of an exchange of letters. No charterparty seems to have been established. Information supplied by M. CHEVALLIER (letter 10 Jan 1961).

This judicial activity would seem to reveal that the passenger/shipper generally, is prone to attack the middleman rather than the supplier of aircraft and crew[273]—but in view of the ephemeral life of most operators during the early post-war period this should not come as a surprise. This observation, however, does not help to establish any principle as to who is the Warsaw carrier, nor as to the distinction between Warsaw charters and non-Warsaw charters. As far as is known, no case has decided that either of the two carrier parties involved in the charter agreement is not a Warsaw carrier as against the passenger/shipper. On the contrary, three cases are offered in which the Convention has been applied to all the three relationships involved in a complicated three-party charter situation. Apart from the Swiss cases in which the courts relied on express statute on the point, the load contract was held to be covered by the Convention in *Jonker v. Nordisk Transport & Spedition*; the instrumentality contract in *Air Algérie v. Fuller Frères*; and the third open relationship in *Trésor Public v. Aigle Azur*. The authority of these cases is limited, however. In the French cases, the court's attention appears not to have been called to the problems here discussed and the Swedish decision was not final. It is therefore submitted that these cases permit no safe conclusions as to the distinction between Warsaw charters and non-Warsaw charters. This distinction must seek a fuller articulation in doctrinal discussion.

[273] Reports of cases settled before trial, however, do not fully support these conclusions and rather indicate the practice of suing both airlines involved in the complicated situation: When both airlines had issued tickets, both were sued as Warsaw carriers (ICC doc 310/INT. 51 case no 1). When one airline only had issued the ticket, both were sued, the ticketing airline as Warsaw carrier and the other one in tort; furthermore a separate action for non-performance was brought against the Warsaw carrier alleging breach of contract in failing to perform the carriage and in chartering an aircraft with an imcompetent and negligent pilot (*op cit* case no 2). Both cases appear to be British. The non-performance action perhaps reflects a belief in the tortious character of the Warsaw Convention liability; if this liability arises in tort, it is logical that in a complicated situation a non-performance action against the middleman is not covered by art 24 of the Convention. In the French case *Hattab v Air France* and *SAGETA* proceedings were brought against both airlines; against the non-ticketing one on the allegation that it was "le véritable transporteur" (Trib com Seine, withdrawn 1959). In the case of a pooled service, one airline providing the crew and the other the aircraft, the Warsaw action was brought against the first and a tort action against the second (ICC doc 310/INT. 51 case no 3)

SUB-CHAPTER 3.

# EFFECTS RELATED TO THE INSUFFICIENCY OF THE WARSAW CONVENTION

## SECTION 1. THE PROBLEM

Convention reproached on two main counts — Who is the Warsaw carrier? — if the middleman is the Warsaw carrier it follows that the position of the other parties changes because of intervention of charter — Warsaw carrier identity — small practical importance of problem — court reactions — insurance company reactions — second issue has two phases — position of passenger/shipper — position of the supplier of aircraft and crew (operator) — interrelation of positions — basis of proposition that the position of the passenger/shipper deteriorates — practical argument: the man of straw — Conventional argument: "all necessary measures" defence — the man of straw a problem for the general law — the Conventional argument and the position of the operator — conclusions of argument controlled by the state of the delictual and tort remedies of the general law — Warsaw defences and Warsaw penalties in overlapping patterns. — impact of Warsaw penalty attached to wilful misconduct etc. — Is Warsaw carrier under Continental school imputable with operator's wilful misconduct etc. — Arts 20-1 and 25-2, interrelation of Warsaw defences and Warsaw penalties — turning issue: meaning of "préposé" — origin of term in art 1384 — Goedhuis' denial of operator having *préposé* status — evolution of general school — Lemoine — Riese — *Jacquet v Club neuchâtelois* — answer to problem offered by Jacquet case — Jacquet decision a safeguard to position of passenger/shipper — impact of tort and contract dichotomy of remedies — position of operator — contents of air charter contracts

Riese, in 1958, summarized the insufficiency of the Warsaw Convention in relation to air chartering in the following words:[274] "la situation juridique qui naît de l'utilisation d'avions affrétés rend souhaitable une réglementation complémentaire de la Convention de Varsovie... Les utilisateurs doivent être protégés contre une aggravation de leur situation juridique résultant de l'exécution du transport par un avion affrété. En particulier, ils ne doivent pas souffrir de l'insécurité qui règne sur le point de savoir qui de l'affréteur ou du fréteur doit être considéré, à leur égard, comme le transporteur au sens de la Convention de Varsovie... Le fréteur, avec l'avion et l'équipage duquel le transport

[274] See RIESE, *Le projet de la Commission Juridique de l'O. A. C. I. (Tokyo, 1957) sur l'affrètement, la location et la banalisation des aéronefs dans le transport international*, 1959 13 RFDA 1—35, at 11—12; the article was originally published in German in 1958 7 ZfL 1—27, the passage appearing at 8—9.

a en fait été exécuté, doit être protégé contre le risque d'une responsabilité excessive."

The insufficiency of the Convention thus indicated may be restated in the form of a criticism on two main counts. First, nobody knows who is the Warsaw carrier. Secondly, should the middleman be the Warsaw carrier the position of the other parties in a complicated situation will in fact change, depending upon whether the aircraft is owned or chartered by the party contracting with the passenger/shipper.

What merits are there in these criticisms?

Let us assume that the identity of the Warsaw carrier is a controversial matter—thus disregarding how much the European dissension on the point bore the imprint of the Warsaw revision work in the direction of holding the operator liable as such under the Convention, and that, when that work was terminated without these principles being adopted, the dissension has ended as well.[275] The uncertainty as to Warsaw carrier status seems to invite both parties involved to insure the same liability — a situation generally referred to as double insurance. It should be noted, however, that in practice as far as it is known, neither of the two candidates for Warsaw carrier status has ever been deprived of the defence of the Warsaw suit time limit. The double insurance aspect, furthermore, appears to have been taken care of by resort to the so-called cross-liability clauses.[276]

The second criticism has two aspects. One is that the situation

[275] Compare page 291 and note 205 *supra*.

[276] In some of the Lloyd's policies, there is used *i. a.* this clause: "In the same manner and to a like extent as though this policy were issued in the name of one of them only, this policy shall indemnify the insured firms in respect of claims as are insured under this policy made by one of them (or their servants or agents) against any other of them, however, nothing contained herein shall operate to increase underwriters' limit of liability as set forth in the policy." Some years ago Pan American added the following clause to Paragraph 9 of its standard Charter Contract: "Pan American warrants that, during the charter flight, the Charterer will be named as an additional assured under certain of the liability insurance regularly carried by Pan American, which will insure Pan American and the Charterer, on the terms set forth in the respective policies of insurance against liability for claims by others for injury or death of persons, including passengers on the aircraft but excluding crew members, or for loss of or damage to property, including the property carried on the aircraft, arising out of or in any way connected with the charter flight. A certificate from the insurer evidencing such insurance will be furnished to the Charterer upon request." DUTOIT, *La collaboration entre compagnies aériennes* 110.

[277] In the present section the term "operator" will be used for the sake of brevity to signify the supplier of aircraft and crew although it is less accurate, since operator status in the administrative sense can move to the charterer and the problems here discussed still remain the same.

of the passenger/shipper deteriorates if the aircraft is held under charter. The other, is that the Convention will offer no protection for the supplier of aircraft and crew[277] against claims in tort if he is not the Warsaw carrier. Apparently, these two features of the criticism are *inter se* incompatible; they cannot possibly exist both at the same time under one legal system. The explanation is that they seek different legal bases and whether the result will be for one or another of the parties involved depends on the status of these bases in the particular legal system.

For example, the case of the passenger/shipper who finds his situation having deteriorated under the charter, can have two bases. One is practical and relates to the fact that an aircraft operator may decrease his risks as against passengers and shippers by chartering his aircraft to a *man of straw* who then enters into the contracts with the said parties. This case was early observed by Goedhuis,[278] and has ever since been carried in the back of the mind of many lawyers considering the Convention.[279] But however deserving this case may be, it should not be forgotten that it is not peculiar to aviation, but arises in all fields of the law, and is met by general doctrines.[280] If general doctrines provide the solution, the Convention cannot be criticised as insufficient on the point. The other basis for the passenger/shipper's case derives its force from the *Warsaw defences*. A passenger/shipper who has contracted for carriage with an airline and is prepared — in the event of transportation difficulties — to sue this airline, will possibly find himself met by the defence that the airline had "taken all necessary measures to avoid the damage"[281] by entrusting the carriage to another reliable aircraft operator under a charter agreement.[282] Such a defence, if valid (to this problem I will shortly revert), will force

[278] *La Convention* 98.

[279] VAN HOUTTE 123 no 77; SHAWCROSS & BEAUMONT 2d 473 no 513 note h; ALTEN, 1 *Hague Conference* 227 and *Ansvaret* 12.

[280] Cf *Luckenbach SS Co v W R Grace Co*, 267 F ed Reporter 676, CCA 4, 1920. Cf STEVENS, *Handbook on the Law of Private Corporations* 2d 1949 p 88 and note 98. FLATTET, *Les contrats pour le compte d'autrui*, Paris 1950 p 17 no 16.

[281] Art 20.

[282] GOEDHUIS, *Handboek* 207, 208: "The example is submitted whereby KLM has made an agreement with Air France under which the former undertakes to put a certain aircraft at the disposal of Air France for a fixed time to perform air carriage in the service of the latter in consideration of a price reckoned on the lapse of time; . . . Air France now enters into contracts of carriage with passengers and consignors of goods. —.—.— Assumed that the damage suffered by a passenger is due to a fault of the pilot. The pilot, being in the service of KLM, is not a "préposé" of Air France, because there is no contractual relationship whatever between himself and Air

the passenger/shipper to seek his remedy against this latter operator. But here — for the premise, it is recalled, is that the middleman is the Warsaw carrier — he cannot proceed on the force of the Convention but must rely on the general law of the land. If this general law is less favourable to him than the Convention his situation has deteriorated.

When the aircraft operator complains that his situation has deteriorated because of the intervention of a charter agreement, his complaint can be founded on the same argument which supported the proposition that the rights of the passenger/shipper had been diminished because of the charter, *i.e.* the argument stemming from the Warsaw defences. The difference is only that the operator finds the general law less favourable to him than the scheme of the Convention.

It thus follows that the value of the claim of the passenger/shipper is increased or decreased by the advent of a charter contract depending upon what principles prevail in the general law as to damage inflicted by the operator of the aircraft upon the passenger/shipper when there is no contract connecting them. These principles, apparently, form part of the general law of tort or delict.

But the Warsaw carrier himself — assuming that the general Continental school is right, *i.e.* that the middleman is the Warsaw carrier — may find his position deteriorated owing to his having contracted away the business on charter to another airline, because of the provisions in the Convention itself. He may be faced with difficulties arising from the application to a complicated situation of a contract type drafted for a simple situation. The execution of the instrumentality contract is part of the middleman's performance under the load contract. This may then

France. Is it now possible for Air France to avoid liability by proving that Air France itself and its own employees have taken all necessary measures? A strict interpretation of Article 20 leads one to accept this view however unsatisfactory it may be for one's feeling of justice." Since the original statement is made in Dutch and therefore seems to have escaped the notice of many scholars, I have felt it proper to quote it in full in English. Translation mine. Cf GRÖNFORS, *Air Charter* 68 note 11; also KEAN, 11 1 ICAO LC 15. This defence was raised in *Air Liban v Cie Parisienne de réescompte and Air France*, 1955 9 RFDA 439, 1955 18 RGA 61; 1956 10 RFDA 320, 1956 19 RGA 291, 1956 30 JCP II no 9511, which concerned successive carriage. Air France maintained that had taken all necessary measures to avoid the damage by delivery of the cargo to Air Liban; but the Cour d'appel de Paris quashed the defence. In view of the separate treatment of successive carriage in the Convention, it is submitted, however, that this case cannot be authority for charter cases falling outside the ambit of successive carriage.

involve the situation where the carrying party under the first contract is a Warsaw carrier as against the middleman, but the same party, under the load contract to which the middleman is the Warsaw carrier, here is a mere Warsaw agent. Consequently, the Warsaw defences and the Warsaw penalties will be distributed in overlapping patterns, productive of some confusion.[283]

The case will be discussed on the basis of the Warsaw penalties attached to "dol ou . . . faute qui . . . est considérée comme équivalente au dol"[284] in Article 25. Under Article 25 paragraph 2 of the Warsaw Convention as translated the Warsaw carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability if the damage is caused by the wilful misconduct, or what under *lex fori* is equivalent thereto, of any agent of the carrier acting within the scope of his employment. Accordingly, if the operator, flying the operation for which the Warsaw carrier has contracted with the passenger/shipper, is guilty of wilful misconduct, the Warsaw carrier will be subjected to the Warsaw penalty if that operator is the Warsaw carrier's agent in the sense of the Article.[285] This result offers a striking contrast with the result obtained where the Warsaw carrier successfully invokes Article 20 paragraph 1 on the theory that by entrusting the operation to this other operator he had "taken all necessary measures to avoid the damage."

Which argument here is the better one?

To answer this problem we must ascertain the meaning of the term "préposé" in the French text of the Convention, which until now has been translated somewhat loosely as (Warsaw) agent. If the supplier of aircraft and crew is within the circle of the Warsaw carrier's *préposés* the Warsaw carrier must answer for the acts of the supplier and cannot avail itself of the Warsaw defence (which excludes the Warsaw carrier's liability in the sense of Article 25-1). But if the flying airline does not belong to this circle, logic demands that the Warsaw carrier may avail itself of this Warsaw defence.

[283] Warsaw defences, see arts 20, 26-4 and 29; Warsaw penalties, see arts 3-2, 4-4, 9 and 25.
[284] Restated in the Hague Protocol, art XIII, as: "intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement . . ." — Origin of principle, see Dig 50.16.226 Paulus *libro primo manualium:* "Magna neglegentia culpa est: magna culpa dolus est." For a recent discussion of art 25, see ZOGHBI, *La responsabilité aggravée du transporteur aérien — "de Varsovie à la Haye par Paris et Rio-de-Janeiro"*, thèse Paris 1960 (Beyrouth) p 69—110 nris 164—249).
[285] Cf DUTOIT, *La collaboration entre compagnies aériennes* 57.

As will be dealt with *infra,* the term *préposé* appears in article 1384 § 5 of the French Code Civil. It originally served to hold the "commettant" liable for the acts of his employees in contract as well as in tort. Not until the advent of the 20th century did French scholarship develop the distinction between the "responsabilité pour le fait d'autrui" in contract and in tort and limit the application of article 1384 to the latter category.[286] As may be understood from this account of the legal history of the term *préposé,* its exact meaning in the Warsaw Convention is a controversial matter.

Goedhuis holds the opinion that *préposé* cannot mean the operating airline in the situation here discussed. Referring to a case of Air France engaging a KLM aircraft and crew under charter to run certain of the Air France traffic services, he submits: "The pilot, being in the service of KLM, is not a 'préposé' of Air France, because there is no contractual relationship whatever between himself and Air France."[287] But the general trend of French legal scholarship and its followers has been opposed to this. Lemoine indicates — indeed relying on the very teachings of Goedhuis himself[288] — that the basis of liability in Article 20 is "La confusion de la personne du débiteur et des personnes dont il se sert pour l'exécution de son obligation"[289] and this opinion has been followed in Continental scholarship in the direction that "Der Begriff der 'Leute' des Luftfrachtführers, für deren Verschulden er einzustehen hat ... ist weit auszulegen; es fallen darunter alle Personen, deren sich der Luftfrachtführer bei Ausführung des Beförderungsvertrages bedient."[290] Advancing on this road, in the end, meant that the services rendered by an independent airline to the Warsaw carrier under charter were considered acts of the Warsaw carrier's *préposés,* and it was so adjudicated by the Swiss Tribunal Fédéral

[286] See further *infra* page 322 sq.

[287] *Handboek* 208. The full passage is given in note 282 *supra* page 313. Also, LITVINE, *Précis* 201 no 355. GRÖNFORS appears to share this persuasion, see *Air Charter* 68 note 11 where he assumes (here as applied to Goedhuis' example), that Air France, — although having "no practical possibility of controlling the technical operations for the reason that someone else [=KLM] has this control", which means that KLM is not Air France's agent, — yet cannot be exculpated under art 20.

[288] See GOEDHUIS, *La Convention* 180—181, *National* 227. Also VAN HOUTTE, 88—89 no 45.

[289] *Traité* 547 no 822.

[290] RIESE, *Luftrecht* 454 § 43-III-1; RIESE & LACOUR 271 no 328; DRION 238 no 196, cf 246 no 203: "The arguments for extending the meaning of 'preposés' in

in *Jacquet v. Club neuchâtelois d'aviation.*[291] This result has been approved by Riese.[292]

If the Swiss *Jacquet Case* is permitted to lead the future development this means that in the complicated three party situation this Warsaw Article 20-1 defence is taken away from the Warsaw carrier as defined by the general Continental school. This result cannot be affected by the Hague Protocol's having mitigated the Warsaw penalty of Article 25,[293] for the Warsaw defence is excluded not because of the inherent force of the Warsaw penalty but because of the interpretation of the word "préposé."

Under the *Jacquet Case,* then, it is hard to see how the situation of the passenger/shipper can deteriorate owing to a charter apart from the case of the man of straw.[294] The passenger/shipper will always have his remedy against the Warsaw carrier and will never be left solely with his tort remedy. The party whose situation may change because the charter is the supplier of aircraft and crew.

The deterioration of the supplier's situation, furthermore, may follow without being necessarily connected with the passenger/shipper being excluded from his remedy as against the Warsaw carrier. The deterioration stems from the general dichotomy between contract and tort remedies. Under the general theory, anybody with whom an airline has no contractual relation, can attack it with tort remedies.[295] Because of the severe character of the aircraft operator's tort liability under the general law,

Article 20 beyond that of servants are much stronger than those which can be invoked for limiting the notion to servants, where used in Article 25."; cf DUTOIT, *La collaboration* 54 sq; GRÖNFORS, *Air Charter* 110.

[291] 1958 12 RFDA 82, 1958 25 JALC 344, 1958 7 ZfL 259.

[292] 1958 7 ZfL 266.

[293] No longer does the Warsaw carrier lose the protection of those provisions which exclude his liability, but those limits of liability which are specified in Article 22 as revised.

[294] *Supra* page 313 it is submitted that the protection of the passenger and shipper in that case should be taken care of by the general law of the land.

[295] An extensive appreciation of this risk of the aircraft operator, relative to the position of the general law in Italy as it stood before the adoption of Codice della Navigazione, is offered by AGRÓ, *Note sulla figura giuridica e sulla responsabilità dell' esercente di aeromobile,* 1940 14 Rivista di Diritto Aeronautico 3—34. He concludes at p 15: "non può negarsi la possibilità astratta che il danneggiato agisca in via contrattuale contro il proprio vettore ed in via extracontrattuale contro l'esercente dell' aeromobile." It is submitted that his opinion reflects the general position of Continental law, apart from Scandinavian law, on the issue failing special legislation. See further *infra* pages 338 sq.

this possibility has been thought to involve a serious aggravation of the air carrier's liability, as compared with his liability under the Convention, and a number of devices have been invented to avoid the aggravation. The dichotomy between tort and contract thus has come to be responsible for a number of the peculiar air charter clauses which characterize the stereotyped air charter contract.

The interesting feature of air chartering as it has developed under the ægis of the Warsaw Convention is this clausal law designed to supplement the indicated insufficiency of the Convention. In order to appreciate the merits of this clausal law, however, it must be seen against the background of the tort law the effects of which it purports to remedy. It will be found that the insufficiency of the Convention has made a different impact in different countries and at different times. These differences, again, are reflected in the clausal law, and when they are not, the phenomenon calls for an explanation. I have ventured to submit such explanations.

The text will start with a survey of the development of the tort remedies, and proceed to a review of the function of the tort remedies in the complicated situation, dealing in particular with the Scandinavian indifference to the carrier's tort liability. Thereafter I will revert to the defensive measures which may remedy the working of the tort actions in the complicated charter situation, and amongst them the three main clausal measures in the stereotyped air charter formulas: agency, substitution and documentation.

## SECTION 2. REMEDIES IN TORT

### § 1. *General remarks*

Three categories of tort remedies — own fault rule, vicarious fault rule and strict liability rule — rights of air traffic victim in relation to evidence situation — technical failures, pilot error accidents and anonymous accidents — effect of fault rules — strict liability rules — background for their appearance generally

Tort liability may be classified in three main categories. First, there is the liability based upon the defendant's own fault, *i.e.* his intent or negligence. It will hereinafter be referred to as the *own fault rule*. Secondly, there is the supplementing rule of liability for the fault of defendant's servants and agents. When

corporate bodies dominate the field as they do in today's air commerce, this, of course, is the important fault liability. It will hereinafter be referred to as the *vicarious fault rule.* Thirdly, there are the principles of *strict liability,* starting with the shifting of the burden of proof and ending in absolute liability.

The rights of the traffic victim under these rules must be viewed in the context of the evidence features of air accidents. Air accidents may, from this point of view, be classified as technical failures, pilot error accidents, and anonymous accidents. The basis of the classification is as follows: An air accident, because of the intervention of governmental agencies,[296] is subjected to an official aircraft inquiry which ends in a report indicating the cause of the accident. A technical failure may be found. If not, the report may ascribe the accident to pilot error.[297] Sometimes, however, the cause of the accident may remain anonymous,[298] the typical case being where an aircraft without radio contact with its surroundings disappears into the ocean without survivors and without eyewitnesses.[299]

It is, of course, clear that the two fault rules, the own fault rule and the vicarious fault rule, are helpful to the traffic victim only in the case of pilot error and where a technical failure can be imputed to the airline as fault. When the cause of aircraft accidents generally remained anonymous,[300] as in the early days of aviation, it was natural for contributors to air law to seek to promote the development of aeronautics by proposing that the aeronaut should be held liable only in case he was chargeable with some fault.[301] This proposition, however, was swept away in a general development towards strict liability principles.

[296] See Chicago Convention art 26.

[297] I here disregard such cases as the pilot having survived (see *e. g., Pierre v Eastern,* 1957 USAvR 431, at 435), or the airline being chargeable with *culpa in eligendo vel inspiciendo vel instruendo.*

[298] Cf JOSSERAND, 2 *Cours de droit civil positif français* 2d 1933 no 415.

[299] It is recalled, however, that in the case of the Comet which exploded mid-air over the high seas off Elba (cf *supra* page 20 note 83), the British succeeded after a very extensive inquiry in establishing the cause of the accident as technical failure.

[300] Anonymous accidents today seem surprisingly rare. An ICAO table containing 53 reported accidents from 1957 states only three of these to have been caused by undetermined reasons, see *Aircraft Accident Digest No. 9, ICAO Circular* 56-AN/51, 1959. For criticism of statement, see HJALSTED, 1960 27 JALC 2.

[301] International Judicial Congress for the Regulation of Aerial Locomotion, Verona Meeting, May—Jun 1909; HAZELTINE, *The Law of the Air* 84; DE VALLES, 1910 1 RJILA 175—183; BALDWIN, 1910 9 Mich LRev 21—22; VALENTINE, 22 Juridical Review 99—100.

The modern[302] development of strict liability principles has been the mark of industrialization. Towards the end of the 19th century all countries where industrialization had taken place began to feel the insufficiency of their tort law which at that time had barely completed the adoption of the negligence principle.[303] The technical developments which revolutionized conditions of transportation, communications generally, manufacturing and other fields of enterprise, confronted society with huge damage problems completely beyond the capacity of the existing legal tools. Considering that causes of accidents remained unknown and known causes could not always be imputed to anybody as fault, the principle of bare own fault liability would have subjected society to violent forces of change while the true costs

[302] In primitive Germanic law the original basis of tort liability followed the strict liability pattern: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." See the English case *Lambert v Bessey*, 1681, T Raym 421, 83 ER 220.

[303] Although the older civilians may have regarded their law of negligent damage as a modernized version of the Roman *lex Aquilia*, a general action for reparation of damage caused *dolo aut culpa* seems to have been adopted by the courts of Continental Europe, more on the suggestion of Roman law than directly from it. See LAWSON, *Negligence in the Civil Law* 27. The French Code Civil of 1804 codified the principle of liability for negligence in art 1382, which, says Lawson, "reads like a manifesto" (*op cit* 29) and has received a remarkable extension throughout the world. "Almost every civil code that has since been enacted, except the German Civil Code of 1896, contains the gist of article 1382, with very little, if any, modification": Lawson *loc cit.* The compilers of the German BGB reproached the French example for lacking legislative precision and therefore modified the enunciation of the negligence principle towards enumeration of the various interests protected from infringement. BGB § 823. — In Sweden, despite the Roman-inspired teaching of exclusive reliance upon fault liability for almost a century, it was not until the beginning of the 19th century that fault liability finally replaced the older strict liability rules. Evidence of the occurrence of this replacement was to be found in the great reform bills prepared in the early 19th century. Although they never were adopted by the legislature except for a detached part relating to criminal law in which the own-fault liability rule was positively reflected (Penal Code 6:5), the principle of own-fault liability became thenceforward regarded as basic Swedish law. LUNDSTEDT, *Strikt ansvar, Förberedande undersökningar*, Uppsala 1944 p 92 note 4. In Denmark and Norway, this is the case too although the courts there have advanced the principle without any legislative support other than some statutes which apparently presuppose the existence of a fault rule. See USSING, *Erstatningsret* 8; ØVERGAARD, *Norsk Erstatningsret* 2d 54 sq. — In Anglosaxon law the feeling that legal liability should coincide with moral blame became very marked in the course of the 19th century. At least as early as the year 1825 the improved road communications and the early railways accompanied by records of fatal casualties had reacted sufficiently upon the system of actions which now was in the process of disintegrating, to allow negligence to be recognized as a separate basis of tort liability. See PROSSER 2d 117 and FIFOOT, *Judge and Jurist* 32. In the United States a general rule of fault liability was established by 1850 (see PROSSER 2d 117 citing *Brown v Kendall*, 1850, 6 Cush 292, 60 Mass 292); in England its establishment is said to have been delayed another forty years (see SALMOND 9th 26 citing *Stanley v Powell*, 1891 1 QB 86. But see note a *ibidem*).

of this change would have fallen upon parties reaping no other profits from it than a meagre living. This the Western peoples were generally disinclined to accept. Their feelings were reinforced by the advent of modern conceptions of democratic government which made the reaction of the suffering parties important by virtue of their massive numbers.[304] Ways were sought to mitigate the violence of the evolution and one such way was believed to be to make the enterprising forces themselves assume the costs of change. As instrumentalities of this mitigation the principles of vicarious fault liability as well as of strict liability were pressed into service. It is the development of these remedies in relation to one of the greatest technical advances of them all, and one of the most dangerous industries of them all, aviation, which will be surveyed in the subsequent sub-sections.

## § 2. *Vicarious fault liability and strict liability in France*

Art 1384 §§ 1 and 5 — no distinction between tort and contract — modern distinction and Becqué — information conveyed by preparatory works — discovery of the potentialities of article — the two nudes — expansion of alinéa 1 of article — worker's accidents — *Guissez v Teffaine* — *théorie du risque créé* — resistance to expansion offered by legal particularism — maritime law — aviation law — *Lamoricière Case* — *Vizioz Case* —boundary put to article's expansion into gratuitous carriage — boundary rendering service in military transportation — relation between Code Civil and Air Navigation Act — liability scheme of Act construed as based on art 1384 — liability scheme of Act does not exhaust potentialities of art 1384 — Who is bearer of liability under art 1384? — *the commettant* and art 49 of Act — the *gardien* — Franck decisions — vehicle supplied with and without driver — transfer of *garde* incompatible with master and servant relationship — consignor's tort action pursuant to art 1384 against a commettant or gardien possible as a result of the interposition of a middleman — intervention of Warsaw Act limited to the "transporteur", will not affect the *gardien* or *commettant* as such

*France* was one of the countries best equipped to meet the new demands posed by industrialization. Article 1382 had carried in its wake *i.a.* article 1384 paragraphs 1 and 5 which read as follows:

"On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."

[304] Cf FOYER, *Les Obligations*, in DAVID, 2 *Le droit français, Principes et tendances du droit français*, in 12 *Les systèmes de droit contemporains*, 137: "Le régime démocratique se montre généreux envers les faibles, craintif devant le plus grand nombre."

"Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés;"

The last paragraph contained a rule of vicarious fault liability. This liability of the employer for the wrongful acts of his employees was by no means dependent upon any direct fault on the employer's part.[305] For a century, this provision served as a basis for the master's liability for the faulty execution of contracts by employees as well as his liability for the employee's torts generally when in the scope of the employment. The modern distinction between the employer's liability in contract and that in tort is a reflection of the German Civil Code and was introduced in France by a paper of Becqué in 1914.[306]

The reasons for adopting the first paragraph of article 1384 were explained by Bertrand de Greuille in his report to the Tribunat: "Toutes les choses que nous possédons doivent être tenues en tel état qu'elles ne nuisent point à autrui".[307] Not until the end of the 19th century did the courts interpret this paragraph to mean anything beyond the fault principle contained within it. Then, however, it was discovered what a potent tool could be fashioned by a careful reading of the paragraph. As worded, the provision charges the defendant with liability for any damage occurring in connection with an object in his custody: there is justification for the assertion that one has to consider a case of assault between two nudes before being safely outside the scope of application of the article.[308]

The expansion of the article began at a careful pace. Having lain dormant for such a time the article had a tradition which worked against expansion. When the need for principles imposing greater liability upon enterprising industrialists arose, resort was had, not to article 1384, paragraph 1, but to contract, and the problems were removed into the field of contractual liability (which, of course, included the use of article 1384 paragraph 5).[309] But the workmen's accidents were to open up the way.

[305] Cf NEUNER, *Respondeat Superior in the Light of Comparative Law*, 1941 4 La LRev 2.

[306] *De la responsabilité du fait d'autrui en matière contractuelle*, 1914 13 Rev trim dr civ 251 sq.

[307] LOCRÉ, 13 *Législation civile, commerciale et criminelle de la France; Receuil des discussions et travaux préparatoires de nos Codes* 42—43.

[308] Cf RIPERT, note to 1930 Dalloz I p 59.

[309] *E. g.* workmen's compensation and passenger carriage problems.

The 1896 judgment of the Court of Cassation, Chambre Civile, in *Guissez, Cousin et Oriolle v. Teffaine*[310] fired legal opinion towards the development of the "théorie du risque créé." From that point on the article has expanded impressively, in particular as applied to motor car accidents after the first World War. The decisive steps were taken in the years around the Warsaw Conference, in 1927 and 1930.[311] The courts arrived at a strict tort liability under which the burden of proof was equal to that laid down by article 1147 as to contractual liability.

The avenues of expansion thus opening up, the "particularité" of certain special legal fields could offer but little resistance to the reception of article 1384 paragraph 1. There were certain fields which had received their own statutes and could claim that their problems were comprehensively regulated. The intervention of the forceful article would upset the delicate balance arrived at by way of such statute. After all, the recognized autonomy of the maritime law had previously succeeded in excluding the application of the doctrine of the general law[312] against negligence clauses.[313] Such particularity was now invoked against the operation of article 1384 paragraph 1 both in maritime law and in aviation law,[314] but the barrier was impressively quashed in two famous decisions by the Court of Cassation in the fifties, the *Lamoricière Case* as to maritime law[315] and the *Vizioz Case* as to air law.[316]

[310] 1897 Dalloz I p 433, Note Saleilles; 1897 Sirey L p 17, Note Esmein;

[311] The litigation *Veuve Jand'heur v Galeries belfortaises* provided both the leading cases. In the first, Cass civ 21 Feb 1927, 1927 Dalloz Périodique 1 p 97, note Ripert, 1927 Sirey 1 p 137, note Esmein, the Court of Cassation indicated that a certain number of "choses" required a "garde" because of their dangerous nature; in the second, 1930 Dalloz Périodique 1 p 57 note Ripert, 1930 Sirey 1 p 121 note Esmein, the Court of Cassation found the paragraph to contain the even broader principle of a presumption of liability (Ch réun 13 Feb 1930). See generally (in English), LAWSON, *Negligence in the Civil Law* 44 sq.

[312] For a recent discussion, see 2 RODIÈRE 509 no 938 B.

[313] The French doctrine in point had been firmly established ever since 1878, see RIPERT, *Précis* 6th 1952 p 252 no 408; *Duclaux, Monteil v Cie des Messageries Maritimes*, Cass civ 14 Mar 1877, 77 Dalloz I p 449, 79 Sirey I p 423; *Busch & Cie v Wats, Ward & Cie*, Cass 31 Jul 1888, 89 Dalloz I p 305; *Cie de navigation Fraissinet v Naville, liquidateurs de la Sté Armanieu et Naville*, Cass 20 Jul 1891, 92 Dalloz I p 94; *Cie générale transatlantique v Duboscq et Deffès*, Cass Civ 25 Oct 1899, 99 Sircy I p 496, 99 Dalloz I p 567.

[314] DE JUGLART gives a summary of the dispute in *Le droit aérien actuel est-il un droit autonome?*, 1954 Dalloz Chronique 117—122. For the last echo of the argument, see LEMOINE before the Court of Cassation in the *Vizioz Case*, 1959 13 RFDA 274.

[315] Cass Civ 19 Jun 1951, 1951 Dalloz Jurisprudence 717.

[316] Cass Civ, 2d Section, 23 Jan 1959, 1959 13 RFDA 282, 1959 22 RGA 100.

The success of the literal reading of paragraph 1, however, required imperatively that its limits be set. It is noteworthy that one such was found in the case of gratuitous transport.

The French law of passenger carriage had settled since 1911 for a contractual course which posed an "obligation de securité" on the carrier.[317] It was therefore thought necessary to avoid any finding of contract in the case of the gratuitous carriage so frequent in the age of private motor cars.[318] The field then lay open for the expansion of article 1384 paragraph 1. The courts hesitated, however, finding the idea of its extension to car traffic a little too radical, and by two decesions in 1928 it was finally settled that article 1384 paragraph 1 did not apply to gratuitous carriage.[319] The victim could, however, rely on article 1382.[320] The importance of the principles involved can best be appreciated by the use made of them by the French military agencies performing air carriage with civilians. These agencies were able to arrive at practical irresponsibility by keeping within the frame of "transport bénévole", first by having no charge at all, then under the reign of the "loi de Finances" of October 7, 1946, by making charges but no profits.[321]

What then was the relation between the tort liability of the Code Civil and the provisions of the Air Navigation Act of 1924, later consolidated into the 1955 Code de l'aviation civile et commerciale? The Act provided for the liability of the "transporteur"[322] and of the "exploitant".[323] Both schemes of liability could be construed as based on article 1384; the liability of the *transporteur* because he was liable as against the passenger/shipper for certain acts of the pilot and crew; the liability of the *exploitant* because he was made to assume liability for damage

[317] *Cie générale transatlantique, v Zbidi Hamida ben Mahmoud*, 1913 Dalloz Périodique 1 p 249, 1912 Sirey 1 p 73.
[318] JOSSERAND, *Les Transports* 2d 935 no 895.
[319] *Veuve Gasse v Saby*, Civ rej 27 Mar 1928, 1928 Dalloz Périodique I p 145, 1928 Sirey I p 353; *Demoiselle Brousse v Guiraud*, Req, 9 Jun 1928, 1928 Dalloz Hebdomadaire 382, 1929 Sirey I p 17. See also JOSSERAND, *Le refoulement de l'article 1384*, 1930 Dalloz Hebdomadaire 5—8, and, generally, HUSSON, *La querelle du transport bénévole*, in *Les transformations de la responsabilité, étude sur la pensée juridique*, thèse ès lettres Paris 1947 p 79—110.
[320] See *e. g. Sté Monnot et Cie v Veuve Dusson*, Cass civ 19 Feb 1945, 1945 Dalloz I p 181.
[321] See HOMBURG, 1948 11 RGA 582—586; DELAHODDE, 1958 12 RFDA 221 sq.
[322] Arts 41—43, 45 and 48.
[323] Art 53.

produced by the vehicle which he had put into circulation. Whatever the construction, it soon came to be clear that the Act did not exhaust the potentialities of article 1384 — not only were the beneficiaries at times different but the bearer of liability could also be another person.

As to the bearer of liability, article 1384 was ambiguous. On the one hand paragraph 5 which held the master liable could be invoked. Coupled with article 49 of the 1924 Act,[324] this meant that in the case of a charter, unless it was put on official record, the "propriétaire" would be liable for the fault of the pilot.[325] On the other hand, paragraph 1 could be invoked, which meant that the "gardien" was liable for any damage occurring incident to the use of the aircraft. It was eventually settled by the Franck decisions in 1941[326] that the "garde" was to be defined as the power over the object arising from the fact that somebody had the use of it, directed it and controlled it — "l'usage, la direction et le contrôle" —.[327] This meant that in the case of a lease of vehicle without employees the *garde* passed to the lessee.[328] If the servants went with the vehicle, the place of the *garde* could be determined only according to the circumstances of each case.[329] It was conceivable, however, that the charterer was the *gardien* while the owner was the master. In such a case both were liable although on different grounds. In order to avoid such a *confusio graduum* the Court of Cassation displayed a marked tendency not to accept transfer of the *garde* within a master and servant relationship.[330] Nevertheless it is apparent that under the general law it is fully possible that the *gardien* or master is held liable pursuant to article 1384 for the damage done to cargo put on board his vehicle pursuant to a contract to which he is not a party, and is thus not liable upon it, nor protected by it.[331]

It remains to consider how the contents of the Warsaw Act may intervene into this scheme. The 1957 Act sought to exclude

[324] Now CAvi art 125.
[325] *Assurances Aériennes v Aéro Club de Creil*, 1959 13 RFDA 389.
[326] *Connot v Franck*, Cour de Cassation, Chambres réunies, 2 Dec 1941, 1942 Dalloz Critique 25, Note Ripert; 1941 Sirey I p 217, Note Mazeaud; 1942 JCP II no 1766, Note Mihura.
[327] RODIÈRE, *La location des camions*, 1958 Service-Direction 901—905, 1009—1013, at 1011 no 16.
[328] RODIÈRE, *ibid.*
[329] RODIÈRE, *op cit* 1011 no 18.
[330] RODIÈRE, *ibid.*
[331] RODIÈRE, *op cit* 1009 no13. See further *infra* pages 339—340 note 395.

the intervention of article 1384 paragraph 1 but did it in a manner which hardly takes care of the present situation. As revised by this Act, article 117 of the Code de l'aviation (art 41 of the 1924 Act) provided that "La responsabilité du transporteur de marchandises ou de bagages est régie, au cas de transport par air, par les seules dispositions de la Convention de Varsovie . . . ou de toute convention la modifiant et applicable en France". Similarly article 123 of the Code (art. 48 of the 1824 Act) provided that "La responsabilité du transporteur de personnes est régie par les dispositions de la Convention" and added that "La responsabilité du transporteur par air ne peut être recherchée que dans les conditions et limites prévues ci-dessus" Evidently, anybody not a "transporteur" but rather an *exploitant* or *gardien* or *commettant* and possessing such status only, has no status under the Convention and can still be attacked outside the Convention.

## § 3. *Vicarious fault liability and strict liability in Germany*

Prevalence of the own fault principle — inefficacy of § 831 — resort to special legislation — Air Traffic Act § 19 — *Erfolgshaftung* and limitation of liability — gratuitous carriage — the bearer of liability — tradition behind *Halter* notion — the aircraft *Halter* defined — *Halter* liability and contract — *Halter* and the Warsaw carrier — in three party situation, success of direct action against Halter by passenger/shipper envisaged — the Warsaw Act — merits of *Halter* principle and its return to power under the Warsaw Act — details of solution — importance conferred upon status of air transport undertaking — complications resulting from *Halter* status and status of air transport undertaking not coinciding on same person in three party situation — the remedy of the passenger/shipper — 1959 Revision — no other tort remedy than the pure negligence action

German law contains no equivalent to the omnipotent article 1384. On the contrary it has persistently stuck to the principle of own fault liability as the general tort rule. This principle, it is true, received a sharper edge by the addition of § 831 which provides that "a person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work."[332] But this edge, again, was substantially blunted by the privilege bestowed upon the employer to exonerate himself by showing that he exercised care in the selection of the servant and, if supervision was necessary, that he reasonably performed his duty of supervision. It is only natural that in most cases the employer

[332] As translated by LORENZ, 1940 11 JALC 228 note 271.

willingly undertakes this rather light burden of proof. Nor is it unnatural that plaintiffs have been prone to avoid this issue of exoneration by moving disputes to contractual grounds where they were aided by a vicarious fault liability rule rather than to delictual grounds.[333]

Generally speaking, the demands of the industrialized age were met by special legislation in Germany.[334] Paragraph 1 of § 19 of the Air Traffic Act of 1922 read as follows: "Wird beim Betrieb eines Luftfahrzeugs durch Unfall jemand getötet, sein Körper oder seine Gesundheit verletzt oder eine Sache beschädigt, so ist der Halter des Fahrzeugs verpflichtet, den Schaden zu ersetzen."[335] For passenger as well as for third party damage this section introduced an extraordinarily strict principle of absolute liability. This "Grundsatz der reinen Erfolghaftung" prevailed also in the case of damage arising out of *force majeure*[336] and was modified only by the establishment of contributory negligence on the part of somebody other than the defendant.[337] But if the liability rule was sharp[338] its effects were ameliorated;

[333] NEUNER, *Respondeat Superior in the Light of Comparative Law*, 1941 4 La LRev 3—4. — A rule of contract liability for the negligent acts of the contractor's servants and agents had become settled in German law during the 19th century. The milestones of the development were: the dispute over "eorumve" or "eorumque" in Dig 19.2.25.7; via the decision of the Reichs-Oberhandelsgericht in *Frankf. Transp.- u Glasversicherungs Akt. Ges. v Masthaler & Comp*, 14 Mar 1874, 13 Entscheidungen des Reichs-Oberhandelsgerichts 76; and the Reichsgericht decision in *The Ema*, 23 Jun 1883, 10 RGZ 165; to § 278 in BGB.

[334] The first *Reichs*-legislation in the field was the Reichshaftpflichtgesetz of 7 Jun 1871, reprinted and translated in LAWSON, *Negligence in the Civil Law* 195 sq. — It is noteworthy, however, that the German courts succeeded in making neighbourly principles under the doctrine of "Aufopferungsanspruch" extend the possibilities of imposing liability without fault. See PALANDT, *BGB* 20th 1961 p 693, Introduction to § 823; cf VON MEHREN 447—448. Surprising though it may seem this doctrine succeeded in establishing itself in aviation by the Reichsgericht decision in *Märkische Industriewerke v M*, 100 RGZ 69. In this case a flying student crashed the school's plane through the roof of a private house destroying pieces of furniture. Suit was successfully brought against the school despite the absence of negligence on its part. Cf VON MEHREN 448.

[335] As translated by LORENZ, 1940 11 JALC 221, the paragraph reads as follows: "(1) If in the operation of aircraft a person by accident either is killed, or his body or health injured, or damage caused to a thing, the holder of the aircraft is obligated to compensate for such injury or damage."

[336] SCHLEICHER & REYMANN 2d 117.

[337] This result follows from § 20 of the Air Traffic Act which refers to § 254 of the BGB; furthermore, however, § 20 provides that in the event of property damage, fault on the part of a person having actual control ("tatsächliche Gewalt") of the property concerned shall be deemed equal to negligence by an injured party.

[338] The liability rule also applied to gratuitous carriage. Since the Act, however, recognized the effect of special contract, see *Reichstagsdrucksachen* 1920—1921 Nr 2504 p 2474, the courts were prone to find a contract between the parties modifying this result. See SCHLEICHER & REYMANN 2d 125—126.

liability under the Act was combined with a limitation as to amount (§§ 23—25) and provision for mandatory insurance (§ 29).

Bearer of this absolute liability is the "Halter". *Halter*, like *Frachtführer*,[339] was a notion developed in surface carriage,[340] and its most extensive service had been in the Motor Vehicle Act of 1909.[341] The legislative history of the Air Traffic Act reveals a clearly formulated view that the motor car legal principles, in particular the leading Reichsgericht case of 1912,[342] should guide in determining the identity of the aircraft *Halter*. As a result, subsequently developed case law under the Motor Vehicle Act came to provide principles for air law as well.[343]

In motor car litigation, contract aspects had little play;[344] the main distinction between damaged parties did not relate to their contracts but rather to whether they were inside or outside the car. This viewpoint now moved to aviation. Even if only one of the aviation cases comes close to an attack on the carrier by the passenger/shipper, it is strikingly evident how far the determination of the *Halter's* identity is from taking the contract of carriage as an indicative factor.[345]

It was therefore evident that this *Halter* was not necessarily the party to be qualified as the Warsaw carrier. Riese submitted that — in the event of different persons having *Halter* and Warsaw carrier status — the *Halter* might be attacked successfully by a passenger/shipper under national German law while

[339] See *supra* pages 286 sq.

[340] The concept originated in BGB § 833 stating the liability of the keeper of animals, but was adopted to designate the bearer of liability under the Motor Vehicle Act of 1909.

[341] 1909 RGBl 437.

[342] In *Reichstagsdrucksachen* 1920—1921 Nr 2504 p 2474 col 2, reference is made to 78 RGZ 179, a motor car decision by the Reichsgericht of 15 Jun 1912.

[343] Cf SCHLEICHER & REYMANN 2d 121: "Halter des Lfgs. ist nach der feststehenden Rechtsprechung des RG. in Kraftfahrangelegenheiten, wer das Fahrzeug für eigene Rechnung in Gebrauch hat und diejenige Verfügungsgewalt darüber besitzt, die ein solcher Gebrauch voraussetzt." Also MEYER, 1 *Internationale Luftfahrtabkommen*, Köln & Berlin 1953 p 258—259.

[344] The contract served mainly to mitigate liability and as to transport undertakings for line service this possibility was taken away altogether as to passengers by § 25 of the Personenbeförderungsgesetz of 1934. 1934 RGBl I p 1217.

[345] See further *supra* pages 197. WILLNER, *Die Zeitcharter* 127, submits: "Vermietet . . . ein Luftfahrtunternehmer Flugzeuge unter Gestellung des Bedienungspersonals, sorgt er gleichzeitig für die Instandhaltung und einen Teil der Ausrüstung, so bleibt er Halter, mag der Mieter auch für die Betriebsstoffe sorgen und hinsichtlich des Transportbetriebes weisungsberechtigt sein." See generally RUCKRIEGEL *op cit* 52—57. The German courts have pronounced upon the meaning of

the Warsaw carrier could raise a good defence.[346] Since Riese furthermore had indicated that "l'assimilation du droit interne . . . aux dispositions de la Convention ferait disparaître cet inconvénient"[347] it was natural that the German Warsaw Act of 1943 should seek to remedy the situation. This was done by restricting the scope of § 19. As laid down in the Deutsche Justiz, the most authoritative enunciation of legislative intent in the days of the

*Halter* in a sequence of four cases from the early thirties in which air charter contracts have been involved. In the *Schindler Case*, 1932 2 AfL 100, which was decided by the Landgericht Stuttgart 6 May 1931, one of the issues was the identity of the *Halter*. Schindler, a pilot acrobat talked the local manager of Leichtflugzeugbau Klemm into participating with one of the company's aircraft and one of its employees as an aid in a flying stunt which needed two aircraft. The stunt failed and the aircraft fell killing all occupants. The widow of the employee sued the Klemm company and the company denied liability *i. a.* on the ground that Schindler and not that company had been the *Halter* of the aircraft in which the employee found his death. Nothing was known about the agreement concluded as to this aircraft for both parties to it had been killed in the accident. The court, rejecting a transfer of the *Halter* quality, relied on the following argument: "Der Übergang der Haltereigenschaft auf Schindler würde ein Verhältnis von einer gewissen Dauer voraussetzen. An ein solches war nach dem ganzen Zweck, zu dem Schindler das Flugzeug der Beklagten haben wollte, sicher nicht gedacht." At p 103. Furthermore, the court drew an analogy to the case of leasing trucks for a certain transport. At p 104. The next decision, by the Landgericht in Halle in the *Bitterfelder Balloon Case*, was handed down on September 30th same year. 1932 AfL 185. (Scholl, *Die Luftverkehrshaftung in der Rechtsprechung* diss Köln 1938 p 28—29, submits that the Amtsgericht Halle had rendered two prior decisions in the case.) The question before the appellate court was whether the charterer of a balloon or a club which was to contribute to the charterer's costs of an ascent, was to be liable as *Halter* as against a party injured when riding with the balloon. The suit was brought against the charterer and the court held him to have been *Halter* because he had had the disposal of the balloon and had been prepared to pay the cost of an ascent. The contribution of the club had not, in the opinion of the court, affected the charterer's position as *Halter* since the club had not intended thereby to take over the complete cost and the charterer retained full disposal as to the management of the ascent, the piloting and the control. The third case, *Savinsky v Luftreklame GmbH*, 1931 1 AfL 77, 1931 2 JAL 591, was decided by the Amtsgericht Hamburg on 21 Nov the same year. Here the court refused to qualify Luftreklame, the charterer, as *Halter*. Luftreklame used to charter aircraft and pilot from Fliegerhorst Nordmark and made advertising flights for customers. Charter hire was paid on a flight time basis. Luftreklame decided about the beginning and the ending of a flight. This decision, however, said the court, "does not include any considerable right to direct", moreover "the technical conduct of the flight is entirely independent of the will and directions of the renter." Finally, a few years later, on July 3, 1934, Oberlandesgericht Hamm in Westfalen decided the case *Hessing v Ficker*, 1934 4 AfL 274. The holding meant that a person could not be held liable as *Halter* of an aircraft which he had taken under a conditional sales agreement, and the use of which he had passed on to a pilot instructor under terms which gave the latter a fairly independent position.

[346] Riese, *Observations sur la Convention de Varsovie relative au droit privé aérien*, 1930 Droit Aérien 221 note 1; German original in 1930 4 ZAIP 249 note 2. He added the following reservation, however: "à moins que l'on ne veuille conclure de l'assujettissement contractuel aux dispositions de la Convention que la possibilité est exclue de faire valoir d'autres droits à une indemnité que ceux reconnus par la Convention et avec effet aussi à l'égard des tiers."

[347] *Ibidem.*

Third Reich, "Die bisherige Haftung [in § 19] ... soll in Zukunft nur noch bei S c h ä d e n Anwendung finden, die durch den Flugbetrieb a u s s e r h a l b d e s L u f t f a h r z e u g s entstehen, d.h. wenn der Geschädigte am Fluge selbst nicht teilnimmt oder die beschädigte Sache nicht in dem betreffenden Luftfahrzeug befördert wird."[348] Thus the airlines were absolved from the absolute liability to the passenger/shipper which previously had threatened them if the conditions of the contract of carriage with the passenger/shipper had for some reason been ineffective. The 1943 Amendment, however, did not remedy the discrepancy between *Halter* and Warsaw carrier indicated by Riese; it did not adopt the *Frachtführer* notion as had been necessary. The *Frachtführer* notion built upon the contract of carriage. "Der kriegsbedingte Sonderluftverkehr" was found to entail that "die vorherige Vereinbarung besondere Bedingungen unzveckmässig oder überhaupt unmöglich ist."[349] The Amendment therefore preferred to rely on the *Halter* notion which was independent of contract, to connote the bearer of carriage liability.[350] While this entailed complications under the Convention, in most cases of a complicated charter situation the Amendment solution offered the supplier of aircraft and crew in his normal capacity of *Halter* all Warsaw defences and limitations against a tort claim from a passenger/shipper in the open relationship.

A prohibition was introduced in § 29f, whereby persons having

[348] 1943 Deutsche Justiz 123 col 1.

[349] 1943 Deutsche Justiz 123 col 2.

[350] The changes were brought about in the following way. Before § 19 there was inserted a headline "Haftung für Personen und Sachen, die nicht im Luftfahrzeug befördert werden". After § 29 there was inserted a new headline "Haftung aus dem Beförderungsvertrag", followed by a sequence of new sections — §§ 29a—29i. The principal new section was § 29 a. It read "(1) Wird ein Fluggast an Bord eines Luftfahrzeugs oder beim Ein- und Aussteigen getötet, körperlich verletzt oder sonstgesundheitlich geschädigt, so ist der Halter des Luftfahrzeugs verpflichtet, den Schaden zu ersetzen. Das gleiche gilt für den Schaden, der an Sachen entsteht, die der Fluggast an sich trägt oder mit sich führt. (2) Der Halter des Luftfahrzeugs haftet ferner für den Schaden, der an Frachtgütern und aufgegebenem Reisegepäck während der Luftbeförderung entsteht. Die Luftbeförderung umfasst den Zeitraum, in dem sich die Güter oder das Reisegepäck auf einem Flughafen, an Bord eines Luftfahrzeugs oder — bei Landung ausserhalb eines Flughafens — sonst in der Obhut des Halters befinden." The other sections provide for a liability scheme guided by principles equal to those of the Warsaw Convention. The sections all use the expression *Halter*. — Relative to the debate whether or not the *Halter* feature of the Warsaw Act was due to an inaccuracy — "eine Ungenauigkeit des Gesetzgebers" — see ABRAHAM, *Der Luftbeförderungsvertrag* 28, and 1955 4 ZfL 259; RIESE, 1955 8 NJW 1023; BÜLOW, 1955 ZAIP 557 sq; MEYER, 1955 4 ZfL 160; RINCK, 1956 23 JALC 484, and 1958 7 ZfL 308; GEIGEL, *Haftpflichtprozess* 1957 p 474; WUSSOW, *Das Unfallhaftpflichtrecht* 6th 1957 no 619.

the status of an air transport undertaking — "Luftfahrtunternehmen" — relieve themselves of their liability under §§ 29a—29e. The status of "Luftfahrtunternehmen", it is recalled, was a notion used in § 11 for licensing and furthermore appeared in Article 1-1 of the Warsaw Convention in the official German translation as controlling the liability in the case of gratuitous transport.

Post-war German scholarship, however, felt unhappy about the solution introduced by the Warsaw Act. When *Halter* status and the status of air transport undertaking clothed different parties, it was pointed out, peculiar results followed. If *Halter* status remained with a lessor not also clad with the status of air transport undertaking, exoneration was perfectly possible as against the charterer; in such a case, the passenger/shipper contracting with the charterer could bring an action against this lessor-*Halter* within the Warsaw frame. If *Halter* status moved to the charterer but only the lessor was clothed with the status of an air transport undertaking, the charterer could contract out of his liability as against passenger/shipper, and the lessor, similarly, was free to contract out of all liability as against the charterer. Failing a tort action against the lessor, the passenger/shipper then would be deprived of any remedy.[351] Only if both types of status stayed with the supplier of aircraft and crew did the system function as contemplated.[352]

In 1959, the German legislator yielded to the pressure thus brought to bear and replaced the *Halter* in passenger and cargo with the *Luftfrachtführer* as the bearer of liability.[353] As a result, the situation as to tort claims under the Air Traffic Act prior to the 1943 Amendment was reintroduced with the sole but important change that in the complicated charter situation the

[351] See for such criticism ABRAHAM, *Der Luftbeförderungsvertrag* 27—28, and RINCK, 1956 23 JALC 484.

[352] ABRAHAM even attacked the very notion of air transport undertaking. It could never apply to an operator chartering his aircraft to a middleman, he argued. As defined in § 11 the air transport undertaking was an enterprise which as a business *i. e.* for reward, carried persons or property by air; (cf LORENZ, 1940 11 JALC 148). But such an operator did not carry for reward: he would collect the charter price whatever the way the charterer chose to use the aircraft. He did not even carry: he was only obligated to put the aircraft at the disposal of the charterer. *Der Luftbeförderungsvertrag* 27—28. It appears highly unlikely, however, that such a construction of § 11 would have been accepted by the licensing authorities. Since the 1959 revision this problem is moot.

[353] Gesetz zur Änderung des Luftverkehrsgesetzes, 5 Dec 1958, 1958 BGBl I p 899, no 29.

passenger/shipper could bring a tort action against the supplier of aircraft and crew only on the basis of the fault rules in BGB §§ 823 and 831, but not the absolute liability rule of § 19 of the Air Traffic Act.[354]

## § 4. *Vicarious fault liability and strict liability in Scandinavia*

Reliance on statute to meet the demands of industrialization — Danish and Norwegian Code provisions making the master liable for the acts of his servant — absence of equivalent Code provision in Sweden — Railway Accidents Acts — Norwegian court rule relative to danger liability — its application being bent by contract — controversial existence of danger rules in Denmark and Sweden — aviation rules for strict liability — dispute about Swedish irresponsibility rule as applied to pilot error

When industrialization changed Scandinavia the fault principle had just achieved its victory over the archaic principles of stricter liability. The new problems of an industrialized age therefore required the law to deviate from the general direction of the evolution; it was only natural that the change was effectuated by statute.

In Norway and Denmark an archaic statutory rule providing for vicarious liability had survived from the 17th century. King Christian the Fifth's Danish Code of 1683 (3-19-2) and his Norwegian Code of 1687 (3-21-2) both ruled that the master once having commissoned his servant to do an act, should himself give compensation for any damage arising from the act. Under the pressure of the *culpa* dogma, these rules had remained practically dormant during the latter half of the 19th century. Now they were returned to power to meet the demands of the new age.[355] Apart from a rule in the Maritime Code of limited application Sweden had no equivalent to such convenient legislation and had to resort to statutory intervention. Proceedings were piecemeal, beginning in 1886 with a statute relative to railway accidents. In Denmark an equivalent Act appeared in 1898.[356] In Norway, the legislature was less active in these matters.[357] Instead it was the Norwegian courts which developed

[354] Compare, however, GEIGEL, *Der Haftpflichtprozess* 9th 474.

[355] USSING, *Erstatningsret* 92—93 § 14-1-A.

[356] Lov no 56 of 26 Mar 1898; replaced by a sharpened version in 1921, Lov no 117 of 11 Mar 1921; cf USSING, 1915 UfR B 321 sq.

[357] A Railway Act was passed 7 Sep 1854, but this Act said nothing about liability except one article which provided that the railroad corporation was to pay for such damage done to persons or property which should be compensated for: § 15.

a general rule to the effect that strict liability may be imposed to compensate for damage done to third parties in the course of an activity of a dangerous nature.[358] Despite older decisions to the contrary it appears to be settled that such liability cannot be incurred when contract has intervened between the parties.[359] The dangerous activity liability, however, would seem not to be applicable to the case of a complicated charter situation. The City Court of Oslo, in *Bakken v. Norsk Aero Klubb and Hesstvedt,*[360] has stated that "we do not have any rule in our law making the person responsible for an aircraft incur any absolute liability for injury to people staying inside that aircraft." The very reception of a rule of dangerous activity liability in Swedish and Danish law has been controversial. Grönfors denies its existence in Swedish law. Nor does it appear to exist in Denmark.[361]

This provision is seen as proof of the uncertainty existing as to the effectiveness of 3-21-2 of the Code. See LOUS, *Jernbanens erstatningsansvar*, Norsk forsikringsjuridisk forenings publikasjoner Nr 34, 1954 p 4.

[358] 1875 NRt 330, 1890 NRt 538, 1900 NRt 753.

[359] 1933 NRt 509. On the Norwegian law, see ØVERGAARD, *Norsk erstatningsret* 2d 12 sq and *Om ansvar for farlig virksomhet efter norsk sedvanerett*, 1939 52 TfR 313—350.

[360] Decision 10 Feb 1956, in case no 583/1955, 13th chamber no 9; 1 Ark f L 289; also reported in *Luftfartsdirektoratet, Domssamling i luftfartssaker — Sivile saker, straffesaker, forelegg, uttalelser m. v.*, p 253 (mimeograph). The reasoning of the court is interesting. The case concerned the crash of a Piper Cub aircraft owned by Hesstvedt but rented by him to the aero club to be used for instruction purposes. The pilot student, Bakken, was severely injured in the crash and later sued Hesstvedt and the club for damages. The court denied the applicability of the third-party liability legislation (see *infra* page 334) because Bakken was carried in the aircraft, and of the Warsaw Act as well because of the local equivalent to art 34, *i. e.* § 1-2 of Lov 12 Jun 1936 om befordring med luftfartøjer. Thus facing the general danger liability rule, the court said: "The Act of June 12, 1936, . . . does not provide for an absolute liability for passenger injury, since liability is excluded 'in case it may be assumed that the damage did not result from error or negligence on the part of the carrier or his people acting in the scope of their employment.' When the Act does not impose absolute liability for injury to passengers carried for reward, it is also clear that we cannot impose absolute liability for injury to somebody who was carried as a student. We are here in the statutory field and when the legislature has not extended the absolute liability to aircraft passengers, this position is the result of definite considerations which need not be discussed here." At 262—263. It may be added that the court refused to hold the club vicariously liable for the injury pursuant to 3-21-2 of the Code, because the plaintiff failed to show negligence on the part of the instructor.

[361] GRÖNFORS, *Trafikskadeansvar* 164. He added the reservation, however, that a rule of strict liability has been established in a number of typical situations and that nothing prevented the courts from extending the list of them. USSING, *Erstatningsret* 133 § 17-V. GOMARD, *Legal Problems of Compensation involved in the use of Nuclear Energy*, 1960 4 Scandinavian Studies of Law 66. As to the Scandinavian law of delictual liability generally, see USSING, *Responsabilité en droit danois*, in Premier Congrès International de l'Association Henri Capitant, Montreal 1939 p 109;

The pan-Scandinavian air legislation in the beginning of the twenties introduced rules of a very strict nature but these rules can be of no avail to the passenger/shipper since their basic principle is to exclude from their application damage done to any person or property which is carried in the aircraft.[362] The existence of this legislation does not affect, however, the remedies to which the plaintiff may be entitled under the general law.[363]

While the principles now reviewed, as applied to aviation, would seem to indicate that under Swedish law, as contrasted to Danish and Norwegian, the airline may not be vicariously liable for pilot error — and indeed it has been so intimated[364] — yet case law has worked to drive the Swedish position closer to that prevailing in the sister states. A leading case from 1931, *Holm v. City of Västerås,* indicates that an employer is vicariously liable for an employee who has been charged with work involving a particularly high risk of damage and that employee is negligent in the execution of this work.[365] Furthermore, the public interest in undisturbed traffic is sometimes given emphasis to explain why the employer was held vicariously liable, when the act of the employee interfered with this traffic[366] Eventually, Swedish law developed a general exception to the basic rule in the case of foremen.[367] In view of the status of commercial pilots as reflected in their considerable salaries, it seems resonable to assimilate these pilots into the category of foremen. In any case the two other principles apparently coincide in the case of the commercial pilot. It may therefore be assumed that together these principles will suffice to create a vicarious fault liability on the part of the airline for pilot error.[368]

*The Scandinavian Law of Torts — Impact of Insurance on Tort Law*, 1952 1 Am J Comp Law 359—372; *Evolution et transformation du droit de la responsabilité civile*, 1955 7 RIDC 485—498. HELLNER, *Legal Philosophy in the Analysis of Tort Problems*, 1958 2 Scandinavian Studies of Law 149—176. GOMARD, *op cit* 59—100.

[362] Sweden: Aviation Accidents Act, 1922, § 2 para 2. Denmark: Air Traffic Act, 1923, § 36; Civil Aviation Act, 1960, § 127. Norway: Air Traffic Act, 1923, § 37; Civil Aviation Act, 1960, § 153. See however, GRÖNFORS, in *Trafikskadeansvar* 274 sq.

[363] Denmark: Air Traffic Act, 1923, § 38; Civil Aviation Act, 1960, § 129. Norway: Air Traffic Act, 1923, § 39; Civil Aviation Act, 1960, § 158.

[364] VAHLÉN, 1954 SvJT 45.

[365] 1931 NJA 246. A recent discussion of this and subsequent cases is offered in SCHMIDT, *Tjänsteavtalet*, Stockholm 1959 p 154—167, in particular 161—163.

[366] See *e. g.* BENGTSSON, 1 *Om ansvarsförsäkring i kontraktsförhållanden — Den skadeståndsrättsliga bakgrunden*, Stockholm 1960 p 173.

[367] See *e. g.* BENGTSSON, 2 *Om ansvarsförsäkring* 639.

[368] See 1961 SOU no 25 p 147—148, also literature cited in note 72 *ibidem*. Unless we are to assume an oversimplification in view of the pedagogical purpose, the

## § 5. *Vicarious fault liability and strict liability in Anglosaxon law*

The survivors of the archaic remedies — vicarious liability — trespass — distinction between trespass and case — trespass, the gist of the aircraft operator's special liability — Guille's balloon — 1939 Restatement — aircraft liability statutes — Connecticut Act of 1911 — the drafting of Uniform Acts — Uniform Aeronautical Code of 1938 — operator's liability towards passengers — accident policy rule based on the insurable risk attitude — failure of Code — negligence the main remedy — weight added to it by res *ipsa loquitir* and vicarious liability rule

The archaic Anglosaxon law was replete with tort remedies, and when eventually the fault rule was firmly established, it was surrounded by a crop of survivors of these remedies.

In this context should be mentioned that the principle of vicarious liability was about a century older than the fault principle as such. It enjoyes a firm basis in Lord Holt's judgment in *Boson v. Sandiford* in 1691[369] but the maxim *qui facit per alium facit per se* which has come to indicate it was coined by Blackstone.[370] The modern leading case on the subject is *Barwick v. English Joint Stock Bank*[371] although modified by *Lloyd v. Grace, Smith & Co.*[372]

Apart from the fault principle, the important tort remedy in aviation is trespass. The action of trespass has retained its old character notwithstanding the success of the action on the case (*supra casum*) in the form of negligence. The distinction between trespass and case was one of injuries and not of intent: "Trespass ... was the remedy for all *forcible and direct* injuries, whether to person, land, or chattels. Case ... provided for all injuries not amounting to trespasses — that is to say, for all injuries which were either not forcible or not direct, but merely consequential."[373] But trespass was not coupled with vicarious liability.[374]

The common law remedy of trespass not only may play a role in aviation as such, but has furthermore been the gist of the general tort remedy developed against aircraft operators. Under

text proposition must be the basis for MALMSTRÖM's statement that vicarious liability prevails in carriage generally, see BJÖRLING-MALMSTRÖM, *Civilrätt — Lärobok för nybörjare*, 15th Malmö 1958 p 224.

[369] 2 Salkeld 440, 91 ER 382.

[370] BLACKSTONE, 1 *Commentaries* 10th London 1787 p 429.

[371] 1867, LR 2 Ex 259.

[372] 1912 LR App Cas 716.

[373] SALMOND *on Torts* 9th 4.

[374] SALMOND *op cit* 6 note d.

common law an action for trespass lay if somebody let loose a dangerous animal and left to hazard what might happen and damage occurred.[375] This principle was applied to the unhappy balloonist in the famous American case *Guille v. Swan*.[376] The view of the aircraft as an inherently dangerous thing in turn developed the law which in its most famous enunciation, the 1939 American Restatement of Torts § 520 comment b, classified aviation as an "ultrahazardous activity" necessarily incurring strict liability. But that rule only applied to ground damage. More important from the aspects here reviewed, however, are the statutory appearances of the rule.

The early legislation of the various American States placed strict liability on the operator of the aircraft with respect to any damage resulting from the flight: ground, passenger, or cargo damage. The Connecticut statute of 1911 provided that "every aeronaut shall be responsible for all damages suffered in this state by any person for injuries caused by any voyage in an airship directed by such aeronaut and his principal or employer shall be responsible for such damage."[377] For a long time the aspects of passenger and cargo damage were bypassed by the efforts towards uniformity in aviation law, beginning about 1920, by means of draft Uniform Laws recommended by the Aeronautical Law Committee of the American Bar Association and the Commissioners on Uniform Law.[378] The draft Uniform Aeronautical Code which was adopted by the Commissioners at Cleveland, July 23, 1938,[379] however, extended a statutory tort remedy also to the passengers.[380] Pursuant to section 302, they could seek their compensation from the operator of the aircraft. The "operator of an aircraft" was liable "regardless of negligence" for bodily injury and for death resulting therefrom to a passenger merely upon proof that the plaintiff was a pay-passenger and that the injury arose — in a paraphrase of workmen's compensa-

[375] Lord Ellenborough in *Leame v Bray*, 1803, 3 East Rep 595, 102 ER 724.
[376] 1822, 1 Avi 1, 1928 USAvR 53.
[377] The first Massachusetts aviation statute, however, provided that an airman "shall be held liable for injuries resulting from his flight unless he can demonstrate that he had taken every reasonable precaution to prevent such injury"; see HOTCHKISS, *A Treatise on Aviation Law* 2d 43 note 4.
[378] See 1936 7 ALR 281. The first Act accomplished, the Uniform Aeronautics Act of 1922, only referred to damage on the ground and to collision, secs 5 and 6, for text, see 1928 USAvR 472.
[379] 1938 9 JAL 724.
[380] Sec 301. For text of Code see 1938 9 JAL 726.

tion parlance — "out of and in the course of the passenger-air carrier relation".[381] The liability imposed was limited to a fixed schedule with a fixed payment for a death.[382] The identity of the operator was separately treated in the Act.[383] The endeavour of the Act, it was said, was "to shift the emphasis from considerations of the common-law rules of negligence to the realm of insurable risks".[384] Knauth designated the scheme as following "the 'accident policy' rule"[385] and indicated that it sought its origin in the German law.[386] The Uniform Code, however, never proved a success. It was opposed from the start by many aviation interests. The Civil Aeronautics Authority, then newly created, immediately started an investigation into the matter but the advent of the war stripped most legislative projects of all urgency. Eventually the Commissioners withdrew their endorsement of the Code.[387]

Consequently, there is at present no statutory remedy for the passenger or shipper available against the operator as such apart from what may be read into the Warsaw Convention. But the passenger/shipper, of course, can avail himself of the common law remedies and it must be noted that considerable sharpening of the negligence rule has taken place by, on the one hand, the *res ipsa loquitur* doctrine,[388] and, on the other hand, the rule of vicarious liability.

[381] Sec 302-a. Cf KNAUTH, *The Uniform State Aeronautical Liability Act Adopted at Cleveland, July 23, 1938*, 1938 9 ALR 354.
[382] See further KNAUTH, 1938 9 ALR 353 sq.
[383] Sec 102. "Operator" was equivalent to owner — "the person who holds title to an aircraft" — but there was a presumption (prima facie) in favour of the registered owner. In the case of a "bona fide lease or bailment to another for a period exceeding fourteen days" the lessee or bailee should be deemed the operator.
[384] HOTCHKISS, *op cit* 44.
[385] KNAUTH, 1938 9 ALR 355.
[386] KNAUTH, 1938 9 ALR 355. On the Act, see also HOTCHKISS, *Changing Standards of Liability Towards Passengers for Owners and Operators of Aircraft*, 1939 25 Virginia LRev 796—809.
[387] See 1952 19 JALC 166.
[388] See SHAWCROSS & BEAUMONT 2d 320 sq no 345 and literature there cited; RHYNE, *Aviation Accident Law* 121—138 and literature cited in his bibliography 7—10; PROSSER, 1949 37 Cal LRev 183 sq, *Handbook of The Law of Torts* 2d 199 sq §§ 42—43.

SECTION 3. AMBIT OF THE TORT REMEDIES

Availability of tort remedies in contractual situations — Anglosaxon law — divorce between German-French and Scandinavian law — ocean packet mail cases — *Abel und Zimmerman Case* — *Ullman Case* — relationship between availability of tort action in open relationship in complicated situation and in simple situation — from complicated situation to simple situation in German law — delictual *culpa* and contractual *culpa* — *dolus* and *culpa lata* permits free play for tort actions — from complicated to simple situation in Swedish law — from *Ullman Case* to *Dardel Paintings Case* — reflections of German approach in regulation of simple carriage situation in railway law — dilemma — quashing the tort action — Is there any tort action with status in simple situation? — deviation of Scandinavian law explained by legal scholarship — deviation means little risk for a tort action being admitted — reflections of approach in air charter forms

The preceding section has shown the tort remedies which are generally available. The present section will deal with their availability in a contractual situation. The state of affairs in Anglosaxon law needs no further comment. Its fundamentally tortious character has already been dealt with.[389] The effect of the contract is sharply restricted by the doctrine of privity of contract.[390] In Continental law the matter is more complicated and Scandinavian law seems to take a view of it differing from that of German and French law. The problem may be illustrated by two cases dealing with a tort action being brought in the open relationship in a three-party complicated situation.

Both cases concern parcels lost or damaged in transit by the ocean packet mail.[391] The transocean mail routes are generally served by shipping lines under contract with the respective General Post Office.[392] At times it must happen that parcels delivered to the Post Office for transportation overseas are damaged due

[389] See *supra* pages 162 sq.

[390] See 354 *infra*. See *Cosgrove v Horsfall*, 62 TLR 140; compare also *The Winkfield*, 1902 LR P 42, 71 LJ P 21, 18 TLR 178, 85 LT 668, and comments in HOLDSWORTH, 3 *History of English Law* 336—350, 7 *History of English Law* 451—455.

[391] This example is chosen because of the convenient supply of parallel cases in point of different nationality. Often, however, the complicated situation, as arising in mail carriage, is regulated by statute expressly prohibiting the bringing of a tort action in the open relationship. See *e. g.*, the German "Gesetz über die Haftpflicht der Eisenbahnen und Strassenbahnen für Sachschäden" of 29 Apr 1940, 1940 RGBl I p 691, § 10-2; and § 29i of the German Warsaw Act of 1943. The Warsaw Convention does not apply to mail carriage, see art 2-2 the scope of which has been somewhat extended by the Hague Protocol.

[392] Letting mail contracts to shipping lines for many years was the British device of subsidizing the building of steel steamers, see OTTERSON, *Foreign Trade and Shipping*, New York & London 1945 p 20 sq.

to the fault of the officers or seamen of the vessel carrying the mail. The mail regulations invariably impose upon the customers a strict limitation of the liability of the Post Office for damage done to mail packages. In the German case *Abel und Zimmerman Kettenfabrik v. Hamburg-Südamerikanische Dampfschiffs-Gesellschaft*[393] the consignor had a package with chains destined to Brazil damaged in transit due to a criminal offence by the crew of the carrying ship. The Kettenfabrik received the slight compensation permitted by the mail regulations and sued the shipping line for the difference between the award and the actual loss. The Oberlandesgericht Hamburg awarded full damages. But in *Ullman v. Rederiaktiebolaget Nordstjernan*,[394] where a parcel of hides destined for Uruguay was returned after an ocean trip of about two months to the consignor with 14 hides missing due to the fault of the ship's officers, the Swedish Supreme Court found no circumstance shown as to why the consignor should be entitled to any compensation from the shipping line after having received the regulated award from the Post Office.

Thus, in the German case, the tort action was permitted in the open relationship, while in the Swedish case it was quashed.

The availability of the tort action is generally discussed in terms of the status of the action in a simple carriage situation. If the tort action is recognized to have a status in the simple situation, however, it follows *e fortiori* that the action is available in the open relationship of the complicated situation. On the other hand, if the tort action is quashed in the latter situation, it follows that it cannot have any status in the former.

Having noted that in orthodox Continental law, the tort action is admitted in the complicated situation;[395] we may then proceed

[393] Oberlandesgericht Hamburg, 4 Apr 1928, 1928 Archiv für Post und Telegraphie 243.

[394] Swedish Supreme Court, 25 May 1949, 1949 NJA 289.

[395] The German decision was considered to be a maritime parallel to the Reichsgericht decision, 3 Jan 1918, in the *Prussian Eisenbahnfiscus Case*, 92 RGZ 8, see SCHNEIDER, 1928 Archiv für Post und Telegraphie 244 Anm 3. Although the Reichsgericht decision is old, its principle was reaffirmed by Bundesgerichthof Karlsruhe 9 may 1957, see 1958 66 Bulletin des transports internationaux par chemin de fer 107. Cf SCHLEICHER, 1943 12 AfL 14. Compare SCHREIBER, 1927—1928 1 ZLR 29—30. GÜNTHER PETERSEN, *Ansvarsfraskrivelse*, Copenhagen 1957 p 165–168, reviews a number of German cases on the effect of contract in the complicated situation but omits this case. — As to French law, see generally LAWSON, *Negligence in the Civil Law* 78 no 27. Regrettably Günther Petersen *op cit*, omits all discussion of French law on the issue. However, I conclude from the following discussion by RODIÈRE, *La location des camions*, 1958 Service-Direction 901—905, 1009—1013 that the philo-

to its status in the simple situation. In Germany, the tort action was given separate status even in this situation. This result was made possible by a distinction between delictual and contractual *culpa*. Only as to the former kind could the tort action succeed.[396] In the case of the carrier's *dolus* or *culpa lata,* German legal opinion even went so far as to permit complete concurrence of actions, the view being that "bei grober Fahrlässigkeit . . . volle Haftung nach Vertrags- und Deliktsgrundsätzen eintritt".[397] The European international railway Convention of 1890 reflected, if not adopted, this German approach inasmuch as it provided for unlimited liability "dans tous les cas où le dommage aurait pour

sophy underlying the *Prussian Eisenbahnfiscus Case* also is reflected in French law: Rodière examines the effects of "une location régulière . . . dans les incidences de la situation créé par la location à l'égard des tiers. Ces tiers peuvent être . . . les propriétaires des marchandises chargées sur le camion. . ." (At 1009 no 11). As to the case of "Dommages causés aux marchandises transportées" he says: "L'accident survenu peut d'abord être dû . . . à une faute de manœuvre du conducteur; il . . . sera . . . alors question de mettre en cause la responsabilité du loueur en tant . . . qu'il soit tenu du dommage parce que le camion a été loué avec un chauffeur dépendant de ce loueur et resté son préposé." (At 1009 no 13) In cases of "location avec chauffeur", however, "la responsabilité encourue ou mise en cause peut l'être à un double titre: du chef de la garde de la chose et du chef de la qualité de commettant. " Accordingly, "La question . . . se complique d'une interférence des alinéas 1er et 5 de l'article 1384." (At 1011 no 17) "Que ce soit à titre de gardien ou à titre de commettant que le loueur . . . soit responsable, il importe généralement peu aux tiers. Dans un cas comme dans l'autre, ils seront entièrement dédommagés. (At 1012 no 20). — This result harmonizes with the submissions of Agrò in the paper referred to in note 295 *supra* at page 319.

[396] The first case in point appears to be *Sarasin & Heussler u. Cons. v Main-Neckar Eisenbahn*, Reichs-Oberhandelsgerichts, 2 Nov 1874, 15 Entscheidungen des Reichs-Oberhandelsgerichts 83, at 86. In this case, action was brought by the shipper against the railway on the basis of *lex Aquilia* in order to obtain compensation for damage to railway cargo which had been ignited by sparks from an overtaking train belonging to the same railway. The court quashed the tort action by distinguishing between negligent performance under a contract and outside of it: "Ein Verschulden der Bahnverwaltung bei den Handlungen, welche dazu dienen eine Locomotive in Bewegung zu setzen, ist dem andern Transport-Contrahenten gegenüber nicht als Aquilische, sondern als Contractsculpa zu behandeln." At 87. Same solution in 67 RGZ 182. See further SCHREIBER, 1927—28 1 ZLR 29 sq.

[397] See RUNDNAGEL, *Die Haftung der Eisenbahn* 3rd & 4th Leipzig 1924 p 13. Originally, the contract could not cover liability arising from *dolus* or *culpa lata,* the theory being that the contract if attempting to mitigate the liability was inoperative because of *turpis causa.* See BESCHORNER 262—263 and literature there cited. Cf Dig 2.14.27.3 and 50.17.23. — An echo of the idea that *dolus* and *culpa lata* removed the contractual relationship between the parties may be found in the drafting of the Warsaw Convention. At the Citeja meeting in Madrid in May 1928, Ripert and Richter, *i. a.*, submitted the following draft: "In the cases provided in Article 22, the liability action shall not be brought against the carrier except on the basis of this convention unless the damage occurs from an unlawful intentional act as to which he bears a liability." It was then observed that this meant that in certain cases the special law arising from the convention ceased to apply [*i. e.* the statutory contract] and in such instances general principles of law were to be applied. See extracts of discussion given in CALKINS, 1959 26 JALC 226.

cause un dol ou une faute grave de la part du chemin de fer."[398]

The logical conclusion to the Swedish Supreme Court's quashing of the tort action in the *Ullman Case* which involved a complicated situation would, of course, be that the action could have no status in the simple situation. Such a result however, appeared to stumble over an evident acceptance of German principles in the law of carriage, in particular in railway law. There is little doubt that the drafters of the Railway Traffic Ordinance of 1925 adopted the German theory in the matter, not only because the Ordinance was based on the Berne Conventions which reflected the German approach in the treatment of *dolus* and *culpa lata,* but furthermore because Scandinavian writers dealing with the law of carriage generally assumed the orthodox Continental approach to be part of Scandinavian law as well.[399] As a result, § 87 of the Ordinance contained a statutory expression for this reception by providing, broadly speaking, that, in the case of *dolus* or *culpa lata* on the part of the railway, although the limitation of liability was generally removed, the railway could nevertheless invoke it as to valuables in so far as its liability arising from the contract of carriage was concerned.[400] Thus, it could not be disputed that by this provision the Railway Traffic Ordinance recognized that a tort action might be brought against the carrier

[398] Convention Internationale sur le Transport de Marchandises par Chemins de fer, 14 Oct 1890 (*Berne Convention*), art 41. Note that the unlimited liability was replaced in the *CIM Convention*, signed in Berne 23 Oct 1924, by the provision (art 36) that "l'ayant droit doit être indemnisé . . . jusqu' à concurrence du double des maxima prévus" (in the various articles establishing liability limits).

[399] The German development following the adoption of the ADHGB reacted generally upon Swedish legal opinion, see *e. g.*, DAHLSTRÖM, *Den svenska privata sjörätten*, 1882 p 233 sq; HAMMARSKJÖLD, *Fraktaftalet*, 1886 p 93 sq. In the discussion of the pan-Scandinavian maritime legislation of the 1890's the dichotomy of contract and tort remedies was felt to be a reality in the carriage relationship. The preparatory works reveal a clearly formulated view that the shipper could bring an action against the shipowner separately outside the affreightment relationship ("Fragtforholdet (det Forhold, hvori han ifølge Fragtkontrakten staar til Ladingscieren)") on the basis of *dolus* or *culpa*, see Norwegian *Udkast til Sølov, Norske Motiver*, Christiania 1890 p 175—176. See generally BENGTSSON, 1 *Om ansvarsförsäkring* 257—259 and literature there cited.

[400] The formula used, reads as follows: . . . provided, that the railway in relation to goods referred to in § 85 paragraphs 3 and 4 is not liable on the basis of the contract of carriage in a higher amount than follows from the same provisions." — The official commentary to the Ordinance, printed by Royal command, FLODIN & WIKANDER, *Järnvägstrafikstadgan*, Stockholm 1933, p 231, explains that the legislative intent was to retain limitation of liability only coextensively with the duty to contract and thus arrived at unlimited liability on other grounds than the contract of carriage. In reference to the basic negligence rule, the commentators submit: "In the case of *culpa* of some kind on the part of the railway administration contributing to the damage, limitation will not follow."

besides the contract action.[401] Two years after the Ullman decision, the Supreme Court in the *Dardel Paintings Case*[402] was faced with a plaintiff bringing this tort action, invoking *i.a.* the authority of § 87. Although not expressly referring to its Ullman decision[403], the Supreme Court endorsed its general policy in that case by the announcement that "there cannot be assumed any legislative intent, that the railway shall be liable, apart from under the Traffic Ordinance, pursuant to any general tort rules leading to a more extensive liability, unless this follows from the Ordinance itself."[404] Having thereby in fact restricted the ambit of the tort action to the gross negligence dealt with in § 87, the court could solve the case by finding no gross negligence. However, it proceeded to explain *obiter* the meaning of the tort action admitted by § 87, but its explanation was couched in such language as to permit no fewer than four different interpretations, not to mention the alternative that it was chosen in order not to bind the court in the future.[405] From another *dictum,* however, it follows that the Supreme Court thought that in certain extreme cases, the tort action might have a status even under the Ordinance. Some writers assume that this status should be recognized when the action is based on a criminal offence.[406]

Scandinavian law — perhaps less Danish[408] and Norwegian[409] law than Swedish[410] — thus deviates considerably from Con-

[401] See FLODIN & WIKANDER, *Järnvägstrafikstadgan*, Stockholm 1933 p 229—231. The section has been re-enacted in the Ordinance of June 12th, 1935.

[402] *Försäkringsaktiebolaget Hansa v Kungl Järnvägsstyrelsen*, 1951 NJA 656, The facts of the case were rather parallel to those in the *Sarasin Case* referred to in note 396; the locomotive having ignited by sparks a cargo of wooden boxes containing *i. a.* paintings by Dardel.

[403] There is no reason to believe that the Ullman decision is not a general precedent, cf GRÖNFORS, *Om ansvaret* 35. The parallel German case was considered to be based on general law principles.

[404] At 661.

[405] See BENGTSSON, 1 *Om ansvarsförsäkring* 262.

[406] SCHMIDT, *Frakträtt* 85; GÜNTHER PETERSEN, *Ansvarsfraskrivelse* 101; VINDING KRUSE, 1958 Juristen 215. It may be doubted, however, that this is a realistic approach, not only because of the lack of stability of the criminal law which serves to support the modern Byzantine administration in all its intricacies, but also because of the wide application of *volenti non fit injuria* in Swedish law, see *e. g.*, 1953 SOU no 14 p 143—149.

[408] Danish law, as described by GÜNTHER PETERSEN, *Ansvarsfraskrivelse* 164—165, seems more close to Continental law generally, but Günther Petersen himself, *op cit* 179 sq, as well as GOMARD, *Forholdet mellem Erstatningsregler i og uden for Kontraktsforhold*, Copenhagen 1958; p 119—120, represents views harmonizing with those enunciated in the *Ullman* and *Dardel Paintings Cases.*

[409] Note, however, the reasoning of the City Court in *Bakken v Norsk Aero Klubb and Hesstvedt*, 1 Ark fL 389, see *supra* note 360.

[410] For a recent general discussion, see BENGTSSON, 1 *Om ansvarsförsäkring* 169—290.

tinental law on the point of the function of the tort remedies. The matter has recently received much attention in Scandinavian legal scholarship.[411] Attempting to explain why this deviation has taken place, writers have pointed to the absence of "general codifications that compel the courts to keep tort and contract strictly apart".[412] It is furthermore submitted that part of the explanation may be found in the attitudes of legal scholarship generally to the judiciary. Although approaches vary and have many shades, Scandinavian jurists are far from controlling the development of the case law from the systematical aspects[413] and have nothing in common with Germans exercising "doktrinarische Kontrolle" or Frenchmen writing approving or disapproving Notes to the case reports. Scandinavian law in the past decades has been interested in experimentation and analysis of the bases of law. It has regarded "various sociological principles of policy as cause and aim of the law of tort as well as of the law of contract."[414] Both kinds of liability have been found to be based on negligence.[415] In relation to rules for limitation of liability and prescription periods, it has been said, that neither legal scholarship, nor the courts and the legislature, make any distinction between fault liability for physical damage, based on contract and based on tort.[416] The untamed tort action thus has no existence.

The subsequent section will show to what extent the fear of tort claims untamed by the Convention has influenced the shaping of the air charter contracts in general and the stereotyped air charter forms in particular. In the materials presented, there will be one apparent lacuna, *viz.* the Scandinavian forms. Apart from the forms of those airlines which have adopted documents developed abroad[417], the Scandinavian forms are remarkable because of the simplicity of their structure. They are few in num-

[411] GÜNTHERPETERSEN, *Ansvarsfraskrivelse*, Copenhagen 1957; GOMARD, *Erstatningsansvaret*; BENGTSSON, *Om ansvarsförsäkring i kontraktsförhållanden*, Stockholm 1960.
[412] BENGTSSON 639.
[413] It may be mentioned that until 1956 no Swedish treatise had ever appeared which dealt with all of the law of obligations; and the 1956 treatise of RODHE, *Obligationsrätt* — a great effort of systemization and a masterpiece of analysis — was completely different in systematics from the whole structure of law which until then had formed the basis of legal education in Sweden.
[414] GOMARD 467.
[415] BENGTSSON 639.
[416] BENGTSSON 261.
[417] Braathens SAFE relies on a version of the BIATA form, Flying Enterprise on a version of Baltairpac.

ber[418] and perhaps little attention has been paid to their drafting. It seems reasonable to suggest, however, that the simplicity is due to the simplicity of the Scandinavian law to which they may hope to surrender disputes as to their interpretation.[419]

## SECTION 4. DEFENSIVE MEASURES

### § 1. *Transfer of vicarious liability*

Article 24 — effect of article as to operator — Warsaw carrier in simple situation — effect in complicated situation — transfer of operator status in inter-carrier charters — vicarious liability rule in Germany — reasons for discussion of transfer of vicarious liability — the borrowed servant doctrine — doctrine explained — historical context — France: art 1384.5 — trucking cases — scope of doctrine — Germany: *Dienstverschaffungsvertrag* — general employer's liability for servants' acts as against special employer — Nikisch — Scandinavia: diversity of employee notion — uncertainty of law — England: early cases — modern presumption — United States: chaotic state of doctrine — Cardozo's rule — Smith — interference of independent contractor doctrine — Restatement sec 428 — England — doctrine applied in aviation — *Hays v Morgan*

The basic provision on which the airlines rely when attempting to avoid the consequences of a tort action being brought in the open relationship of a complicated situation is Article 24.[420] It reads as follows.

"1. In the cases covered by Articles 18 and 19 any action for damages, however, founded can only be brought subject to the conditions and limits set out in this Convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply . . ."

In the simple situation the benefit of Article 24, of course, will automatically fall upon the operator-Warsaw carrier inasmuch

[418] Printed air charter forms, as far as is known, only exist with Fred Olsen Air Transport Ltd, Scanair and Transair Sweden (and it may be added, the Finnish enterprises Finnair OY and Karair) apart from those mentioned in the preceding note; however, not all airlines are willing to supply information about their documentation and, in any case, the situation may be subject to rapid change.

[419] Fred Olsen ACA clause 18 (laws of Norway); Scanair ACA art 14 (arbitration in accordance with the Danish law of arbitration); Transair Sweden Charterkontrakt § 12 (Swedish law). Karair CA, Finnair ACA, and Flying Enterprise ACA are silent on the point, but the conflict of laws rule prevailing in Scandinavia entails that somebody dealing with a commercial carrier which uses standardized commercial contract documents ("massavtal"), *in dubio* surrenders to the law of the carrier's domicile, *i. e.* generally, his principal place of business. See KARLGREN, *Kortfattad lärobok i internationell privat- och processrätt*, 2d Lund 1960 p 102. Note, however, that Braathens SAFE ACA clause 17 refers to the law of England.

[420] Note however, in France, CAvi art 38, (art 55-2 of Air Navigation Act, 1924).

as he is the proper defendant to tort claims. In the complicated situation, furthermore, in areas where the Warsaw carrier is identified by his operating the aircraft, this carrier will generally, because of this article, have no reason to make special precautions for the tort claim. Possibly, this interpretation of the Warsaw carrier identity prevails in Anglosaxon countries.[421] It has prevailed in Germany, at least under a literal reading of the Warsaw Act of 1943, from 1943 to 1959.[422] As far as domestic law is concerned, consequently, charterparty forms belonging to these areas and periods cannot be expected to reveal any particular reflections of the possibility of the tort claim.

Transfer of the vicarious liability between airlines involved in an inter-carrier charter, of course, may follow arrangements which have been taken in order to control the placing of operator status. In this respect the result may be that the middleman assumes Warsaw carrier status even where the Warsaw carrier identity problem is solved on the basis of operator status. For reasons explained in relation to time charters, however, it appears that the transfer of operator status in not considered attractive by the airlines. As far as Germany is concerned, even after the German switch in 1959 from the *Halter* to the *Frachtführer* approach in determining the Warsaw carrier, there was little likelihood that charterparties would display any noticeable resort to the transfer of the vicarious liability to the middleman, at least in so far as the charters have been made for the German legal area. The vicarious fault liability for pilot error is the only tort liability in question and this liability is very much mitigated by the exoneration proof permitted by BGB § 831. Apparently, the possibility of a tort claim being brought in order to bypass the Warsaw liability limits is not always sufficiently dangerous to warrant any special defensive measures.

However, in view of the position of the general Continental school on the issue of Warsaw carrier identity and the form in which the vicarious fault rule generally prevails, it is necessary to discuss the possibility of transferring the vicarious liability from the supplier of aircraft and crew to the middleman-Warsaw carrier. If the middleman is the Warsaw carrier, he is also protected by Article 24. Transferring the vicarious liability to his

[421] See *supra* pages 292 sq.
[422] See *supra* pages 291 and 329 sq.

shoulders, thus, appears to be an easy solution to the tort problem created by the view taken of Warsaw carrier identity.

The doctrines for the borrowed servant would seem to offer an instrumentality by which such transfers could be effected.

The essence of the borrowed servant doctrine is the splitting of employer status — hitherto viewed as a unit clothed with vicarious liability — into two separate parts, the "general employer" and the "special employer".[423] Vicarious liability goes with the latter.

The recognition of the borrowed servant case as a separate legal problem owes much to the social benefit schemes. Middlemen intervening in the relations between workers and employers have involved evils. On the one hand, they exact great shares of the profits of the workers — the complaint raised against the French "marchandeurs". On the other hand, they upset welfare schemes partly because the middleman, despite his employer status, may deserve the benefits distributed just as much as his workers, and partly because this middleman is much too weak a person to be burdened with duties tailored for resourceful industrialists.

The idea of the borrowed servant situation involving a change in the basic principles of vicarious fault liability, expressed in article 1384 paragraph 5, does not seem to be very important in French law. The notion of the "commettant occasionel" exists, but its area of application has mainly been the family car accident.[424] The borrowed servant doctrine has been tested in a number of cases involving trucks with drivers rented from a trucking entrepreneur for use in some particular business. The case law is summarized by Rodière in the view "que la Cour de cassation ne soit guère favorable au transfert . . . du lien de commission."[425] Cases recognizing the transfer of liability have relied

[423] "Commettant occasionel", "Zwischenmeister".

[424] RIPERT & BOULANGER, 2 *Traité* 430 no 1120.

[425] Note to *Sté provençale de constructions navales v Tetefort*, Cass civ 11 May 1956, 1957 Dalloz Jurisprudence 121, at 122 col 2. However, RODIÈRE submits that the reasons for supplying a driver with the car often can be found in the owner's belief that his car accustoms itself to a certain treatment and that it functions better without variations in that treatment. The conclusion naturally follows that it is better to let one and same driver have the truck all the time than subject it to new drivers, however well qualified. That attitude reveals a desire for a continuous intimate control of the vehicle — indeed, a desire more and more outspoken as the tasks allotted to the vehicle become more specialized. Reasons for replacing this very interested employer by the temporary hirer of the vehicle and its

on "le fait que le locataire seul donnait des instructions au préposé . . ., ou, ce qui est plus probant, sur le fait que véhicule et chauffeur étaient mis à la disposition du locataire sans limitation de durée . . ., ou enfin que le contrat complexe qui unissait le loueur et le locataire faisait de celui-ci le maître d'une entreprise au service de laquelle le premier mettait, sur les ordres précis du second, une certaine traction organisée . . ."[426]

It appears unlikely that courts will permit transfers more readily in aviation where article 38 of the Code de l'aviation offers a safe way to achieve the same result by immatriculation of the inter-carrier charter.

The idea of a borrowed servant situation seems definitely more elaborated in Germany where, as explained above, the usefulness of the device from the points of view here discussed probably is less. The legal structure relied upon is the "Dienstverschaffungsvertrag".[427] By reducing the function of the aircraft *Vercharterer* to that of a general employer it served to establish a master and servant relation between the other two parties. The essence of it was that the general employer — the "Unternehmer" or "Dienstverschaffender" — undertook to render to the special employer — the "Empfänger" — the services of a third party — the "Arbeiter" — who was employed by the general employer to that very end. A master and servant relation was created between the *Arbeiter* and the *Empfänger*. — The discovery of the new phenomenon was made by the courts[428] and a broad ambit was opened up to it by its application to the hiring of a car with driver and of a ship with crew.[429] The *Unternehmer's* liability for the acts of the *Arbeiter* for a long time formed a controversial issue,[430]

driver, accordingly, should be small. *Ibidem* col 1. — Assuming that Rodière's submissions reveal some considerations working against the transfer of employer status, it should be noted that driving a truck in highway or street traffic seem to involve quite another intensity of driver control than does working a ship or an aircraft for the purpose of carriage. It may therefore be doubted that the considerations now indicated have similar force in the latter types of traffic.

[426] RODIÈRE, *op cit* 123 col 1. Rodière's note contains abundant case references.

[427] REBER, *Beitrag* 100—104; RUCKRIEGEL, *Die luftrechtliche Chartervertrag* 12—14.

[428] DALBERG, 1911 JW 140 sq; WÜSTENDÖRFER, *Studien zur modernen Entwicklung des Seefrachtvertrages* 1905—1909 p 102 sq; SCHROEDER, *Der Dienstverschaffungsvertrag*, diss Rostock 1914, and later it received short mention in the great commentaries to BGB in annotations to §§ 611 and 631; see commentaries by OERTMANN, STAUDINGER, and PLANCK.

[429] There exist a number of maritime decisions relative to it, *e. g.*, *The Trio*, 48 RGZ 89; *The Henry*, 56 RGZ 360; *The Portonia*, 69 RGZ 127; *The Rygja*, 71 RGZ 330; *J. D. W. v D & P*, 82 RGZ 427.

[430] DALBERG took the view that such liability based on BGB § 278 extended to the

but after a Reichsgericht decision in 1913[431] in which the *Unternehmer* was supported in disclaiming liability as against the *Empfänger* for the boatswain's faulty loading of a lighter which had been furnished together with the boatswain-*Arbeiter,* the view came to prevail in the twenties that there existed no such liability.[432] In relation to this development it seems reasonable to expect that in these types of contract relations the *Unternehmer* would also have the benefit of non-liability for the servant's wrongful acts outside the contract. Nikisch submits: "In allen Fällen haftet derjenige, der einem andern Arbeitskräften verschafft, nur für ein Verschulden bei deren Auswahl."[433]

The position of Scandinavian law on the point of borrowed servants seems uncertain. Difficulties as to social benefits have been avoided by the use of an employee notion in this legislation different from that in the general law.[434] Borrowed servants are probably forced to stick with the one or the other employer, and cannot be with both simultaneously.[435] In a recent litigation,[436] the Svea Court of Appeals in Stockholm had to consider the case of an enterprise which employed typists and stenographers and rented them on an hourly basis to other enterprises. The court considered the general employer to be carrying on an employment exchange business and thus be in violation of the State monopoly in the matter.[437] The private law principles cannot remain

whole period during which the *Arbeiter* performed his services, 1911 JW 141.

[431] *J. D. W. v D. & P.* 82 RGZ 427.

[432] PLANCK-GUNKEL, *Kommentar* 4th 1928, Vorbem VIII-2 to § 611; OERTMANN, *Kommentar* 5th 1928 Vorbem 3-h to § 611; ERMAN, *Kommentar* 1952, Vorbem 2-c to § 611. See also NEUNER, 1941 4 La LRev 11.

[433] 1 *Arbeitsrecht* 2d Tübingen 1955 p 240 § 26. Cf RUCKRIEGEL 23: "Richtiger Ansicht nach gehören aber die einzelnen Dienstleistungen der Besatzung nicht zum Pflichtenkreis des die Dienste verschaffenden Vercharterers."

[434] See VOURIO, *Har man skäl att arbeta med skilda arbetstagarebegrepp?*, 1957 SvJT 250—252.

[435] *Lange v Alversund & Manger Dampbaatlag*, 1931 32 NDS 48, decided by Bergens byrett, 19 Jan 1931, is illustrative. The vessel "Fusa" was chartered by owners to Alversund & Manger for use in the latter's regular services. With the vessel went the chief engineer. During a landing manœuvre the chief engineer happened to make full ahead instead of full back, and one passenger, Miss Lange, broke her arm because of this. It was disputed between the owners and the charterers who was imputable with the fault of the engineer. The Court held that he had been the employee of the charterer only. See also GRÖNFORS, *Air Charter* 110.

[436] The leading case was *Åklagaren v Giesecke*, decided 7 Mar 1961, judgment No VII:B 42, case No B 957/1960. The decision is not final.

[437] The basis of the appellate holding must have been that the typists and stenographers became the employees of the clients when working for them. The decision was remarkable even because among the clients of this general employer were a number of government agencies, among them the Directorate of Public Prosecutions.

unaffected by the holding if affirmed. At least it must contribute to facilitate the transfer of employer status.

In England, the borrowed servant problem was raised in some cases from the first half of the 19th century involving a passenger hiring a cab and driver. The injured pedestrian sued the passenger. The leading cases[438] pointed out that the passenger had not selected the driver, had not trained him and could not discharge him, and released the passenger. While at times later cases have held the special employer liable[439], there is said now to be "a strong presumption that the regular, the habitual employer, . . . will be liable and the burden of proving that liability rests on the 'borrower', the temporary employer, 'is a heavy one and can only be discharged in quite exceptional circumstances . . .' If the vehicle was lent with the driver it would be even more unlikely that responsibility was transferred."[440] Kahn-Freund states that he "has been unable to find a recent case in which, for the purpose of liability to third parties, the 'borrower' of a vehicle was held to be the driver's 'master'."[441]

In the United States, the state of the borrowed servant doctrine was once described as chaotic.[442] In 1922, in an attempt to harmonize the New York decisions in the matter, Justice Cardozo[443] proclaimed the following rule to be applied: "as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division."[444] Apparently, however, this rule did not prove a success. In 1940, Smith says: "what remains today of the formula then enunciated it is difficult to say" and adds that the formula is, "when occasion arises, distinguished to death".[445]

[438] *Laugher v Pointer*, 1826, 5 B & C 547, 108 ER 204; *Quarman v Burnett*, 1840 6 M & W 499, 151 ER 509; see further SMITH, *Scope of the Business: The Borrowed Servant Problem*, 1939—40 38 Mich LRev 1222—1254, at 1231 and note 27.
[439] *Rourke v White Moss Colliery*, 1877, 2 CPD 205; *Donovan v Laing*, 1893 1 QB 629. See also sequence of cases cited by SMITH, *op cit* 1244 note 60. See also POLLOCK *on Torts* 15th 66.
[440] KAHN-FREUND, *The Law of Inland Transport* 3rd 385 with reference to Viscount Simon in *Mersey Docks and Harbour Board v Coggins and Griffiths Ltd*, 1947 AC 1.
[441] KAHN-FREUND, *loc cit* note 17.
[442] CARDOZO, 1921-22 35 Harv LRev 121.
[443] *Charles v Barrett*, 233 NY 127, 135 NE 199.
[444] At 129.
[445] SMITH, *op cit* 1243.

In commercial carriage, however, formulas holding the general employer liable have difficulty in prevailing undisturbed. They entail that the driver shall not be classified as the servant of the middleman; he is the servant of the supplier. The supplier stands in the relationship of an independent contractor to the middleman. The general rule is that the employer of an independent contractor is not liable for the negligent acts of the latter's servants.[446] However, the doctrine of non-delegable duties has developed an exception to this general rule which has become increasingly important owing to the creation of regulatory schemes intended to protect the general public. Section 428 of the Restatement of the Law of Torts, published in 1934 by the American Law Institute, states as follows:

"An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

As used in motor carrier cases the rule has mainly served to make the franchised middleman pay for the wrongful acts of drivers supplied to him with the leased trucks.[447]

The state of the doctrine in England seems doubtful. Glanville Williams says generally: "The truth seems to be that the cases are decided on no rational grounds, but depend merely on whether the judge is attracted by the language of the non-delegable duty."[448]

In areas of carriage other than motor car traffic it will be found that the franchise is awarded the suppliers and not the middlemen. Sometimes schemes of multiple authorizations are introduced.[449] Will this affect the doctrine of non-delegable duties so that it will force the supplier always to retain his vicarious liability? As to English law, no obstacles to such an application can be found. On the contrary, it is supported by the

[446] See *e. g.* PROSSER 2d 257 § 64.

[447] See note by CHANG, *Trip-Leasing under the Motor Carrier Act*, 1954 34 Boston Univ LRev 307—319, at 317—318; also SLOAN JR, *Liability of Carriers for Independent Contractors' Negligent Operation of Leased Motor Trucks*, 1957-58 43 Iowa LRev 531—554, at 540 sq. Compare 13 CJS 1278—1280 § 690.

[448] GLANVILLE WILLIAMS, *Liability of Independent Contractors*, 1956 Cambridge LJ 186.

[449] See generally pages 59—100 *supra*.

presumption that the general employer remains master. As to the United States the same result would seem to follow from decision of the Circuit Court of Appeals in the Fifth Circuit in *Hays v. Morgan*.[450] Members of the Hays family were the owners of a large cotton plantation and had purchased an aircraft to be used for spraying insecticides. Two licensed pilots forming a partnership called Ballantine Spraying Company were allowed, in return for their spraying the plantation, to use the aircraft in spraying the cotton on other plantations requesting such services from the partnership. In the course of the spraying of such other plantations a so-called flagman on the ground was injured. He sued the owners of the aircraft and the court found pilot error imputable to these owners.[451] Pursuant to the local replica of section 1-26 of the Civil Aeronautics Act the "person who causes or authorizes the operation of aircraft" was "deemed to be engaged in the operation of aircraft." Relying on this section the court said: "It is the evident intent of the statute to protect the public from any negligence and financial irresponsibility of pilots . . . The law may be compared to the statutes of some states that make the insurer directly liable for the negligence of the driver of an automobile when driving with the owner's consent . . . The owner who authorizes a pilot to use his plane becomes liable for the negligence of the pilot in the operation of the plane. Under the statute, the liability arises out of the facts as a matter of public policy, the essential facts being the defendant's ownership of the aircraft, his authorization of the pilot to operate it, the pilot's negligence in operating it, and the consequent injury to the plaintiff."[452]

[450] CCA 5, 27 May 1955, 1955 USAvR 302, 4 Avi 17.669.

[451] It may be recalled that there is no absolute liability statute in the United States in relation to ground damage outside the Uniform State Aeronautics Act of 1922 which once was enacted in 22 States but since has been repealed in several of them, among them Pennsylvania. It did not apply in this case. Cf page 336 *supra*.

[452] In the Swedish *Westlund Case* the Court of Appeals (1961 USAvR 227, 1 Ark fL 262) followed similar principles. Certain operational authority being attributed to a charterer, the latter's Chief of Operations had committed no error in acquiescing in the wrongful conduct of the crew of the formal aircraft owner, since their conduct related to flying outside the charterer's operational authority.

## § 2. *Third party beneficiary doctrine*

Three parties bound by one contract — BGB § 328 — the *Frachtvertrag* of the ADHGB — Code Civil art 1121 — *stipulation pour autrui* and the *contrat de transport* — Scandinavia — early recognition of third-party contract in Norway — late recognition in Sweden — Denmark — effects arrived at by Continental third party contract achieved in Anglosaxon law by resort to the relational obligation — controlling rule remains privity of contract principle — third-party contracts and air charter — Does the mere relation of a flight to a contract of carriage satisfy the Convention requirements? — question discussed from angle of determination of international carriage — use of the notion *Vertrag auf Leistung Dritte* in the construction of the Convention — no charterparty clauses directly bearing on doctrine — point not litigated in air charter cases — doctrine applied in relation to contracts by which governments have secured the services of carriers for the transportation of government officers — French railway cases — *Nittka v Lufthansa* — point argued in *Nolan v Transocean* — merits of doctrinal structure — demerits — Which contract is to be qualified, the instrumentality or the load contract?

Results equally effective as those reached by the transfer of vicarious liability may be attained in yet another way. The modern recognition of contracts for the benefit of third parties offers a device which binds all the three parties involved together by a single contract and thus avoids the consequences of one relation not bound by the contract clauses.

Modern German law offers in § 328 of the BGB general bases for the effects of the "Vertrag zugunsten Dritter".[453] When adopted in 1896, it could build upon a tradition from the special and limited recognition of this contract type which had been extended by the ADHGB in regulating the effects of the *Frachtvertrag*. In 1915, a Reichsgericht decision based on § 328, marked the recognition of direct third party rights in contracts of passenger carriage.[454] The French Code Civil, being a century older and thus a century closer to the Roman law which in principle only permitted the contract to have effect between the immediate parties to it,[455] nevertheless contained in article 1121 a provision

[453] "Provision may be made by contract for rendering a performance to a third person, and such a provision may have the effect that the third person acquires a direct right to demand the performance. In the absence of a special indication of intention, it shall be determined from the circumstances, and especially from the purpose of the contract, whether the third person acquires this right, whether his right arises at once or only under certain conditions, and whether the parties to the contract retain the power to annul or modify the right of the third person without his consent." Translation FULLER, *Basic Contract Law* 551—552.

[454] "Alteri stipulari nemo potest, . . .": Dig 45. 1. 38. 17. Cf Inst 3. 19. 19. SCHULZ, *Classical Roman Law* 487 nris 820 sq.

[455] "*Progress*" *GmbH v Grosse Berliner Strassenbahn AG*, 87 RGZ 64. A father had ordered a cab for himself and members of his family who were travelling with him.

which could be used to support the validity of the essence of the notion, that is "la stipulation pour autrui".[456] The *stipulation pour autrui* was made the basis of the development of the contract of carriage during the 19th century, and was used particularly to explain the position of the consignee.[457]

In the Scandinavian countries, however, the development deviated somewhat from that of the Continental. Norway recognized the effect as to the third party beneficiary at an early date.[458] Danish law was rather close to the Norwegian.[459] The Swedish judiciary, however, opposed this.[460] Not until several decades of the 20th century had passed was it definitely recognized in Sweden that a contract might have effects as to somebody not a party to it.[461]

The Anglosaxon law, however, deviated considerably. The desired effects in carriage — where the Continental doctrine had showed its value — were achieved in English law by a combination of ownership principles and contract assignment.[462] The

The court said: "Daraus folgt noch keineswegs, dass er allein vertragliche Ansprüche aus dem Beförderungsvertrag geltend machen kann. Vielmehr hat er den Beförderungsvertrag gleichzeitig zugunsten seiner mitfahrenden Frau und Tochter abgeschlossen, so dass diese als Dritte gemäss § 328 BGB unmittelbar das Recht erworben haben, die Leistung, d. h. die ordnungsmässige und ungefährdete Beförderung zu verlangen." At 65.

[456] Arts 1119 and 1121 of the Code adopted and extended the only exception to the rule which finally had been recognized by the Romans, *viz.* the *donatio sub modo* which meant that one could validly attach to a gift the condition that the donee should perform something for the benefit of a third party, *e. g.* the donor's children. This exception later had been much developed by Bartolus and in the end entered French law *via* Pothier. See further PLANIOL, 2 *Droit civil* 8th 407 nris 1231—1233. MAZEAUD, MAZEAUD & MAZEAUD 2 *Leçons* 702—711.

[457] See JOSSERAND, *Les Transports* 2d 367—369 nris 383—384; 2 RODIÈRE 209—214 nris 575—579; and literature cited by both. Further LEMOINE 431 no 622 and note 1. Cour d'appel de Paris, 28 Apr 1920, 1920 Dalloz 2 p 58.

[458] 1845, see STANG, *Innledning til formueretten* 279.

[459] USSING, *Aftaler* 2d 367 § 36-II. Further on Scandinavian law, see GÜNTHER-PETERSEN, *Ansvarsfraskrivelse* 151—152 § 31, 180—184 § 39.

[460] 1895 NJA 518.

[461] See NIAL, brief submitted in 1941 NJA 317, summarized at 324.

[462] In maritime carriage, the legal situation in England prior to 1855 had meant that all rights in respect of the contract of carriage contained in a bill of lading had remained in the original shipper or owner. Under the Law Merchant the property in the cargo passed to the endorsee of the bill of lading. The Bill of Lading Act, 1855, sought to secure conformity to the Law Merchant. FINLAY, *Contracts for the Benefit of Third Persons*, London 1939, observes at p 79: "This act . . . is restricted to cases where the property has passed, which is a fact that must be established before its aid can be invoked. The effect of the act is to cause the rights and liabilities arising under the contract contained in the bill of lading to pass with the property in the goods comprised therein, and is, therefore, a statutory transfer of rights and duties arising under a contract . . . Under this Act the indorsee of a bill of lading claims to be able to sue the carrier or the goods, on the contract contained

doctrine of privity of contract, meaning that "a stranger to the contract may neither derive rights nor incur liabilities thereunder", [462a] developed to the detriment of the idea of a reception of the third party contract. While early cases are said to have leaned in opposite directions,[463] *Tweddle v. Atkinson* in 1861 came to dominate the law and in *Dunlop v. Selfridge*,[464] decided by the House of Lords in 1915, it was finally and conclusively laid down that "no stranger to the consideration can take advantage of a contract although made for his benefit."[465] Exceptions to the privity of contract doctrine were very limited. Although the Law Revision Committee, in 1937, recommended the abolition of the doctrine,[466] its prevalence todays is beyond dispute.[467] The scope of the exceptions to it, however, varies somewhat between England and the United States and between the various States in the latter country.[468]

With this general state of the law in mind it is possible to proceed to a consideration of the value of the doctrine in relation to the air law problems here discussed. At times it has been suggested that the mere relation of a flight to a contract of carriage satisfying the requirements of the Convention should suffice to subject the carriage to the Convention. This way was adopted by Coquoz: "Peu importe que l'obligation de transporter concerne l'affréteur lui-même ou les voyageurs et expéditeurs".[469] But Coquoz' opinion there carries less weight because of his conceptual bases.[470] Both Alten[471] and Drion,[472] however, have sug-

therein because he is an assignee of the consignor, the other contracting party." See also CARVER-COLINVAUX 10th 48 sq; GUEST, *Bills of Lading and a Jus Quaesitum Tertio*, 1959 75 LQR 315.

[462a] See SIMPSON, *Handbook of the Law of Contracts*, St Paul 1954 p 299 (blackletter statement), cf *verbo* "Privity of contract" in Index.

[463] CORBIN, *Contracts for the Benefit of Third Persons*, 1930 46 LQR 12, at 17 note 11.

[464] *Tweddle v Atkinson*, 1861, 1 B & S 393, 121 ER 762; *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd*, 1915 AC 847.

[465] Per Wightman J. in *Tweddle v Atkinson* (note 352 b *supra*) at 397.

[466] Law Revision Committee, Sixth Interim Report, 1937 Cmd 5449.

[467] For recent reviews of the question, see FURMSTON, *Return to Dunlop v. Selfridge?*, 1960 23 Mod LRev 373; GLANVILLE WILLIAMS, *Contracts for the Benefit of Third Parties*, 1944 7 Mod LRev 123; E. J. P., *Privity of Contract*, 1954 70 LQR 467; DOWRICK, *A Jus Quaesitum Tertio by way of Contract in English Law*, 1956 19 Mod LRev 374.

[468] See generally CORBIN's chapter on *Third Party Beneficiaries*, in 4 CORBIN *on Contracts*, St Paul 1951 p 1—401 §§ 772—855.

[469] *Le droit privé* 92. Cf LITVINE, *Précis* 144 no 201.

[470] *Supra* pages 291—292 and 304.

[471] 4 ICAO LC 60.

[472] *Limitation* 137—138 no 120.

gested the same and they do not have his conceptual bias. Neither of them explain how they arrive at this interpretation of the Convention. Drion does not consider it necessary "that the persons or goods to be carried be determined at the moment the contract is concluded."[473] This would seem to indicate that he does not proceed from an agency relationship.[474] Both opinions conform well to the idea of accepting the charterparty as a contract for the benefit of a third party. If the charterparty qualifies as such a contract in determining whether the flight is subject to the Convention or not, it seems reasonable to believe that it so qualifies in other respects as well. Koffka, Bodenstein & Koffka are led by this very doctrinal structure of "Vertrag auf Leistung an Dritte" to assert: "Unerheblich ist, ob der Reisende selbst den Vertrag geschlossen hat oder ein Dritter zu seinen Gunsten . . .[475]

Charterparty clauses drafted to fit into the third-party beneficiary doctrine appear in the forms of the European IATA group. The leading KLM clause from 1951, and earlier, reads as follows in the applicable parts: "This Agreement is made by Charterer . . . for the accounts of subcontractors, passengers, and owners and other parties having or claiming any interest in the baggage and goods transported pursuant to this Agreement . . ."[476] Outside this group, however, as far as it is known, there are no special charterparty clauses which strive at establishing a classification of the agreement as a third party contract.

No court decisions indicating what may be the effect of the KLM type clauses have been brought to my attention. There are some interesting cases, however, in which the third party beneficiary doctrine has been used in the complicated situation arising from the government's intermediary position, which followed from the wartime intervention by governments in direct transportation.[477] Disputes followed as to the identity of the parties to the contract of carriage. Such cases were brought before

[473] *Limitation* 137 no 120. See also *infra* page 365.
[474] Compare *infra* page 365.
[475] *Luftverkehrsgesetz und Warschauer Abkommen* 268; cf BODENSCHATZ, 1957 12 VW 357, reprint 2 and RIESE 1958 7 ZfL 7. See also DUTOIT 58, 101.
[476] KLM ACA (HAG/LEG/164, 5th July 1951) art 18, same in subsequent editions; also in the one reprinted by AMBROSINI, *Fletamento y transporte* 38-38. Swissair ACA art 18; Sabena CV art 10-b (Fluggäste and Fracht editions); Lufthansa FCV (Form XL 4—56) art 1—3, but not in cargo charter form, nor in ACA (Form XP 46—61). Cf DUTOIT pages 101—102.
[477] See *supra* pages 13—17.

the French Court of Cassation in the years around the first World War when the French government sent its agents to travel on the then private French railways.[478] On the authority of these decisions, Koffler submits: "Pour expliquer ce contrat, il faut faire emploi de la stipulation pour autrui. En tout cas, le contrat existe, et ces voyageurs sont liés contractuellement avec la Compagnie."[479] The contract to which the said stipulation is affixed appears to be incorporated in the railway's *cahier de charges*.[480] When government intervention extended to aviation[481] the Continental lawyers proceeded on the same theory, and in *Nittka v. Deutsche Lufthansa,* Oberlandesgericht Köln held that an agreement between the civil service department ("Dienststelle") in the Reichswirtschaftsministerium to which Nittka belonged, and Lufthansa had extended the application of Lufthansa's conditions of carriage to Nittka when he travelled on official business because "die Vertragsschliessenden bei etwaigen Schadenfällen auch Dritten — vorliegend also dem Kläger [Nittka] — die Vertragsrechte zukommen lassen wollten."[482] There are no French cases in point but their absence may be explained by the fact that Air France during the war was requisitioned and transferred to the authorities in power "en pleine propriété" in such a way as to destroy Air France's identity as operator.[483] It is noteworthy that the argument has been made before an American court in a case, *Nolan v. Transocean Air Lines,* relative

[478] *Chemin de fer d'Orléans v Veuve Donat,* Cass, 21 Apr 1913 — officers of the mail — 1913 Dalloz I p 256. Cf *Chemin de fer d'Orléans v de Raignac,* 1916 Dalloz Périodique 1 p 176. Also Cass 29 Apr 1915 — military officers — 1916 Bulletin annoté des chemins de fer 2 p 205, as quoted by KOFFLER, *La détermination juridique du contrat de transport,* thèse Paris 1930 p 20 note 4.

[479] *La détermination juridique du contrat de transport,* 1930 p 20, and literature there cited.

[480] KOFFLER, *op cit* 21 and *supra,* page 109 and note 257.

[481] *Supra* pages 13—17.

[482] Page 13 in original judgment 26 Apr 1957. Nittka was a mining engineer sent by the Reichswirtschaftministerium on governmental business to occupied Norway. He went by a Lufthansa aircraft which fell into the Skagerak on 20 Apr 1944. Although seriously injured Nittka succeeded in swimming to safety. He received insurance money and certain social benefits, but in 1956, he sued Lufthansa to be compensated for such damage as was not covered by these awards. Lufthansa relied *i. a.* on the suit time clause of the conditions of carriage the period prescribed having elapsed (because of changes due to the post-war conditions in Germany) at the end of 1953. — The case before the Bundesgerichthof, where Nittka abandoned the argument relative to the identity of the parties to the contract of carriage, is reported in 27 BGHZ 101, 1958 7 ZfL 421. For German cases using similar devices in other fields of transportation, see 87 RGZ 64, (see note 455 *supra*), and 289; 1930 34 Das Recht no 1702.

[483] *Supra* pages 13—14.

to the crash of a Transocean plane operated under contract with the United States Government, "that one of the conditions" of this agreement between Transocean and the Government "was that the defendant [Transocean] would provide safe passage for the decedent and that the decedent was one of the intended beneficiaries of the said agreement."[484]

The apparent merit of this doctrinal structure in relation to the asserted insufficiency of the Warsaw Convention is its power to simplify determination of whether or not charter carriage is governed by the Warsaw Convention and to neutralize the scheme of separate tort claims active outside the frameworks established by the Convention. Its drawbacks, however, are no less apparent. So far we have only dealt with the classification of the instrumentality contract. It should be recalled, however, that the load contract may entail a problem of classification as well. Recently, clauses which may be termed *vicarious immunity clauses*[485] have been introduced in the IATA conditions of contract. Clause 4-e in IATA Resolution 275b reads as follows:[486] "Any exclusion or limitation of liability of carrier under these clauses shall apply . . . also to any person whose aircraft is used by carrier for carriage and his agents, servants or representatives acting within the scope of their employment." A clause to the same effect but somewhat differently framed appears in Resolution 600b.[487] While the effect of such clauses is a problem to which different answers may be offered in different jurisdictions,[488] they will, when effective, give

[484] *Nolan v Transocean AL*, 1959 USAvR 106, at 107. For continuation, see 1960 USAvR 40. The Federal District Court, SDNY, 14 May 1959, however held that Transocean's motion for summary judgment must be granted because plaintiff's cause of action was barred by the applicable statute of limitations; and therefore nothing can be concluded but that the device has been argued. Furthermore, the case involving the wrongful death situation and the action being predicated on the California Wrongful Death Statute (see p 108), it is not clear that the action in fact was based on contract. On the confused situation as to wrongful death and contract compare *supra* pages 294 sq.

[485] Under the inspiration of Holmes, J. in *A M Collins & Co v Panama Rly Co*, 1952 AMC 2054; 197 Fed 2d 893.

[486] Cf *e. g.* Lemoine 431 no 622 note 1.

[486] Issue 2 Mar 1959.

[487] Issue 2 Mar 1960 clause 1: "For the purposes of the exemption from and limitation of liability provisions set forth or referred to herein, 'Carrier' includes agents, servants, or representatives of any such air carrier." This clause is well known in maritime law under the name of "identity of carrier" or "demise" clause, see SELVIG *Unit Limitation of Carrier's Liability — The Hague Rules Art. IV (5)*, in 5 Arkiv for Sjørett 1—264, at 169.

[488] See generally SELVIG *op cit* 168—170 and Anonymous Note, *Transporting Goods by Air*, 1959-60 69 Yale LJ 993—1016, at 1007,

a new perspective to the problem of the application of the Warsaw Convention. The IATA conditions of contract govern the load contract. If the load contract by itself satisfies the requirements of the Convention, as applicable to that contract, the fact that it inures to the benefit of the supplier would seem to place the latter under a Warsaw liability. Suppose that at the same time the instrumentality contract satisfies the Convention, as applicable to that contract. When the instrumentality contract is considered to be made for the benefit of the passenger/shipper, this means normally that his rights and obligations are determined by the Convention as applicable to the instrumentality contract. In view of the fact that the original Warsaw Convention involving one liability standard may apply between certain states, while the Convention as amended by the Hague Protocol involving another liability standard may apply between other states and the two contracts involved in a complicated situation may belong to different conventions, it is apparent that under the third party beneficiary scheme the courts may be faced with conflicts. Which liability standard is to prevail, that attached to the instrumentality contract or that attached to the load contract? The problem is repeated when the instrumentality contract is a Warsaw contract and the load contract is not, and *vice versa*. It may indeed be doubted whether this conflict can be avoided even should there be no vicarious immunity clause in the load contract. After all, if the benefit flowing to the passenger/shipper under the instrumentality contract is that he secures carriage, it appears to be difficult to dispute that benefits flow to the supplier from the load contract inasmuch as this brings him the money which keeps his fleet flying. The flexibility of the third party beneficiary device, therefore, would seem at times to defeat itself.

## § 3. *Agency clauses*

Agency clause in British air chartering — wording of clause — distribution of clause — leading idea behind clause: Article 24 — survey of contract law concerned — personality in contract — representation in contract — undisclosed principal doctrine — Continental regulation of "commission" business — Code de commerce art 101 — French waybill — passenger carriage — German and Scandinavian "Kommission" principles — analysis of law as applied to the case of middleman assimilated to passenger/shipper — absence of clause: when fatal to assimilation? — Which clause is primary? — travel agency conditions — cargo carriage conditions — coordination of agency clauses in instrumentality and load contracts — charterparty contradicts load contract — agent's conduct contradicts load contract — charterparty contradicted by non-existence of principal when charterparty concluded — importance of time lapse in coordination in inclusive air tours — analysis of law as applied to the case of middleman assimilated to carrier — same results — explanation of distribution of the charterparty agency clauses — insufficiency of legal considerations to explain distribution generally — in England — absence of clause in France explained — absence in Scandinavia explained — absence in the United States — private law reasons — CAB policy reasons

The agency clause has a stronghold in the British air charter business by virtue of its adoption in the BIATA charterparty form, originally inherited in substance from the Imperial Airways forms.[489] The clause reads as follows: "This agreement is entered into by the Charterer both on his own behalf and as agent for all persons and the owners of all goods carried in the aircraft."[490] This clause is used not only by the members of BIATA in their company variants of the BIATA form[491] but also by a number of the companies belonging to the European IATA group, headed by KLM.[492] In France the agency device seems less appreciated. However, it is discreetly adopted by UAT and Air France.[493] In Germany, a number of the German independent airlines used the BIATA form as a model for their own company forms.[494] In Scandinavia, however, apart from Scanair's and Braathens

[489] See *supra* page 219.
[490] BIATA ACA clause 16.
[491] Silver City ACA clause 15; Skyways ACA clause 16; Independent ACA clause 15; Eagle ACA clause 29; etc.
[492] KLM ACA 1951 art 18; Swissair ACA art 18: Sabena CV art 10-b; Lufthansa FCV Art 1-3; IATA Model Air CA (1954) art 13, (1957) art 15.
[493] There is no clause spelling out an agency in the Air France Contrat type provisoire passagers & bagages, but the company's Circulaire d'instruction No 7 envisages that "L'affréteur doit traiter, . . . . au nom et pour le compte d'un groupe constitué, existant antérieurement à la conclusion du contrat . . .", see art 1—III 1er règle 2°. — UAT CdA art IV-1: "L'affréteur, ayant conclu la présente convention tant en son nom propre qu'en celui de tous intéressés: passagers, propriétaires de marchandises et bagages, . . ."
[494] Deutsche Lufttransport FCV Art 14; LTU FCV clause 24; Karl Herfurtner FCV art 17; Trans-Avia FCV art 17.

SAFE's foreign-inspired forms[495] there are no forms known using the agency clause. In the United States, until recently, the clause similarly was not used.[496]

The leading idea behind the agency clause is the wish to take advantage of Article 24 of the Warsaw Convention although the airline in fact engages in an operation involving an instrumentality contract and a load contract. The agency clause is believed to compress this three-party situation into a two-party situation in which the effect of Article 24 cannot be disputed. Such compression can be achieved by assimilating the middleman either to the passenger/shipper or to the carrier himself.

An appreciation of the effects of the agency device necessitates a short survey of some fundamental aspects of contract law. The basic principle, from which the agency clauses derive their effect, is that contracts are effective between those parties *in whose names* they were entered into.[497] The party need not personally attend to the making of the contract. He can leave the contracting to an intermediary, provided that he has conferred powers of representation upon the latter. As principal, he is thereafter bound by the contract entered into by the representative in the principal's name. In certain cases, however, representation is allowed the effect of binding the principal notwithstanding that the representative enters into the contract in his own name. This is possible under the Anglosaxon law of undisclosed principal.[498] The doctrine of the undisclosed principal entails that the principal may sue for breach of the contract.[499] Likewise, the contract may be enforced against the principal once his identity is disclosed. At the same time, the middleman is a party to the

[495] As to Braathens SAFE ACA, see *supra* page 222 note 421. Scanair ACA art 12-b contains an agency clause which appears to be copied from Sir WILLIAM HILDRED's Circular of 30 Nov 1960 on Standard Liability Clauses for Use in Charter Agreements between IATA Members and Outside Persons and Institutions Other than an Air Carrier, clause 3.

[496] See Air Charter Exchange ACA 1960 clause 16. Note that there was no equivalent in the predecessor, the Air Charter Traffic Exchange Form A.

[497] On this point, see generally the discussion of *Personality in Contract* by GOODHART & HAMSON, *Undisclosed Principals in Contract*, 1930 4 Cambridge LJ 338—345.

[498] See generally MECHEM, *Outlines of the Law of Agency*, 4th Chicago 1952 p 99 §§ 150—151.

[499] See United States — Statement with respect to forwarders, in 11 2 ICAO LC 78: "The . . . consignors whose goods were damaged could also bring their claims against the operating carrier. However, if this were done, the recovery . . . would . . . be . . . as an undisclosed principal upon the air waybill issued by the operating carrier to the forwarder."

contract as well and has a legal power to enforce it in his own name. This is a general doctrine and applies to air commerce as well as to other fields of business. Obviously, it dispenses with the requirement of express agency clauses.

In Continental law, however, the commercial law institutions of "commission", "Kommission", "commission de transport" and "Spedition", while covering some of the field of the undisclosed principal doctrine, are less developed as to the effects between the principal and the so-called third party, *i.e.* the party with whom the representative contracts on behalf of the principal. These effects are generally much more limited. However, there is one exception from this rule in the French *commission de transport* which in fact offers a regulation not far away from the Anglosaxon one.

Under the French Code de Commerce, article 101, "La lettre de voiture forme un contrat entre ... l'expéditeur, le commissionnaire et le voiturier." Under article 114 of the Code de l'Aviation, this provision applies to aviation as well as to surface carriage. Apparently it entitles the shipper, bypassing the *commissionnaire de transport,* to sue the carrier upon the contract evidenced by the waybill, even should the immediate parties to that contract be the carrier and the *commissionnaire.*[500] The *commissionnaire,* thus, would not be an independent intermediary. Article 101 has been explained in terms of the consignor, because of certain documentary requirements, always being known to the carrier as to his identity.[501]

Failing the support of article 101, however, the French law seems rigidly to adhere to the principle of no effect to *res inter alios acta.* In passenger carriage, therefore, even though principles of *commission de transport* otherwise may be applied,[502] the instrumentality contract *per se* has no effect between the carrier and the passenger, unless the intermediary travel agency has contracted in the name of the passenger. Quite normally,

[500] BAILLY, *La commission de transport,* in *Le contrat de commission,* Paris 1949 p 235—279, at 274, cf 254; and ROGER, note in 1929 Dalloz Périodique 2 p 29. — Compare *Sté Veuve Terrasson v Sté Messageries Nationales,* 1951 5 RFDA 440; 1957 11 RFDA 31. See also *Sté des Transports Clasquin v Sté Socotra* 1949 3 RFDA 204.

[501] See BAILLY *op cit* 254.

[502] Cf BAILLY *op cit* 249—250. See also *Rapport présenté par M. Dubrujeaud au nom de la Sous-Commission des Transports,* in 3 *Travaux de la Commission de Réforme du Code de Commerce et du Droit des Sociétés* 169.

however, the travel agency contracts with the carrier without disclosing the identity of the passenger.[503] In such cases there would be no contractual lien between carrier and passenger.

German and Scandinavian law proceed along lines in between the two French positions. In both legal systems the "Kommission" business is regulated by statute.[504] In Germany, even the "Spedition" business is regulated by statute, and the *Kommission* regulation applies to supplement the *Spedition* rules.[505] In Scandinavia, there are no statutory equivalents to these rules, but the *Kommission* regulation is believed to apply by analogy.[506] Nowhere, is the position of the travel agency yet regulated.[507] Under the *Kommission* principles the relationship between the cargo carrier and the shipper cannot be governed by the instrumentality contract: *Kommission* means "Mandat ohne Vollmacht".[508] However, under Scandinavian law the principal may, in certain cases, have the benefit of this contract, if he elects to assert his right against the third party himself.[509] He is never bound by this contract.[510]

As a consequence, when the desired result is the assimilation of the middleman to the passenger/shipper, the complicated situation may be analysed in the following way. The Continental law generally will require that the instrumentality contract be entered into in the name of the passenger/shipper, otherwise it will fail in its effect between this person and the carrier. This is not necessary, however, either in French cargo carriage or under Anglosaxon law generally. The absence of the agency clause in the instrumentality contract, thus, is fatal to the assimilation of the middleman to the passenger/shipper except in these two cases. The absence of the agency clause in the load

[503] Cf BAILLY *op cit* 253—254. See further *infra* page 365.

[504] ADHGB Arts 360—378; HGB §§ 383—406. Pan-Scandinavian Mercantile Agents Act, adopted in Denmark, 8 May 1917, Act no 243; Norway, 30 Jun 1916, Act No 1; Sweden, 18 Apr 1914.

[505] ADHGB Arts 379—389; HGB §§ 407—415. See ADHGB Art 387, HGB § 407—2.

[506] Cf EBERSTEIN, *Om spedition och befraktning*, Stockholm 1915 p 24; USSING, *Enkelte Kontrakter*, Copenhagen 1940 p 371 § 48-VI; compare GRÖNFORS, *Om ansvaret* 74 sq.

[507] In this context, administrative regulation is not considered.

[508] LABAND, *Stellvertretung bei dem Abschluss von Rechtsgeschäften*, 1866 10 ZfgdHR 205.

[509] Mercantile Agents Act §§ 56—58. Applying these provisions by analogy would seem to entail that a contractual direct relationship between the shipper and the carrier is not created until the shipper notifies the middleman of his intention to demand performance directly from the carrier.

[510] GRÖNFORS, *Ställningsfullmakt och bulvanskap*, Stockholm 1961 p 19. Compare *Norrköpings stads hamnstyrelse v Morales*, 1935 NJA 328.

contract is, without exception, fatal to this assimilation. Indeed, the primary function in the scheme is performed by the load contract clause which confers powers of representation upon the middleman; the instrumentality contract clause is rather a measure of coordination. Only under the third party beneficiary scheme is the primary function performed by the instrumentality contract.[511]

In the absence of an agency clause in the load contract, the charterparty agency clause will fail of its effect. In actual practice, however, in passenger carriage, this latter clause will almost invariably be supplemented by some sort of agency clause in the load contract. It is a general feature of the standardized contracts offered by travel agencies in Europe to the general public that the travel agency pretends only to operate as an intermediary agent — something in the nature of broker. Conditions to this effect have been adopted for general use by the French Union Syndicale des Agences de Voyages: "L'Agent de Voyage agit en qualité d'intermédiaire . . ."[512] and the group of travel agencies working in close cooperation with Air France,[513] as well as by the German Reisebüro-Verband,[514] the Swedish Resebyråföreningen,[515] Thos. Cook & Son, Ltd., Dean & Dawson, Ltd.[516] and the Workers Travel Association Ltd.[517] — Concerning the clauses relied upon in cargo carriage, the little information available indicates that consolidators are generally active only as agents of the carrier, and not of the shipper.[518]

The coordination of the contract clauses in instrumentality and load contracts is not always complete.[519] Travel agencies are

[511] Note the KLM type clause mentioned *supra* at page 355.
[512] Conditions Générales approved 4 Jan 1958.
[513] "Les inscriptions sont prises par notre bureau à titre d'agents."
[514] "Der Reiseunternehmer ist bei allen Reiseveranstaltungen nur Vermittler der . . . Transportgesellschaften, . . .".
[515] Allmänna resevillkor, originally adopted 10 Dec 1957. "Arrangören är i fråga om alla arrangemang endast förmedlare av transportföretag . . .".
[516] ". . . all tickets and coupons are issued by them and all arrangements for transport or conveyance or for hotel accommodation are made by them as agents . . .".
[517] ". . . in all cases so far as the Association shall not be acting as agent for principals other than Workers Travel Association Ltd., the Association shall be deemed to be acting as agent for the person or persons effecting the booking."
[518] According to Rinck, 1957 6 ZfL 321, "sei der Luftfrachtspediteur im internationalen europäischen Verkehr stets nur 'Agent' der Luftverkehrsgesellschaften." Compare Rössger, *Luftverkehr und Spedition* 20.
[519] How complicated it can be is illustrated by the IATA regulation for inclusive tour producers; *supra* page 103. The travel agency producing the tour is there made to agree that in selling the tour the carrier is acting only as the agent of the producer. The travel agency is the agent of the passenger, and the carrier is the agent of the travel agency; but the carrier, one would believe, was rather himself a party

forced to accept the standard forms of the airlines;[520] at the same time they adhere to their own general conditions in the load contracts with the traveling public. It may then happen that the travel agency appears as an independent intermediary, acting in its own name, in the charterparty, while the load contracts indicate that the travel agency is the mere agent of the passenger. Considering the by no means general acceptance of the agency clause in charterparties, this case must occur fairly often: the charterparty contradicts the load contract. The load contract, however, may also be contradicted by the conduct of the alleged agent. Such conduct, under schemes of mandatory law, *e.g.* the Warsaw Convention, may destroy agency status. The agency clause in the load contract, and even less, of course, in the instrumentality contract, will not strip the travel agency of Warsaw carrier status if the courts arrive at the conclusion that in fact the travel agency undertook to transport.[521] The

to the contract of carriage than the agent of his counterpart.

[520] This information was supplied by the Union Syndicale des Agences de Voyages in Paris during an interview, 1959.

[521] Such findings are by no means uncommon in France. Illustrative cases are: *Mac Carron v Agence Lubin*, Cour d'appel Lyon, 20 May 1926, 1926 Sirey 2 p 58; *Palamides v Sté Exprinter*, Trib com Seine, 8 Jan 1936 no 272, Cour d'Appel de Paris, 18 Oct 1938, account in the work of ROBERT, below, p 494—496, and recently *S. A. R. L. Transtours v Desnoyers*, Cour de Cassation, 11 May 1960, 1961 24 RGA 75, and *Plez v Sté Transtours*, same court same day, 1961 24 RGA 79, note Cas. For prior litigation, see *Livian v Transtours*, Trib com Seine, 4 Jan 1957, 1957 JCP II no 9932, Cour d'Appel de Paris, 26 Mar 1958, 1958 JCP II no 10617, 1958 Revue de jurisprudence commerciale 145. Aviation cases: *Jeantelot v Sté Michelson et Cie*, 1950 4 RFDA 101, 1951 14 RGA 81; 1953 7 RFDA 99, 1953 16 RGA 176; 1956 10 RFDA 217; but contra *Mare v Sté Michelson et Cie*, 1954 8 RFDA 87, 1954 17 RGA 193. French literature: BAILLY *op cit* 249—250, 253 sq. CHAUVEAU, *La croisière maritime*, 1959 JCP I no 1498; GEORGIADES, *Les responsabilités du commissionaire de transport et de l'agence de voyage dans le transport aérien*, 1957 7 RFDA 16—47; ROBERT, *Les agences de voyage*, 1938 1 Etudes pratiques de droit commercial 479—503; RODIÈRE, *La responsabilité des agences de voyage*, 1958 Recueil Dalloz Hebdomadaire, Chronique 241—244. — Findings of carrier status appear less frequently in Germany. There appear to be a few cases, however, in which the omission of any incorporation of the travel agency's general conditions containing the agency clause has permitted the holding that the travel agency was liable for damage done to a passenger by the transport undertaking which had been employed by the travel agency to carry the passenger. The basis of liability, then has been BGB § 278: the travel agency has made a contract of carriage and employed the transport undertaking as an *Erfüllungsgehilfe*. It appears to have been presumed that when nothing was said about the identity of the contractor, he must have been the travel agency negotiating with the passenger. KLATT, *Zur Haftung des Reisebüros*, 1956 8 Zeitschrift "Der Fremdenverkehr" (Offizielles Organ des deutschen Reisebüro-Verbandes E. V.), Fachbeilage "Das Reisebüro" nr 3/4 p 1—2. Cf BODENSCHATZ, *Haftung für den Fluggast in gecharteten Verkehrsflugzeugen* 1957 12 Vw 358 col 2, at note 17. — As to Sweden, it is noteworthy that the Supreme Court in *Lövgren v Riksåklagarämbetet*, 1953 NJA 688, held a travel agency carrying out an inclusive tour programme, liable in the capacity of operator for

coordination of the clauses may fail in a third case which is practically perhaps the most important one. It is a basic idea of representation, that representation between principal and agent cannot have effect without a principal being in existence at the time when the representative concludes the contract. In the absence of a principal existing at this time, the contract cannot bind, without more ado, anyone other than the immediate parties negotiating it. Although legal scholarship has attacked this principle[522] it appears to be followed by French[523] and English courts. Subsequent ratification by a principal cannot remedy the defect.[524] It only would seem to operate as an assignment of the agent's contract. The importance of this rule in relation to the agency device may be appreciated when it is recalled that the characteristic feature of inclusive tour business today is that charters are concluded half a year or more before the individual tickets are sold — *i.e.* the time at which the alleged agent has appointed his principals.[525] At the time of concluding the charter contract, there is no principal.

When the desired result is an assimilation of the carrier and the middleman, similar considerations apply *mutatis mutandis*. As to the coordination of clauses, little need be said. The agency between carrier and consolidator[526] generally arises from a

having violated the provisions of the Motor Carrier Act reserving regular services to undertakings licensed for such services. This case report, however, should be supplemented by the information that the travel agency had sold tickets for the tour which only indicated the name of the travel agency. (Information supplied by *Lövgren* in interview).

[522] See CHAUVEAU, *La croisière maritime*, 1959 JCP I no 1498, at note 5.

[523] Cour d'appel de Paris, 1re Chambre, in *Sté Transtours v Livian*, 1958 JCP II no 10617 col 2: "situation juridique . . . inconcevable puisqu'elle ferait desdites agences des mandataires auprès d'elles-mêmes".

[524] GOODHART & HAMSON, *Undisclosed Principals in Contract*, 1930 4 Cambridge LJ 325: "The doctrine of undisclosed principal is limited to a very important extent by the rule that no man may sue or be sued as an undisclosed principal on a contract made by an 'agent' unless that 'agent' was in fact his authorized agent *at the time of the formation of the contract*. This rule was finally declared in the case of *Keighley, Maxsted and Co. v. Durant* . . . If this rule did not exist, any person might intervene in any contract by agreeing with one of the contracting parties to give and accept retrospective authority." The citation given is: 1901 AC 240. FINLAY, *Contracts for the Benefit of Third Persons*, London 1939 p 96 makes the same submission but refers to *Watson v Swann*, 1862, 11 CB (NS) 756, 142 ER 993, in which, he explains, "the Court decided that it was not possible for a person to be a principal in a contract when the party who was alleged to be his agent had, at the time of the contract, never heard of him." CHESHIRE & FIFOOT, *The Law of Contract*, 5th London 1960 p 390—391,

[525] See *supra* pages 37—38.

[526] Cf RINCK, 1957 6 ZfL 321. — ALTEN, *Ansvaret for passasjerer og gods ved befordring med luftfartøy*, Norsk forsikringsjuridisk forenings publikasjoner Nr 38,

separate IATA agency contract by which the consolidator is appointed IATA Agent. At times, this contract may be contradicted by the load contract. Under German law, such contradictions may result from the applicable statutory clauses. In the capacity of *Spediteur,* pursuant to HGB § 408, the middleman is under a duty to further the interests of the shipper; in his capasity of agent, pursuant to HGB § 86, the middleman should further the interests of his principal, *i.e.* the carrier.[527] When agency status is contradicted by conduct,[528] as well as emptied of its contents by the non-existence of a principal when the contract is concluded,[529] these situations are equally fatal to the effect of the agency device as when attempts are directed towards the assimilation of the middleman and the passenger/shipper.

The agency device, it is recalled, is a common but not a universal device in air chartering. If charterparties were always drafted by lawyers who were only guided by strictly legal considerations, it would be possible to explain the distribution of charterparty agency clauses in reference to the local law from which the clauses derive their effect. As it appears, however, such legal arguments cannot provide a satisfactory explanation. Aircraft charterparty forms are international phenomena, and at times a successful form floats from company to company, from country to country, apparently almost undisturbed by contact with the local law. It may be recalled how the Imperial Airways form succeeded in establishing itself in Germany and Norway[530] merely because of the general British preponderance in post-war North-European aviation. The natural device in these areas to

p 8, submits that "the travel agency generally will act as the agents of the airline". Similarly, BODENSCHATZ, *Haftung für den Fluggast in gecharterten Verkehrsflugzeugen,* 1957 12 Vw 357 col 1—2: "in der Mehrzahl der Fälle".

[527] RÖSSGER, *Luftverkehr und Spedition* 20. This contradiction, probably, is not fatal to the scheme.

[528] See *Jonker v Nordisk Transport & Spedition,* 1961 USAvR 230; 1 Ark f L 273

[529] See *Style v Braun,* 1959 13 RFDA 405, 1961 24 RGA 284, at 291—292; 1 1959 8 ZfL 382. The air waybill was delivered to the consignor's agents by Braun, signing it "as agent only". The Tribunal de première instance de Genève said: "D'autre part, il a bien conclu le contrat de transport en son propre nom. Il cherche aujourd'hui à se retrancher derrière le fantomique capitaine Herminger, dont il n'a jamais parlé à son autre partie contractante. Il faut relever que la 'procuration' quele Sieur Herminger a conférée au demandeur est de deux jours postérieure à la redaction de la lettre de transport . . . Il convient donc de retenir que Sieur Braun est bien le transporteur au sens de la Convention de Varsovie." Pages 15—16 in the original judgment. Also compare Art 1-III 1re règle 2° in the Air France circulaire d'instruction no 7, *supra* page 359 note 493.

[530] See *supra* pages 222 sq.

solve the problem, if there was a problem, would have been the third-party contract,[531] not the British agency clause.

Even in reference to English law, however, the function of the clause appears doubtful. First, it at least does not reflect any faith in the prevalence in English law of the operator approach to the Warsaw carrier identity problem, advocated by the British delegation at Tokyo in 1957.[532] If that approach was the law of England, there was no need for an agency device in so far as liability was concerned. Secondly, the clause does not appear in the Baltic documents. These documents, it is true, reflect a French influence.[533] They may, of course, be expressions of a belief in the operator approach. However, what appears most likely, is that they reflect that under the undisclosed principal doctrine, when assimilation of the middleman to the passenger/shipper is desired, there is no need for an express agency clause in the charterparty.

Outside Great Britain, it is even easier to explain the absence of the clause in reference to local law. It is natural that French air cargo charters find no use for the clause. Article 101 of the Code de Commerce would seem to perform all the functions needed.[534] It is equally natural that the clause is not adopted in the truly Scandinavian forms. The underdeveloped state of the dichotomy of tort and contract removes the basic problem. Again, it is natural that the clause is seldom to be found in the United States. First there are reasons of private law. If we are to believe in the prevalence of the operator approach in this legal system, or, more correctly, this group of legal systems, the clause is not necessary; furthermore, the undisclosed principal doctrine performs the same service as the clause may render; finally, air carriers may wish to proceeed on the theory that air charters are private carriage,[535] not subject to the CAB economic regulations, and there-

[531] See *supra* pages 352—358.
[532] See *supra* page 292.
[533] See *supra* page 221.
[534] Compare *Sté Veuve Terrasson v Sté Messageries nationales,* 1951 5 RFDA 440, (continuation, 1957 11 RFDA 31).
[535] Note the submissions in the Anonymous Note, *Transporting Goods by Air,* 1959—60 69 Yale LJ 993—1016, at 1013 and note 140. — It is notable that the Flying Tiger CTA (1957) carried the following provision in paragraph 3: "It is understood that this agreement shall at all times be construed and applied as an agreement for private or contract carriage of persons and property and not as an agreement for common carriage or carriage for hire. Neither party shall do any act, or make any representation, or assert any right inconsistent with this paragraph."

fore object to an agency device which would bring the carrier into that direct contact with the general public which is one of the earmarks of the common carrier.[536] Secondly, CAB policy may account for the absence of the device in the United States. The interests of the Board in the contractual position of the travel agencies related to the protection of the scheduled air services generally. The Board proceeded on the assumption that wherever a travel agency signed on behalf of the charterer there had necessarily been a professional solicitation from the general public; but such solicitation must not be permitted since it might involve a serious diversion of passengers who would normally patronize the scheduled services. The charter regulations enacted by the Board therefore were strictly adverse to travel agencies negotiating in the position of charterer's agent.[537] Even in their capacity of carrier's agent, however, the American travel agencies were met with suspicion by the Board. They could render no service that the carrier could not render himself, if sufficiently financed. As agents of a number of carriers the travel agencies had shown their potentialities of upsetting the Board's regulation of operators of aircraft.[538] As to cargo carriage, the Board worked to make the air freight forwarders independent intermediaries[539] which would involve that, under the general law, they were carriers, not intermediary agents.[540] Agency clauses, accordingly, had no function, as common carrier status was part of *ius cogens*.

[536] The following clauses appeared in American Airlines Transportation Agreement of 1946: "It is agreed that all transportation contemplated hereby is entirely on a charter basis, that shipper in no sense acts or will act as contractor's agent and that contractor does not in any way hold itself out as a common carrier in respect of such transportation. "(Clause 9)." Contractor agrees that, in carrying out any transportation of cargo under this agreement, it acts and will act solely as a contractor with Shipper and in no sense as the agent of Shipper . . . (Clause 10)

[537] Economic Regulations Parts 207.1-a; 212.1-a-2; and 295.20: "A travel agent may not . . . engage in the administration of the charter flight . . . including signing the charter agreement for the charterer . . ." For a more general discussion of the position of the travel agents in American aviation, see *Off-Route Inv ExD* 22-31; CAB E-12945/6 p 13. Further information in 2 *Antitrust Hearings* 1308—1338, 3 *Antitrust Hearings* 1752—1822.

[538] See *supra* pages 34—37.

[539] See *supra* pages 40—41 and 93—94.

[540] See *supra* pages 168—169 compared with note 257 on pages 184—185.

## § 4. *Substitution clauses*

Substitution, novation. *cession* and assignment — Article 24 — transfer of duty to carry or transfer of right to be carried — IATA substitution clauses — charterparty variants — Alten — the circulating contract — novation — *animus novandi* — synallagmatic contracts and unilateral contract parts — *cession de dette* and *cession de créance* — transfer of duty to carry — can in practice mean transfer of contract — creditor's assent — maritime tradition supporting view of the contract being transferred — cargo carriage — *contra* in passenger carriage — tendency in German general law — transfer of right to be carried — *ex scriptura* promises — relationship between promise and basic *negotium* — the negotiable Warsaw promise — splitting a synallagmatic contract into claims and debts — defences adjusted to original creditor — the Mallorca flight — Is the Warsaw contract transferred by transfer of the right to be carried? — impact upon transferee's intent — clausal law meaning of word »substitute« — discussion of its meaning in relation to scheduled flights — Drion — exacting passenger/shipper's assent — ticket stamping — Riese — submission — coordination of devices

The systems of law here discussed, all, in one form or another, on certain conditions, permit the substitution of a party to an agreement. Substitution generally may mean that the original party withdraws from the contract altogether and the new party takes his place. The law of such substitution is gathered in institutions such as novation generally, the Continental "cession" ("Zession") and the Anglosaxon "assignment". How can they be used to remedy the alleged insufficiency of the Convention?

The answer is that this institution allows the change of a three-party situation into a two-party situation thus placing the relationship under Article 24. The middleman transfers his part in the operation to either of the other parties. The charterer may transfer his contract with the passenger/shipper to be executed by the aircraft operator, or he may transfer the charterparty to the use of and fulfilment by the passenger/shipper. The first case entails the transfer of a duty to carry, the second a transfer of the right to be carried. In either case the ultimate contractual situation will be that of a single two party contract.

The most important substitution clause is the one appearing in the IATA conditions of carriage. Clause 7 of Resolution 275b and Clause 5 of Resolution 600b both provide in part that "carrier may without notice substitute alternate carriers or aircraft." This provision appears in the carrier's tickets and air waybills and is almost invariably incorporated into the charter contract by reference. Seldom, however, does the provision in this form appear directly in the charterparty.[541] The charterparty generally con-

[541] See however UAT CdA art 1-7; Air Charter Exchange ACA clause 5; Scanair

tains a modified variant, either a reservation by carrier of the right to substitute *aircraft*[542] or the provision that the carrier has a right to *subcontract* the operation to third parties,[543] often supplemented by some discreetly placed clause disclaiming all liability for the acts of the sub-contractor.[544]

While the IATA substitution clause points to the transfer of the duty to carry, there is not much documentary evidence of clauses working a transfer of the right to be carried. Alten, however, is a forceful and persistent supporter of the view that air chartering, properly viewed, involves the transfer of the right to be carried.[545] In his last contribution. Alten went so far as to submit: "Different from subchartering, but perhaps more practical in aviation than in shipping, is the simple transfer of the right to be carried under a contract of carriage. This is what happens when, *e.g.,* a shipowner charters an aircraft for the carriage of a ship's crew or a military agency does so for the carriage of a military unit or a freight forwarder does so for the carriage of goods which he has undertaken to forward. The charterer does not become carrier and is not liable under the Convention as against the passengers or the owners of the goods. He only has to pay the freight . . . It may also happen that a travel agency charters an aircraft partly or in its entirety and pursuant to the charter agreement cedes the right to be carried to those passengers with which it is negotiating but without concluding any subcontract of carriage."[546]

The leading idea behind these arrangements is that the contract, while retaining its unity, can freely circulate between persons successively becoming parties to it, and successively being released from their participation in it. There is one general legal doctrine which fully supports this idea. From Roman law we

ACA art 2; and IATA Model Air CA (1954) art 24.

[542] KLM ACA art 2-2; Swissair ACA art 2-2; Lufthansa FCV (forms VK 88—55 and XL 4—56) Art 2-2; of Sabena CV (Fluggäste and Fracht) art 3-b. Further: BIATA ACA clause 15; Eagle ACA (1958) clause 2; Fred Olsen ACA clause 1.

[543] BEA SFOA condition 1; BOAC SFOA condition 1, BOAC CC clause 18; Air France Contract condition 1; Lufthansa Agreement (cargo) art 4; TCA CA; Flying Tigers CTA paragraph 18.

[544] BEA SFOA condition 17 (T 176 4th); BOAC CC clause 17.

[545] 9 1 ICAO LC 131; 1956 TfR 478—479; *Ansvaret for passasjerer og gods ved befordring med luftfartøy,* 1958, Norsk forsikringsjuridisk forenings publikasjoner Nr 38 p 7—8.

[546] *Ansvaret* 7—8. Translation mine.

are familiar with the idea of *novation* of a contract.[547] This means that the original contract is discharged through the introduction of new parties, whereby a new contract is created in which the terms remain the same as in the old one but the parties are different.[548] It is quite clear that the novation satisfies the Warsaw Convention. If otherwise applicable, it continues to apply to the novated contract. This is so whether the novation corresponds to a transfer of the right to be carried from middleman to passenger/shipper, or of the duty to carry from the middleman to the supplier. The principal requirement of novation is *animus novandi,* the intent to novate the contract. This is a heavy burden of proof. "La novation ne se présume point;" says article 1273 of the Code Civil, "il faut que la volonté de l'opérer résulte clairement de l'acte".[549] Even German legal scholarship treats novation with caution.[550]

As already indicated, however, the substitution of parties may also be explained in terms of a distinction between a transfer of the duty to carry and a transfer of the right to be carried. It must then be noted that the contract of carriage is a synallagmatic institution with rights and duties interwoven in intimate relationship to each other. The duty to carry and the right to be carried, on their part, are unilateral entities. Their unilateral character results from the fact that they are notions considered to exist without being dependent on counterperformance. They are static notions rather than dynamic ones such as the contract of carriage. However, ever since 19th-century German legal thinking dissatisfied with novation worked out the doctrines of "Schuldübernahme" and "Gläubigerwechsel"[551], the normal approach to questions of substitution of parties has been to consider them in terms of the transfer of a debt, "cession de dette", and the transfer of a claim, "cession de créance." Does the transfer of these unilateral entities fit into the pattern of a Warsaw contract circulating between the various parties to a complicated situation?

[547] As to Roman novation, see SCHULZ 483 sq no 815; SOHM-MITTEIS-WENGER, *Institutionen* 17th Berlin 1949 p 483—487 § 78; 2 WINDSCHEID 5th 285 § 338.
[548] See *e. g.*, PLANIOL 8th 174 sq §§ 529 sq; SIMPSON *on Contracts* 563 sec 159.
[549] See generally RIPERT & BOULANGER, 2 *Traité* 635—637 nris 1756—1760.
[550] See generally ENNECCERUS-LEHMANN, *Recht der Schuldverhältnisse*, in ENNECCERUS-KIPP-WOLFF, 2 *Lehrbuch des Bürgerlichen Rechts* 15th Tübingen 1958 p 303 § 75. Compare *infra* page 376.
[551] The leading contribution was DELBRUCK, *Die Uebernahme fremder Schulden nach gemeinen und preussischen Rechte*, Berlin 1853. See generally 2 PLANIOL 8th 135—138 nris 392—398, in particular no 394.

For several reasons the transfer of the duty to carry is the easier case to handle. The general principle is that the transfer of a debt cannot take place without the creditor's assent.[552] The transfer of a right, on the other hand, unless there is contract to the contrary, operates without the participation of the debtor; he may only have to be notified to prevent his being discharged by subsequent performance to the original creditor.[553] For practical purposes then, the two institutions almost merge into one, since once the creditor's assent to the transfer of the debt is received, it is up to the other party to transfer the rights involved. Furthermore, as will be seen, the nature of the creditor's assent in air commerce is often such that it is mere child's play to construe it either as consent to the transfer of the debt or as consent to novation. In particular legal areas, Continental legal opinion has grown accustomed to regard what is taking place as a case of transfer of the whole contract. There appears to be a maritime tradition to construe the case of the charterer's bill of lading this way. It was prescribed in ADHGB § 664, and in HGB § 662, until it was abrogated in 1937, that it was not the charterer, the "Unterverfrachter", who was bound to execute the subcharter contract ("haftet für die Erfüllung des Unterfrachtvertrags") but the shipowner, the "Rheder", provided that the execution fell within the duties of the master and had been assumed by him, in particular by his acceptance of the goods and his issuance of the bill of lading.[554] This solution, adopted in Scandinavian law[556] as well as, it appears, in French law[557], was considered as a "Fall einer gesetzlichen privativen Schuldübernahme"[558] while at the same time it was occasionally interpreted to entail that the shipowner had "une action directe et un droit de créance contre le

[552] Note, however, that the *cession de dette* as such is not known to French law, but the same results are achieved by indirect means, See *e. g.*, MAZEAUD, MAZEAUD & MAZEUD, 2 *Leçons* 964—973 nris 1208—1230 and p 977—987 nris 1231—1252; ARMINJON & NOLDE, 2 *Traité de droit comparé*, Paris 1950 p 159 no 426.

[553] As to Anglosaxon law, see *e. g.*, SIMPSON *on Contracts* 330 sec 88.

[554] The provision was applied with some caution in Germany. SCHAPS, 1 *Das deutsche Seerecht, Kommentar* 2d Berlin & Leipzig 1921 p 571 submits "dass seine Anwendung so zu beschränken ist auf solche Fälle, in denen der Unterfrachtvertrag unter . . . Bezugnahme auf den Hauptfrachtvertrag geschlossen ist."

[556] It was accepted definitely in Scandinavian maritime law by *Vestlandske Lloyd v Meyer*, 1903 4 NDS 331. See *supra* note 211 in Chapter Three.

[557] *The Oronsay* (*Gardiner et Cie v de la Brosse*) 1899—1900 15 Revue internationale du droit maritime 17; RIPERT, 2 *Droit maritime* Paris 1922 p 302—303 no 1366, cf 4th 281 no 1370; KOFFLER, *op cit* 41.

[558] WILLNER 20.

destinataire pour le paiement du fret."[559] Failing the support of express provision, however, the idea of transferring the contract of carriage from charter to shipowner was less successful. Thus, in German maritime passenger carriage the law was interpreted to mean that "Zwischen dem Unternehmer [*i.e.* the middleman] und dem Reisenden gilt der Überfahrtsvertrag . . . Zwischen R e e d e r u n d R e i s e n d e n bestehen keine vertraglichen Beziehungen."[560] In German general law, however, legal scholarship grew prepared to accept the simultaneous transfer of the debts and the claims arising from a contract as involving the transfer of the complete contract, including the right of cancellation and other powers to change the legal consequences of the contract, provided that the parties had contemplated the transfer of the complete contract: "Es genügt, wenn sich die Absicht der Parteien bei der Verbindung von Zession und Schuldübernahme auf den gekennzeichneten einheitlichen Erfolg richtet; . . ."[561]

The case of the transfer of the right to be carried is less clear in practical application. Industrialized society, it is true, is accustomed in commercial law to deal with unilateral promises of various kinds, the most extreme ones being the German-Scandinavian creations which derive their effects *ex scriptura*.[562] These promises circulate between various holders who successively acquire the status of promisees. Characteristic of these promises has been that they are more or less completely detached from the basic legal relationship, the *negotium,* in the course of which they were created. Since the Hague Conference, 1955, it is clear that the synallagmatic Warsaw contract can be converted into a unilateral promise to carry.[563] But in today's air commerce it is certainly not so converted. The submission that air chartering properly viewed means the creation of a Warsaw contract between passenger/shipper and the supplier because the middleman transfers his right to be carried to the former must, therefore

[559] See *The Oronsay,* in note 557 *supra.* German and Scandinavian legal opinion generally, however, were not prepared to accept a transfer of the complete contractual relationship between shipper and middleman, see *e. g.,* JANTZEN, *Tidsbefragtning* Kristiania 1919 p 126—129; JANSSEN, *Die Zeitcharter* Leipzig 1923 p 66.

[560] SCHLEGELBERGER & LIESECKE, *Seehandelsrecht* Berlin & Frankfurt a. M. 1959 p 470 Anm 2 to § 676.

[561] ENNECCERUS-LEHMANN, *Recht der Schuldverhältnisse* 13th 336 § 87. Later editions have suppressed this discussion.

[562] See *e. g.,* HECK, *Grundriss des Schuldrechts,* Tübingen 1929 p 194 § 65.

[563] Hague Protocol Art IX, amending art 15 of the Convention.

be seen in reference to the general state of the law concerning substitution of parties.

In relation to the right to be carried, taken by itself, which can be transferred without the debtor's consent (unless it is part of a contract *intuitus personae)*, the shortcomings of splitting a synallagmatic contract into a claim and a debt grow more apparent. The transfer of contracts, whether an insurance carrier's total stock of contracts or a single Warsaw contract, run into the difficulty of not being detached from the original *negotium.* The right to demand performance may freely circulate but the debtor's defences, *e.g.,* the *exceptio non adimpleti contractus,* remain adjusted in reference to the original creditor.[564] From the field of air chartering one may consider the case when an aircraft, engaged on an inclusive tour programme and flying from Stockholm to Las Palmas de Mallorca, turned in midair with all its passengers because the chartering travel agency refused to sign a cheque to the airline, a dispute over the airline's billing having arisen.[565] Is the right which the charterer in such a case has conferred upon the passenger/shipper equivalent to the contract of carriage which is required to make the Convention apply? The answer to this question may be different in different legal systems and it is easy to see that the situation fits better into the third-party contract pattern in jurisdictions recognizing that structure than corresponds to ideas of novation or assignment of contracts. While it is beyond the scope of this book to submit possible answers for the various jurisdictions, as no case law is known, it should here be indicated how the problem reacts upon the passenger/shipper's intent. Since the assignment of a right is an ordinary contract, its effects are controlled by the parties' intent. Should the transfer entail, however, that the middleman is released from all obligations as against the passenger/shipper

[564] Inocêncio GALVAO TELES, *La cession de contrat,* 1951 RIDC 217—237, at 223—224: "L'interdépendence synallagmatique ne va pas jusqu'au point d'empêcher que les effects actifs et passifs circulent séparément . . . Cette interdépendence se manifeste . . . dans la possibilité d'exercer l'*exceptio inadimpleti contractus* ou dans l'action en résolution de la convention (c'est la condition dite résolutoire tacite) pourvu que les obligations et droits continuent d'exister, encore que ce soient des personnes différentes qui en soient titulaires. Dans l'exemple donné, l'acheteur peut se refuser à payer au *cessionnaire* tant que le vendeur (le cédant) ne lui a pas remis la chose vendue, et il peut même résoudre le contrat en se basant sur ce défaut de remise."

[565] Facts as stated in *Transair Sweden v Svensk Bussreseljänst,* and *Transair Sweden v Skandinavisk Resebureau,* Stockholms rådhusrätt files T 267/57 and T 252/57 respectively; cases settled before trial.

while he can destroy the value of the matter transferred at his pleasure, it appears strange that anybody would willingly agree to be the transferee. Such an intent can certainly not be presumed, and in the absence of this intent, it appears that Alten's submission must fail. Accordingly, this theory seems to be an acceptable one only in the cases of novation and situations equivalent thereto in which the middleman steps out of the contract altogether and the passenger/shipper steps into it.

On the basis of this analysis of the law, what do the clauses mean?

In reference to the substitution of carrier clauses, first, it may be noted that the word "substitute" in English law does not have the connotation of assignment which "substitution" has acquired in Swedish law.[566] "Substitute" is a loose reference to subcontracting as well as assigning and this vagueness is also reflected in the translations of the clause into other languages which have been effected by the airlines.[567] The meaning of the clause thus may be subject to dispute. In air chartering, the clause appears to have raised only incidental remarks made in the discussion of cancellation and non-performance clauses. Its meaning, however, has been discussed in relation to scheduled flights. Drion has submitted that, in substitution arrangements based on these IATA conditions, "the carriers who would have been substituted should be considered agents of the issuing carrier falling within the notion of *préposés* of Article 20."[568] Thus, the IATA clause would seem not to indicate assignment, and the sole fact that the passenger/shipper is subject to the IATA conditions of contract cannot imply any assent to an assignment.

The challenge then lies in what assent can be exacted when the substitution is decided. We may use the example of a carrier experiencing a breakdown of its services and therefore chartering a substitute plane to perform the scheduled flight. Before takeoff of the substitute carrier, it is usual to indicate his identity to the passengers by stamping his name into the boxes for "Endorsements" or "Via Carrier" on the regular IATA tickets.

[566] See RODHE, *Obligationsrätt* 609 § 55 A.
[567] Air France GCP art 10—2: "Le transporteur peut, . . . sans qu'il ait à donner un préavis se substituer un autre transporteur . . ." Lufthansa GCP Art 10-2-a: "Der Luftfrachtführer kann ohne Ankündigung andere Luftfrachtführer . . . einsetzen."
[568] *Limitation* 245 no 202.

Does this act amount to the transfer of the contract of carriage substituting the airline that is to fly the passengers for the airline that has ticketed them? Riese has disputed the idea that a mere acceptance of a ticket with the added initials of the substitute airline would suffice to establish assent to such a result. He suggests, on the contrary, that courts in all likelihood will consider the act of the passenger as a mere permission to the ticketing airline to subcontract the performance but not to transfer it.[569] Since most people will be surprised to hear that by such an insignificant act as putting a ticket already bought and paid for, after its being checked at a counter, back into one's pocket, one would have made such an important change as that of transferring the contract, it at least appears reasonable not to strain the interpretation of the passenger's act to his disadvantage but rather allow the construction that is least in derogation of the rights already vested in him to prevail.

Secondly, turning to the transfer of the right to be carried, apart from what already has been said about the difficulty of making the transferee's intent fit into the substitution scheme, it will often be found when a complete documentation covering the complicated situation is available, that the contracts involved are too badly coordinated to permit any inference of an intent to transfer even on the part of the transferor. A middleman who is styled the agent of the supplier, certainly has no such intent without contradicting himself. A number of the stereotyped charterparty clauses, furthermore, prohibit the charterer from assigning the contract without the carrier's prior, often written, assent.[570] In such a case, of course, without such assent being produced, the assignment cannot be established.

The objections to the substitution scheme now reviewed lead to the conclusion that assignment, at least as air chartering stands today, is not often a useful device in spite of the IATA clause appearing by reference in most charterparties.

[569] RIESE, 1958 7 ZfL 7.

[570] *E. g.*, BIATA ACA clause 10; Baltairvoy 1951 clause 6-vii, Baltairpac clause 5-vi; Air Charter Exchange ACA clause 15; Chartepartie dite Transair paragraphe XI. Note Instone & Co Ltd Aircraft Charter Party clause 12: "Charterers have the right to transfer this Charter Party, but in such case the original Charterers shall remain responsible for the right and true fulfilment of same." Compare Transair Sweden Charterkontrakt § 6: ". . . befraktaren . . . äger att i egenskap av fraktförare disponera över kontrakterad lastkapacitet. . . ."

## § 5. *Documentation*

Warsaw carrier status as a result of carrier's name appearing on traffic documents and documents being handed to passenger/shipper by the same carrier — separation of tickets and air waybills — tickets older than modern notion of contract — tickets are a help to operator, not contracts — Goddard — conditions of contract effective because of ticket or because of tariff — success of tariff system has reduced ticket functions — maritime exception to development — clauses of maritime ticket recognized as part of contract — air tickets are based on maritime tickets — Warsaw Convention view of ticket — penalty for not delivering ticket — if the ticket is the means by which to avoid the Warsaw penalty, is it also the way to establish a Warsaw relation? — charterparties and the ticketing efforts — the strategic position of the middleman in ticketing — practical to leave ticketing to him — early French attitude — certain special situations — risks involved in middleman assuming ticketing — the Warsaw penalties — the tort claims — leaving ticketing entirely or partly to operator, a dominating feature in charterparties — carrier's documents, charterer fills them in and hands them to passenger — charterer to indemnify operator — Pan American clause — charterer's load lessened when agency clause inserted — BIATA group clause — airwaybills — contradictions in Convention — obligation upon consignor, penalty upon carrier — Hague Protocol — the air waybill is the result of two parties' cooperation — more equal to making a contract than ticketing — identity of parties to the air waybill decisive for the identity of the parties to the Warsaw contract — one air waybill made out to middleman for the entire load — ticket never made out to middleman

The device which airlines have thought to be most helpful in meeting the possible difficulties involved in carrying out charter operations under the Warsaw Convention has been reliance on the Warsaw documentation. It is common belief that if the aircraft operator succeeds in handing his own ticket to the passenger or his own air waybill to the shipper he will by that very act be clothed with Warsaw carrier status as against that same passenger or shipper. A solid majority of the charterparty forms now in use or previously used purport to secure that the operator is able to ticket or waybill his customers in this way.

The reliability of this device cannot be properly appreciated without reviewing tickets and air waybills separately. There are important distinctions between them from a more general legal point of view.

The idea behind the attempts to allow the operator to issue documents of carriage to his customers is that these documents incorporate a contract and that the handing over of the document is the act creating a contract between the parties to the transaction (a party to the transaction, of course, includes a principal present by way of an agent) provided that their names appear as parties in the document.

The success of this idea as to *tickets* is surprising. Tickets are much older than is the modern notion of contract. The Crusaders travelled on a "carta"[571] and travellers between the various parts of the Swedish realm, which at one time embraced most of the Baltic, received "Frij-Zedlar"[572] when using the services of the mail yachts regularly plying over the Baltic Sea during the 17th and 18th centuries.[573] The evident function of such tickets was to make sure that the right person was admitted on board and carried to the right destination: they were an aid to the Captain of the vessel and nothing more. Reliance on the ticket became an early characteristic of railway law. By serving as a receipt for the fare and as an indication to the railway personnel of the passenger's rightful destination, the ticket was the simple device by which industrialization could spread into contracting so that industrialized mass transportation was made economically possible. The advent of industrialization, however, inspired carriers to make use of tickets for new purposes. Bills of lading and express receipts were recognized as "written contracts to the just and reasonable terms of which the shipper by bare acceptance of the instrument becomes bound . . ."[574] The passenger ticket, however, could not, as desired by carriers, equally easy be made to render the service of incorporating the contract. The ticket was, says Goddard, "spoken of as a receipt, a token, which does not profess to contain the contract of carriage, but only to show that the passenger has made a contract to be carried on the trains of the carrier between the stations specified".[574a] The ticket had difficulty evolving further although it did become accepted as conclusive evidence of the passenger's contract, due to the obvious expediency of this device for the frequently occurring situation where a passenger was on the wrong train and was disputing the contents of his contract of carriage with an unknowing conductor.[575] There was one good reason why the

[571] GOLDSCHMIDT, *Universalgeschichte des Handelsrechts* Stuttgart 1891 p 344 note 43.
[572] Or "resesedel" or "fracht-Zedlar".
[573] See Kanslikollegii Instruktion May 1690 for Skepparen på Påstjakten emellan Rewel och Pårkala Udd § 8 ; *Idem*, Instruction 3 Mar 1724 för postiljonen i Wittow § 11. In RUDBECK, *Svenska Postverkets fartyg och sjöpostförbindelser under tre hundra år*, Stockholm 1933 p 98 and 207.
[574] GODDARD, 1926, 25 Mich LRev 2. För similar ideas, see ENNECCERUS-LEHMANN, *Recht der Schuldverhältnisse* 15th 862 § 216. Cf *Aktor v Pedersen Pynten*, 1880 NRt 711; but HAGERUP in 1891 NRt 773.
[574a] GODDARD, *ibid.*
[575] GODDARD, *ib.*

ticket should not evolve further, namely, that its function of bearer of the contract terms generally was assumed by carrier tariffs. Tariff filing schemes became a concomitant to governmental supervision of rates[576] and as a result the ticket in general could return to its older and simpler functions. The very efficient systems of the various subways by which a piece of cardboard or a metal disc is delivered from a machine in exchange for the fare, put the matter back into proportion.

In one area, however, this development failed to take place. Maritime carriage for one reason or another, probably because it was less governmental and more international and intercontinental in character, failed to reduce the importance of ticketing to its proper dimensions. The various passage tickets were used to carry the contents of the railway tariffs in small print on various places. Sometimes they were governmentally regulated,[577] sometimes not, and not all companies used them in this way.[578] On the whole, however, carriers succeeded in

[576] Rules tariffs attached to the rate system in French railway carriage were approved by the Government pursuant to an Act of 15 July 1845; RODIÈRE, 1 *Droit des transports* 364 no 299. In Germany the Verein deutscher Eisenbahnverwaltungen many members of which were government railways, agreed upon uniform rules tariffs ("Betriebsreglement" of 11 May 1874) which later were, with modifications, revisions and amendments changed into statutory or treaty form — "Eisenbahnverkehrsordnung" of 15 Nov 1892, the Berne Railway Convention of 1890. The railway treaty, in turn, was implemented by statutory rules tariffs in all the Scandinavian countries except Norway. By similar devices tariff rules prevailed in motor carriage when time was ripe for them, *e. g.*, the German Personenbeförderungsgesetz of 1934. In the United States matters developed similarly. The adoption of the Interstate Commerce Act 1887, and the Carmack Amendment of 1906 settled the effects of rules tariffs in railway carriage and the Motor Carrier Act of 1935 amending the Interstate Commerce Act made the system spread into motor carriage. Common carriers by water were required to file tariffs with the United States Shipping Board under the United States Shipping Act, 1916 as amended by the Merchant Marine Act, 1920. — Even in Great Britain, in the end, rules tariffs were permitted to supplant the ticket law in railway carriage. The Standard Terms and Conditions adopted under the Railways Act, 1921, set a landmark, and another followed after the nationalization of the railways by the Passenger Charges Schemes, 1952.

[577] The British Passengers Act of 1855, 18 & 19 Vict c 119, provided that the receipt of money in payment of a passage obliged the receiver to "give to the person paying such money a contract ticket". The ticket form was subject to governmental approval. In the case of approval being refused, *e. g.* with respect to the Cunard negligence clause, the shipowner could not rely on such clauses. *The Titanic*, 1914 3 KB 731. This system of intervention was later deserted with regard to ordinary passengers but retained as to emigrants. Merchant Shipping Act, 1894, sec 320; 57 & 58 Vict c 60.

[578] The emigrant tickets used by the United States Lines and the Guion Lines in the 1890's are mere coupons attached to an emigration contract. In Swedish coastal shipping in the 1840's and 50's the tickets contain apart from a receipt of the passage money only instructions relative to life on board, quite naturally indeed, since these tickets, to avoid abuse, were required to be delivered by the passenger when leaving

defending their positions and the clauses on the tickets in a number of cases were considered to belong to the contract.[579]

When commercial aviation sprang to life, it claimed to inherit the results gained by the maritime tickets and when the Warsaw Convention arrived to codify the results of the development it was felt natural to make provisions along the lines of the maritime ticket. Thus, pursuant to Article 3-1-e the passenger ticket must contain "a statement that the carriage is subject to the rules relating to liability established by this Convention," and paragraph 2 of the same Article apparently proceeded on the assumption that the absence of the passenger ticket might affect the existence of the contract of carriage, if the Convention had not provided to the contrary. The carrier's failure to deliver a ticket to the passenger was considered to be most serious and was penalized with the loss of carrier's right to "avail himself of those provisions of this Convention which exclude or limit his liability" (Art. 3-2).[580]

Ticketing was the means by which the carrier avoided the Warsaw penalty. Could it be inferred therefrom that ticketing also was the means by which a Warsaw relationship was established — *i.e.* to confer Warsaw carrier status upon the carrier issuing the ticket to the passenger in his relationship

the vessel. Whatever was written on such a ticket he would not know after having left the ship.

[579] France: *Cie générale transatlantique v Schimpf*, Cass civ 12 Jul 1893, 1893 Dalloz 1 p 590: "l'acceptation par le passager du billet . . . implique acceptation de la clause. . ."; *Cie générale transatlantique v Hazan*, Cass civ 16 Mar 1896, 1896 Dalloz 1 p 264. Germany: *The Bilbao*, Reichsgericht 23 Feb 1927, 1927 2 JW 1248 (note, however, that the case deals with general conditions of carriage. See further explanations in text *infra* page 382). Cf WOODRICH, *Haftpflicht und P. & I. Versicherung beim Passage-Vertrag*, 1958 95 Hansa 633—634, 654—656, at 633: "Dem Passagier wird zu seiner Legitimation die sog. 'Schiffskarte' ausgehändigt, die die einschlägigen Beförderungsbedingungen enthält." Scandinavia: *Sundby v Den Norske Amerikalinie*, Kristiania sjørett 3 Feb 1921, 1921 NDS 75; *The Geisha* (*Ferran v Skipsaksjeselskapet Pacific*), Haugesunds byrett, 1957 NDS 248, at 264, proceedings before Højesterett, see 1957 NRt 875, 1957 NDS 232. Cf OLSSON, *Verkan av avtalsklausuler i standardformulär*, 21 Nord Juristmötet, reprint 23—24. England: *Hood v Anchor Line*, 1918 AC 837; *Acton v Castle Mail Packets Co*, 1895, 73 LT 158; cf *Richardson v Rowntree*, 1894 AC 217. Cf SCRUTTON 16th 12 note b. United States: *The Cretic*, 224 Fed Rep 216; *The Morro Castle*, 168 Fed Rep 555; *Bachman v Clyde SS Co*, 152 Fed Rep 403; *Siegelman v Cunard White Star Ltd*, 221 Fed 2d 189, 1955 AMC 1691. But see *The Majestic*, 1897, 166 US 375. See generally, GODDARD, 1926—27 25 Mich LRev 1—14, at 11 sq; ROBINSON *on Admiralty* 561 § 78 note 203; GILMORE & BLACK, *The Law of Admiralty* 22 note 77.

[580] See *Glenn v Cia Cubana de Aviacion*, 1952 USAvR 182; but see *Grey v American AL*, 1950 USAvR 507, 3 Avi 17.404; *Preston v Hunting Air Transport*, 1956 USAvR 1.

with that same passenger?[581] The argument that ticketing establishes a Warsaw relationship has been supported by the editors of Shawcross and Beaumont.[582] But no theory was ever put forward to explain why such an extraordinary effect should be given to the ritual of making out and handing over a ticket.

Such a theory is not easy to construct. It must maintain that certain constitutive powers are conferred upon the ticketing process. As far as the Warsaw Convention is concerned two things can be inferred from its text. It seems reasonable to infer that ticketing by itself is not constitutive. Pursuant to Article 3-2 the absence of the ticket does not affect the existence of the contract of carriage; why then should the presence of the ticket validate a contract of carriage otherwise absent? Abraham[583] submits that the ticket "keine konstitutive Urkunde ist." This result would also seem to follow from a comparison with the air waybill. The waybilling procedure envisaged by the Convention involves the waybill being "made out", "établi"[584]: as to the ticket the Convention only requires that the carrier "deliver" it. This suggests that ticketing is more of a formality than waybilling.[585]

Since there appears to be no basis in the Convention itself for this enlarged role of ticketing, reference should be made to the general law governing tickets.[586] Ticketing is there considered

[581] Of course, some of the inherent force in the idea is taken away when it is no longer required that the carrier deliver the ticket to the passenger in person but it suffices that it is given to somebody organizing the passenger's voyage: *Ross v Pan American*, 1948 USAvR 47, 541; 1949 USAvR 168; 1953 USAvR 1; 1954 USAvR 400; 1955 USAvR 396. The passenger in that case was placed in a queue at LaGuardia, this queue was checked against the tickets for the group transportation, and all of the tickets were administered by the organizers of the voyage. The passenger never saw any ticket. The New York State Court of Appeals was at pains to explain the delivery of the ticket: it chose to proclaim that by queuing and boarding the plane the passenger "impliedly, if not expressly, ratified and adopted what had been done" by the organizers of the voyage. At 175.

[582] In their 2d edition of *Air Law* they submit that if the passenger contracts for his carriage with a charterer but receives a ticket from the operator, both operator and charterer are to be considered as Warsaw carrier: p 333 no 351. Also RIESE, 1 *Hague Conference* 233; DUTOIT 108.

[583] SCHLEICHER-REYMANN-ABRAHAM 3rd 304.

[584] Art 6-1.

[585] The *Jane Froman Case*, *supra* in note 581, of course, lends support to the view that ticketing is a mere formality.

[586] Note that ticketing, under various theories, may be considered the decisive sign of ratification, *e. g.* of agency under English law, or third-party contracts under French law, cutting off cancellation rights unless expressly reserved in the ticket. Under German law, however, the third party acquires his right direct from the principal contract, and no act, not even knowledge of the contract is required on his part to vest the right in him. BGB § 328, cf ENNECCERUS-LEHMANN, *Recht der*

from two aspects. One is *how* ticket conditions become binding, the other is *when* ticket conditions become binding. Dealing with the first aspect, legal scholarship works either along the idea of a surrender to the carrier's conditions, or along the idea of notice and assent to his conditions. Broadly speaking, Continental law seems inclined to pursue the first idea,[587] and English law the second.[588] It is notable, however, that while the ticket is most important as a means of notifying the customer, it has very little to do under the surrender theory. The most extreme variants of the surrender theory are encountered in systems with public law rules tariffs.[589] The question when the conditions become binding is not very important under the surrender theory: by putting your foot on the vehicle or even by negotiating your transportation you surrender. Under the notice theory, however, this aspect grows important. The contract may be complete before ticketing; what effects are then conferred upon the ticket conditions? The British seem to be caught in the horns of this dilemma. Having explained the notice theory, Kahn-Freund submits: "It is ... very doubtful if what is said in the text can apply to tickets such as bus tickets which are issued in the course of a journey, *i.e.* at a moment when, according to what is probably the better view, the contract has already been concluded."[590] The French once attempted to get over the difficulty by the theory that "C'est la remise du billet qui forme le contrat de transport entre la compagnie et le voyageur."[591] This theory, which indeed supported the idea of the ticket's constitutive force, failed, however, to gain a more general acceptance.[592]

The guidance offered by the review of these two major aspects of ticketing must be read in the context of a consideration of ticketing as a part of the broader problems concerning standard

*Schuldverhältnisse* 15th 154 § 35.

[587] See Olsson *op cit* 23 and literature cited in note 45.

[588] MacNamara 3rd 65 no 57; Kahn-Freund, *The Law of Inland Transport* 3rd 434 sq.

[589] An American illustration of the interrelationship between tariffs and tickets is found in *Hearings on S 2647* p 669: When the CAB ruled that limitations and conditions relating to carrier liability for personal injury and death were excluded from the effective parts of carriers' tariffs, Eastern and TWA indicated, it appears, that they would continue to impose these rules on their passengers by way of inserting them in small print on the back of their tickets.

[590] Kahn-Freund *op cit* 434 note 1. Cf Olsson *op cit* 24.

[591] Lyon-Caen & Renault, 3 *Traité de droit commercial* 5th 1923 p 685 note 1.

[592] Josserand, *Les Transports* 2d 823—824 no 795; Lemoine, *Traité de droit aérien* 437 no 632.

form contracts and commercial usage, and not as a problem *per se*. While no legitimate objection can be made against this change in the focus of legal observation, one of the peculiarities of tickets in carriage should be noted. If aviation should develop to entail industrialized transportation of the subway type, the notice approach apparently must be deserted in favour of a surrender theory.[593]

The national air law of the various nations reflects the general law. There are some French and British cases dealing with the aspects of notice and assent to airline ticket conditions. The typical controversy is where the contract has been arranged by telephone calls or by letter exchange and later, when the passenger arrives at the airport, a ticket replete with exoneration clauses is handed to him. In France, in spite of the fact that the 1924 Act aimed at a dual contract regime (one at law and another established by contract clauses) and was clearly inspired by maritime law, the courts originally refused to let ticket conditions establish the contract regime.[594] But the Court of Cassation by the *Kunzewa Case* decision in 1942 brought matters back to the maritime ways.[595] In England the holding of the *Fosbroke Hobbes Case*[596] indicated that where the operator's pilot handed a ticket over (in the form of a document called Special Charter) this did not *per se* create a contract between the operator and the receiver of the ticket. The Court (Goddard) here stated that it might be open to the pilot to say "I am not going to start except on the acceptance of certain conditions" and that in such a case the hirer would have been entitled to refuse to go and sue the

[593] Cf COOPER, 1 *Hague Conference* 128: "He was looking ahead the time of mass transportation by air where the fare would be collected on the aircraft and the ticket issued there."

[594] *Cie des Messageries aériennes v Lambert*, 1926 Gazette du Palais 1 p 124, Cour d'appel de Paris 28 Nov 1925; for previous judgment in the litigation by Trib civ Seine 18 Dec 1922, see 1922 Gaz Pal 2 p 745.

[595] *Sté des transports aériens rapides v de Kunzewa*, 1937 6 RGDA 444; 1946 9 RGA 90, 1947 1 RFDA 121. de Kunzewa called the airline's local office by the telephone and asked to be flown from Cannes to le Bourget. The clerk booked her a seat on a regular flight. Arriving at the airfield she was given a ticket. The lower courts could find no assent to the conditions of that ticket when the issue became important after a crash, but the Court of Cassation found assent in the fact that she had "reçu . . . un billet dont il dépendait d'elle de prendre connaissance"; hence "le fait d'être ensuite montée dans l'avion implique nécessairement l'acceptation tacite par le voyageur des conditions de transport telles qu'elles lui avaient été notifiées par la délivrance préalable du billet." See also *de Martel v Cie aérienne française*, 1934 3 RGDA 823.

[596] *Fosbroke Hobbes v Airwork*, 1938 USAvR 194.

contractor instead. Of course, the hirer could also acquiesce and thus be considered to have agreed to contract on the conditions of the pilot.[597] Now, nobody disputes that it is possible to contract even with the ticketing airline. The essential problem is whether the handing of a ticket is a proper way for an airline to indicate that it is going to repudiate the contract which it has undertaken to help to perform. It seems more proper to allow greater effect to the naked act of ticketing where this merely adds more conditions to a contract already made than where this makes a stranger a party to the contract. While the Kunzewa and the Fosbroke Hobbes decisions belong to different jurisdictions moth can be reconciled with such a rule. The rule furthermore may receive some support from those writers who deny that ticketing can influence the character of an already established contractual relationship.[598]

The belief in constitutive powers in the ticketing process is thus open to much criticism. Nevertheless, the view that ticketing can establish a Warsaw relationship has impressed the drafters of the charterparty forms. In view of the fact that most charterparties will meet the requirements laid down in the Convention as to passenger tickets (except perhaps that they are called Aircraft Charter Agreements and not Passenger Tickets)[599] and thus should serve to avoid the Warsaw penalty, the variety of charterparty forms reveals a surprisingly large effort addressed to the task of separately ticketing each passenger.

Ticketing is subject to one inevitable prerequisite: the ticketing airline must know the identity of its passenger. Therefore, when the selection of the passenger is left to the charterer (as is, indeed, the case in all charters but those for own use), the strategic position as to ticketing is held by the charterer.[600] As a result, if the charterer is capable of establishing such technical documents as tickets, it is very practical to leave matters to him. The first French charterparty forms took this approach, either by expressly authorizing the charterer, or by omitting any

[597] At p 201.

[598] Ticketing an employee of the airline cannot *per se* make him a passenger: DOLK, 1953 2 ZfL 315. Ticketing a sailor travelling to his ship on an aircraft chartered to that end by the shipowner cannot make the sailor a passenger party to a contract of carriage: KEAN, as reported by RIESE in 1958 7 ZfL 14 note 29.

[599] But see now *mutatis mutandis*, *Flying Tiger Line v United States*, 1959 USAvR 112.

[600] Cf GRÖNFORS, *Air Charter* 87 sq.

mention of ticketing.[601] Of course, in inter-carrier agreements[602] and large-scale contract operations,[603] it may sometimes be practical for the carrier to avoid the bureaucratic effort involved in ticketing. Leaving ticketing altogether to the charterer, however, first involves the risk that the charterer may fail to perform the ticketing as required, with the resulting Warsaw penalties conceivably falling upon the operator, if the Courts find him to be the Warsaw carrier. Secondly, it leaves the feared tort claims unattended to. Although the risks may be compensated for by the adding of an indemnity clause, it appears that the liability exposure is considered too large, and airlines seem to prefer a complete change of functions. The general feature of the industry, accordingly, is to confer all or part of the ticketing work upon the operator. Some of the forms put the heavier load upon the charterer: while the operator will supply its company documents, it is up to the charterer to fill them in and hand them to the passengers. To put weight upon his responsibility, the charterer in some forms is to indemnify the operator for damage occurring because of the irregularity, absence etc. of the documents.[604] In

[601] TAI CdA (1947) clause 11[0] "L'affréteur établira son propre règlement de transport définissant ses relations avec le public, ses propres tarifs de transports, ses billets de passages, ses lettres de transport aérien, dans la forme prévue par la législation en vigueur . . ." Sabena Contrat (1946?) art 11. Chartepartie dite Transair paragraph VI: "L'affréteur remettra à la TAI tous documents . . ." Overseas National Airways (Cal) ACA clause 11: ". . . All . . . documents and agreements pertaining to passengers and baggage shall be issued and executed by Charterer in such manner as to make Charterer the sole responsible party in respect of the transportation thereof. . ."

[602] SAGETA CdA art 3-5[0] But contra: SAS — Transair Sweden Avtal (1956 SAS model for chartering from sub-SAS-standard airline) § 9; US Overseas — CAVE Agreement, clause no 1.

[603] ICEM letter agreement relative to "Air Bridge to Canada" programme para 9 A.

[604] Baltairpac clause 5-i: "Charterers undertake: to be responsible for handing passenger tickets and, if necessary, baggage checks to all passengers and for bringing the conditions of passenger tickets and baggage checks to the notice of each passenger and/or obtaining his signature hereto;" similar clauses in Condor and Flugdienst Chartervertrag nris 4-d and 5-a, BEA and BOAC SFOA condition 5: "Charterers . . . will . . . ensure the completion of all Tickets, Baggage Checks, Consignment Notes . . ." BOAC CC clause 10. "The Charterer expressly represents and warrants that the Charterer is . . duly authorised to accept delivery from B.O.A.C. of passenger tickets for and on behalf of each person to be carried on the chartered aircraft and that on delivery of such passenger tickets to the Charterer by B.O.A.C. the Charterer will prior to the commencement of the flight hand one such passenger ticket to each passenger . . ." Lufthansa FCV (passengers & cargo) (VK 88—55 and XL 4—56) Art 3: "Die DLH übernimmt die Ausstellung der Beförderungsdokumente. Der Charterer . . . trägt die Verantwortung für deren Richtigkeit und Vollständigkeit. Für sämtliche Schäden die infolge falscher Angaben oder infolge Nichtaushändigung. . . entstehen, haftet der Charterer . . ."; (cf ACA (XP 46—61) Art 6); Scanair ACA art 6; Trans-Canada (1958); IATA Model Air CA (1954) art 15, (1957) art 19 — but the Model contained provision for using the operator's documents as a faculty only, first added in the 1957 draft, art 21.

the group of documents which follow the style of Pan American's Charter Contract (an early post-war specimen of which is believed to be reprinted in Hürzeler's thesis "Probleme des Chartervertrags nach Luftrecht", Annex p. II-IV) this idea is developed into the terse clause: "No passenger shall be permitted on the aircraft unless an appropriate contract ticket has been so issued to him and presented to the Company by him prior to the commencement of the charter flight."[605] In the BIATA group the matter is regulated along similar lines but the burden cast upon the charterer is less: "The Carrier will, as far as possible, issue ... the traffic documents ... and will supply the forms necessary ... The Charterer ... will use his best endeavours to ensure that the said documents duly completed ... are always issued and supplied ..."[606] Since the members of this group, generally, claim that the charterer is the agent of the passenger, it is only natural that they do not make the charterer responsible to the operator for his dealings with his principal.

As to the air waybill, matters are somewhat different. Relative to ticketing, the Convention envisages nothing more than a ticket for each passenger. Hence the carrier can comply with the obligation by ensuring that each passenger gets his ticket. Relative to cargo, however, responsibilities are divided between the consignor and the carrier. This involves certain contradictions. In the first place, Article 5 provides that the carrier has the right to require the consignor to make out and hand over to the carrier

[605] Pan American CC paragraph 9; (as reprinted in HÜRZELER, Annex p III); WA Charter Passenger Flight Agreement (3—47) art 5-a: "Charterer shall not permit any passenger to be carried ... unless such passenger has been issued a ticket by TWA ..."; CFA (4—58) art 4. Similarly but relative to cargo American Airlines CC (early 1947) paragraph 9. But: American Airlines Passenger ACA (early 1949) paragraph 5: "... The Company reserves the right to issue to the Charterer and passengers documents of carriage (passenger ticket and baggage claim tag and air waybill). ... " Lately UAT has joined the group, CdA art I-5: "Le transport de tout passager, marchandise ou poste sera subordonné à l'établissement de billets de passage, LTA et autres documents individuels, de transport ... les documents ... seront ... établis sur imprimés UAT ... Sur tous documents UAT apparait comme le transporteur."

[606] BIATA ACA clause 7. This coincides well with BEAUMONT's statement about the relationship between this form and the prior Imperial Airways form since it is known that Imperial's contracts of special charter were made subject to the condition that the party taking the aircraft on charter is required to facilitate completion of all tickets, baggage checks and consignment notes and other necessary documents: BEAUMONT, 20 IATA Inf Bull 18. Followers in style if not in exact terms: Silver City ACA, Eagle ACA, Herfurtner FCV, Trans-Avia FCV, LTU FCV, Deutsche Lufttransport FCV. Furthermore, KLM ACA (1951) art 13-1 and 2; Air France Contrat type provisoire passagers & bagages art IV-1 and 2; Sabena CV (Fluggäste) Art 6.

a document called an Air Consignment Note. Article 8 provides that this document shall contain a number of particulars; and Article 9 provides that if the carrier accepts goods without an Air Consignment Note having been made out, or if the Note does not contain a number of the particulars specified in Article 8, the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability. Thus, it happens that, although an obligation is cast upon the consignor to complete the particulars, if any of these are omitted, the carrier is under the Convention not only subject to unlimited liability but also is deprived of all defences to an action or claim.

The essential idea of the regulation is cooperation between two parties, *i.e.* the consignor and the carrier. Possibly, this idea is reinforced by the Continental maritime tradition of the bill of lading as bearer of an autonomous promise and the provision in the Code de Commerce that "La lettre de voiture forme un contrat . . ." (art. 101). This idea has resulted in a more willing acceptance of the establishment of an air waybill as equal to the making of a contract. The party who provides the particulars and the party who hands out the air waybill form are apparently making a contract together, indeed a contract of carriage, which may fit into the Warsaw framework provided that the geographical requirements of the Convention are satisfied.

Once the Hague Protocol enters into force, the idea of cooperation may be less apparent, the number of particulars required being very much restricted, the time for their establishment postponed until after contracting and the weight of the penalty mitigated. However, tradition will probably prevent any fundamental changes in ideas from taking place.

A corollary to this contract idea is that the identity of the parties to the air waybill is decisive as to the identity of the parties to the Warsaw contract.[607] If the consignor appoints the charterer to be his agent in filling in the air waybill, there is probably only one contract of carriage, one shipper and one carrier. If the charterer gives the consignor a house air waybill, and the charterer in turn receives an operator air waybill, there are certainly two contracts of carriage. This is a complication

[607] It is noteworthy, though, that at times this device is less helpful than it may seem, *viz.* because the name of the carrier is not correctly filled in. See *supra* pages 308 sq. Sometimes the charterparty attempts to help: Lufthansa Agreement art 6-2 "The charterer is deemed to be the consignor . . ."

which does not arise in the same way in passenger carriage, simply because nobody considers giving the travel agency a ticket.

## SECTION 5. THE GUADALAJARA CONVENTION

The Guadalajara Convention — preparatory works — purpose of the Guadalajara Convention — limitations of scope of application — basic principle: duplication of Warsaw carrier notion — effects of principle — extension of ambit of Warsaw rules — Warsaw liability as by-effect of purely domestic contracts — standards of Warsaw liability — modifications of Warsaw liability scheme — principle of reciprocal representation — increase of exposure to risk — modification of administration of damage claims — Warsaw defences and Warsaw penalties affected — art 20-1 of Warsaw Convention — art 25 of Warsaw Convention — art XIII of Hague Protocol — incomplete mutuality in application of principle of reciprocal representation — documentation — Is only one documentation set necessary in a composite service? — pertinent texts — aspect of the Warsaw clauses — submission — general comments upon double documentation — reciprocal representation principle and ancillary acts — complete mutuality of principle in spite of its formally unilateral character — evaluation of Guadalajara Convention — recommendation to await Anglosaxon ratifications — Guadalajara Convention and the clausal law

On September 18, 1961, there was signed at Guadalajara, Mexico, a convention called Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier.

This Convention materialized as the result of a prolonged study of hire, charter and interchange situations. Studies of charter agreements for the purpose of arriving at an international regulation of their terms were initiated by the Citeja as early as the thirties.[608] A draft convention "sur la location et l'affrètement des aéronefs" was laid before that body in 1946.[609] The work which eventually led to the adoption of the Guadalajara Convention, however, emanated from Chauveau's paper to the Conference on Coordination of Air Transport in Europe, April—May

[608] During Citeja's first session (it was established in 1926) COGLIOLO proposed to put amongst other items the "location des aèronefs *(locatio totius rei)*" on the work programme of the 2d Commission and it was resolved accordingly. See Minutes p 29 and Resolution No 3. In spite of this resolution, however, the subject was not taken up by the Citeja until 1932 when the IATA sent to the Citeja a questionnaire "concernant les contrats de charte et de louage d'aéronefs, en connexion avec la Convention de Varsovie du 12 Octobre 1929": see 182 Citeja.

[609] In the course of the 14th session of the Citeja, in January 1946, the subject of charter again was put upon the Agenda and MANIATOPOULOS was appointed Rapporteur. He delivered a draft convention in May same year, see 423 Citeja. The Citeja was liquidated before the draft was considered.

1954[610] and the work in the ICAO Legal Committee which developed from the problems being dealt with in that paper.[611]

The Guadalajara Convention purports to resolve the ambiguity that is alleged to exist in circumstances where the Warsaw Convention uses the expression "the carrier" and two carriers are involved. As a result the new Convention is only concerned with the complicated situation as understood in this book.[612] The regulation of this situation offered by the Guadalajara Convention is subject to two important limitations. First, the new Convention does not apply to cases covered by the successive carriage regulation offered by the Warsaw Convention (whether in its original form or as amended by the Hague Protocol).[613] Secondly, the new Convention does not apply to the instrumentality contract.[614] The solutions offered are consequently asymmetrical rather than symmetrical.

The Guadalajara Convention describes itself as supplementary to the Warsaw Convention. This is something of an understatement. The modifications introduced in the Warsaw scheme are considerable. This result is inevitable, since the Guadalajara Convention, faced with the problem whether the operator (*i.e.* the supplier of aircraft and crew when endowed with operator status under the aspects of civil liability, in the new Convention termed "the actual carrier") or the middleman (in the new Convention termed "the contracting carrier") has Warsaw carrier status, solves the problem by making both candidates Warsaw carriers simultaneously.[615] This principle of *duplication*

[610] CHAUVEAU, *Improved utilization and interchangeability of aircraft*, CATE WP 51.

[611] The report of this Conference (ICAO doc 7575 — CATE/1 p 15) indicated that the chartering or hiring of aircraft might raise legal problems in the international field, and in response to this report the ICAO Council decided, on 22 Mar 1955, that the Chairman of the ICAO LC should be asked to establish a subcommittee for the purpose of studying the problems posed. The subcommitte held sessions at The Hague in 1955, in Caracas in 1956, and in Madrid in 1957. The matter was considered by the Legal Committee in Tokyo in 1957, by the subcommittee in Paris in 1960, by the Legal Committee again in Montreal in 1960, and eventually a diplomatic conference was convened at Guadalajara in August-September 1961.

[612] See *supra* pages 177 sq.

[613] Successive carriage is excluded by the definition of the "actual carrier" in art I-c.

[614] Art X: "Except as provided in Article VII, nothing in this Convention shall affect the rights and obligations of the two carriers between themselves." Art VII deals with the joinder of parties in litigation.

[615] Art II: "..., both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement,

*of the Warsaw carrier notion* means a considerable extension of the ambit of the Warsaw rules. In jurisdictions holding the middleman to be the Warsaw carrier, the Guadalajara Convention will promote the operator (*supra*) to assume Warsaw carrier status. As a result this latter airline may find that as against the passenger/shipper a Warsaw liability (presumed but limited) has replaced the liability which previously was governed perhaps only by the negligence rule, (as for instance under the French system of having the charterparty immatriculated).[616] In jurisdictions where the prevailing interpretation is believed to be that the operator is the Warsaw carrier, the Guadalajara Convention will make the middleman assume Warsaw carrier status.[617]

The new Convention extends the application of the Warsaw rules in still another way. The Guadalajara Convention applies to domestic contracts and domestic carriage to an extent to which there is no equivalent in the Warsaw Convention except perhaps in relation to successive carriage inter-carrier agreements. The new Convention removes the requirement that the carrier's contract shall permit determination whether the geographical details of the Convention are satisfied or not. A domestic airline may agree with another domestic airline to run a domestic segment of the other airline's route network on its behalf. It will then find that under the Guadalajara Convention it has incurred Warsaw liability when merely receiving some passenger having entered into a Warsaw contract with the airline on whose behalf the service is run. The essential requirement under the new Convention is that the contract between the middleman and the passenger/shipper shall satisfy the requirement for the application of the Warsaw Convention. This result follows from the definition of "contracting carrier" in Article I. Contracting carrier means a person who is "partie à un contrat de transport régi par la Convention de Varsovie".

As a corollary to this constructing of the Guadalajara Convention the load contract will determine as well whether the liability incurred by the operator will conform to the standards laid down in original Warsaw Convention or in the Warsaw Convention as amended by the Hague Protocol. This result follows from the definition of the "Warsaw Convention" in Article

the latter solely for the carriage which he performs."

[616] CAvi art 38-2, formerly art 55-2 of the Air Navigation Act, 1924.
cf *supra* pages 196 and 200 sq.

[617] See *supra* pages 290—298.

I, which refers to the definition of "contracting carrier" in the same article.

The duplication of the Warsaw carrier notion, furthermore, entails a system of reciprocal representation which weaves modifications into the system of the Warsaw Convention. The middleman is made responsible for the operator by the prescription that "The acts and omissions of the actual carrier and of his servants acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier."[618] The operator is made responsible for the middleman by the prescription that "The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier."[619] While the former of these two propositions duplicates the principle of the *Jacquet Case*[620] and thus, to the extent the guidance of this case is recognized, involves no departure from the Warsaw Convention, the latter proposition implies something altogether new. The reasons for its introduction are believed to be considerations of the passenger/shipper's convenience, in particular as to the administration of claims.

A consequence of the elaboration of the reciprocal representation scheme in the Guadalajara Convention is that, as compared with the situation when only one airline is involved, each participating airline will find that it has doubled its exposure to risk. In part, the increase of risk is of a rather innocent nature, *i.e.* in relation to those devices of the Warsaw Convention which only seek to channel claims so that they can be handled by an airline without adversely affecting the business administration. The provisions for notice and suit time and *forum* may be so classified.[621] When the Guadalajara Convention as a corollary to the reciprocal representation principle offers more jurisdictions[622] to the passenger/shipper seeking to enforce his claim, and more addressees for complaints[623] thus facilitating their being brought,

[618] Art III-1
[619] Art III-2
[620] *Jacquet v Club neuchâtelois d'aviation;* see *supra* pages 309 and 316 sq.
[621] Arts 26, 28 and 29.
[622] Arts VII and VIII.
[623] Art IV.

none of these changes can be considered as serious modifications of Warsaw Convention system.

Modifications of a more serious nature appear in relation to the Warsaw defences and the Warsaw penalties. Article 20-1 of the Warsaw Convention may first be considered. Under the Guadalajara Convention the participating carriers are deprived of some of the defences that previously were at least envisaged as possibly available. The argument of the middleman that he was exonerated under this article by having transferred the operation to another fully competent airline cannot be raised successfully under the new Convention.[624] The argument of the operator that he was exonerated under the same article by his establishing that the cause of the accident was fault on the part of the middleman, — perhaps improper packing or improper addressing of the consignment — cannot be raised successfully under the new Convention.[625]

The Warsaw penalties similarly are subjected to modification. The application of the reciprocal representation principle is not fully mutual on this point, however. Wilful misconduct on the part of the actual carrier, *e.g.* renders the contracting carrier liable to the Warsaw penalty of unlimited liability.[626] This result probably follows already under the *Jacquet Case*.[627] Contrariwise, however, the acts and omissions on the part of the contracting carrier, will render the actual carrier liable but not in excess of the limits specified in Article 22 of the Warsaw Convention.[628] The principle of reciprocal representation thus works fully as far as the middleman's liability for the supplier's conduct is concerned, but only on a limited scale when the supplier's liability for the middleman's conduct is concerned.

The Warsaw penalties attached to ticketing and waybilling errors have a more particular status. When the Guadalajara Convention provides that the actual carrier "shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention . . . for the carriage which he performs",[629] does this cast upon the operator the obligation to

[624] Art III-1.
[625] Art III-2.
[626] Art III-1.
[627] See *supra* note 269 page 309.
[628] Art III-2.
[629] Art II.

issue tickets and to see to it that air waybills are made out? It has been argued that the Warsaw Convention will be satisfied if the Warsaw carrier accepts his load for carriage when the documentation has been established and that the identity of the party establishing the documentation has no importance.[630] I do not feel convinced by this argument. First, from the point of view here discussed there is a difference in the wording of the relevant provisions of the Warsaw Convention relating to tickets and relating to air waybills. The air waybill shall be made out by the consignor;[631] the activity of the Warsaw carrier is theoretically limited to require the consignor to do so. The ticket, however, entails a duty directly cast upon the Warsaw carrier: "le transporteur est tenu de délivrer un billet."[632] On the other hand, the Hague Protocol has suppressed this attachment to the carrier's person, inasmuch as the pertinent article, as amended, reads: "Dans le transport de passagers, un billet de passage doit être délivré".[633] The argument made thus seems irreconcilable with the ticket regulation of the original Warsaw Convention, although it perhaps need not be considered to contravene the same regulation as laid down in the Hague Protocol, nor the air waybill regulation. Secondly, it must be recalled that one of the functions of the mandatory ticket and waybill regulations of the Warsaw Convention was to make the documents bearers of Warsaw clauses which in turn should secure the application of the Convention even in litigation before courts in non-contracting states. Assuming that the supplier of aircraft and crew having failed to establish the Warsaw documentation, is thereafter called upon to defend a suit brought against him by a passenger or shipper in a non-contracting state, what is there in the relationship between the litigants which will secure the application of the Warsaw Convention? It is noteworthy in this connection that the few Europeans who have argued that the operator is the Warsaw carrier, have never suggested that he should not be obliged to issue Warsaw documents. As a result it appears highly questionable whether an airline having Warsaw carrier status can avoid the Warsaw penalty by mere reference to the fact that some other airline has issued such documents

[630] Drion, 13 1 ICAO LC 61.
[631] Art 5.
[632] Art 3.
[633] Art III.

to the passenger or shipper concerned, or indeed any other person whomsoever. It is submitted that the airline certainly cannot avoid the penalty under the passenger carriage regulation of the original Warsaw Convention.

Does the Guadalajara Convention modify this interpretation? It appears not. The drafters may have felt that the situation was taken care of by the wording of Article III, *viz.* that "The acts ... of the contracting carrier ... shall ... be deemed to be also those of the actual carrier", but this reasoning does not carry much weight, since it is simultaneously provided that "The ... omissions ... of the actual carrier ... shall ... be deemed to be also those of the contracting carrier." Indeed, in order to arrive at an interpretation contrary to the one here advocated one has to find in the Guadalajara Convention a rule to the effect that the word "act" is superior to the word "omission". Whether the drafters of the Guadalajara Convention have believed such a rule to exist or not, they certainly have failed to insert it into the Guadalajara Convention. Courts are left with the naked text of the Convention.

As a result the Guadalajara Convention in some cases is believed to require a double documentation, at least in passenger transportation governed by the original Warsaw Convention. It may be noted that a similar double documentation scheme may be envisaged in cargo carriage independently of the new Convention. It is recalled that the passenger status proposition,[634] which in passenger carriage results in the Warsaw Convention not applying to the instrumentality contract, has no effective equivalent in cargo carriage. In cargo carriage, accordingly, the instrumentality contract may be qualified as a Warsaw contract. Such classification entails the requirement of a Warsaw documentation. As a result double documentation is required in respect of the same consignment, one air waybill covering the instrumentality contract, another covering the load contract.

The effects of the reciprocal representation principle should also be considered as evidenced in the regulation of ancillary acts by the participating airlines. Such ancillary acts can be the acceptance of a certain delay within which the carriage is to be performed[635] or of a certain value of the consignment[636] or of

[634] See *supra* page 289.
[635] Cf Warsaw Convention art 19.
[636] Cf Warsaw Convention art 22-2.

the consignor's orders for stopping the consignment, changing its itinerary or returning it to the point of departure.[637] The Guadalajara Convention expressly deals with these ancillary acts only in so far as they are performed by the middleman. The Guadalajara lays down the general principle that these acts shall not affect the actual carrier unless agreed to by him.[638] Furthermore, it provides that the consignor's orders referred to in Article 12 of the Warsaw Convention shall only be effective if addressed to the contracting carrier.[639] This regulation in the new Convention apparently serves to protect a particpating carrier from surprise stemming from the other carrier's subsequent actions. The unilateral character of the regulation on its face reflects that it is mainly the supplier who deserves protection, since the middleman has a direct contact with the passenger/shipper. The wording of Article III—1 of the Guadalajara Convention, however, appears to support a mutual application of the regulation except when the Convention itself contains express provision to the contrary. If the supplier accepts the passenger/shipper's request as to a certain delay within which the carriage should be completed the natural conclusion is that he accepts the request as the agent of (on behalf of and for the benefit, *i.e.* the goodwill of) the middleman. This interpretation is supported by Article III-1.

The further provisions of the Guadalajara Convention need not be commented upon in this work.

Taking a general view of the Guadalajara Convention it may be said that its shortcomings relative to the increased exposure to risk all stem from the attempt to promote the supplier of aircraft and crew to a Warsaw carrier as against the passenger/shipper. The new Convention creates considerable conflicts with the prior law, in particular in countries which have adopted the French system permitting the supplier to exonerate himself from part of his third party liability by having the charter immatriculated, and it modifies certain features of the Warsaw Convention. This attempt in relation to the supplier seems to have been taken mainly to meet alleged Anglo-American difficulties. Since it may be that the Anglosaxon difficulties will be disposed of already by judicial interpretation of the Warsaw Convention

[637] Cf Warsaw Convention art 12.
[638] Art III-2.
[639] Art IV.

itself under the harmonizing method, it seems reasonable that other countries should abstain from ratification until the Anglo-saxon countries have shown their appreciation of the Guadalajara work by ratifying the new Convention. It is in any case not likely that the entry into force of the Guadalajara Convention will suppress the need for the clausal law which until now has developed among the air charter forms. In order to come into force the new Convention only requires the ratification of five of the signatory states.[640] Air charter operations normally cover a lot more territory than is represented by five states and hence airlines cannot afford to suppress the clausal law. The charter will only be governed by the Guadalajara Convention in these five states but litigation may arise in any point of the territory covered. Outside the five states the clausal law is therefore required to stabilize the relationships involved in the charter operation.

[640] Art XIII-1.

*CHAPTER FIVE*

# AIR CHARTER UNPERFORMED

SUB-CHAPTER 1

# NON-PERFORMANCE AND DELAY

## SECTION 1. INTRODUCTORY NOTE

Scope of Warsaw Convention limited — carriage left unperformed without physical damage occurring — cancellation and non-performance clauses — distinction — ambit of clauses and ambit of Convention — Warsaw Conference discussion — diversity of local laws in point — interrelationship of various legal notions used — delay as non-performance and non-performance as delay

The Warsaw Convention entails only the unification of "Certain Rules" relating to the international carriage by air. Broadly speaking, these rules focus on the case where misperformance of the contract of carriage is caused by physical damage to the passengers or cargo. The normal contract relating to carriage by air, however, covers a number of other contingencies as well, contingencies in which the carriage is not performed although the cargo and the passengers remain physically intact. This latter instance of non-performance typically occurs when the carriage fails to start because passengers or goods are not embarked or when the carriage is not completed because passengers or goods are disembarked before reaching their destination. In charter carriage, these cases are generally governed by so-called *cancellation clauses* and *non-performance clauses*. These two types of clauses work in different directions. Commonly, the cancellation clause works for the benefit of the charterer by reserving to him a right to terminate the contract before performance starts. The non-performance clause, on the other hand, works primarily for the benefit of the operator by restricting the consequences when the operator fails to perform at all, or the operator's performance fails faithfully to follow the conduct prescribed by the contract. The non-performance clause then qualifies the contract's essential performance by adjusting the performance which is due under the contract, or it limits the operator's liability for non-compliance with the conduct prescribed by the contract.

In principle, the cases covered by this clausal law do not fall under the Warsaw Convention. This principle may be deduced from the discussion which took place at the Warsaw Conference.

The problem was posed there by Ambrosini, in the following way: "une marchandise est remise au transporteur: elle se trouve sur l'aérodrome, l'avion ne part pas, le contrat n'est pas exécuté. On doit dire que le transporteur est responsable ou non?"[1] Ambrosini wished to have a uniform air law on the point. He indicated that the Convention anticipated all kinds of cases, such as the death or wounding of a passenger, the destruction or loss of or damage to luggage or cargo and delay in carriage, but it did not anticipate the case of non-performance. He proposed that the provision for liability for delay be redrafted so as to include the "cas de non exécution du contrat" as well.[2] But in the discussion which followed, Ripert pointed out: "Si vous avez l'inexécution totale, il n'y a aucun intérêt à avoir une convention internationale; l'expéditeur est dans son pays, il a toutes les ressources du droit commun."[3] Eventually, it was agreed that the Convention should not apply to the case of non-performance. It was left to local law to govern this situation.[4]

Outside the ambit of the clausal law, however, the local law applicable to the case of the unperformed contract is highly diversified. This case may be considered from the aspects of termination of contract, non-performance generally, delayed performance, deviating performance, etc. Various legal systems prefer one aspect to another and attribute legal consequences accordingly. However, the various legal doctrines involved are closely interrelated. Delay and deviation can be expressed in terms of non-performance; non-performance can be expressed in terms of delay or deviation.

Inasmuch as non-performance may be expressed in terms of delay, however, the scope of Article 19 of the Warsaw Convention, which provides for the carrier's liability in the case of delay, must be considered.

### SECTION 2. ARTICLE 19

Citeja draft, art 21 — discussion at Warsaw Conference — interpretations of article 19 — guidance from other articles? — *Transport Mondiaux v Air France* — *Robert Houdin v Panair do Brasil* — summary

The Citeja draft convention which was placed before the Warsaw

[1] *II Conférence* 52.
[2] *Ibidem.*
[3] *Ibidem.*
[4] *II Conférence* 52, 115.

Conference provided for a carrier's liability for delay without qualifications.[5] In reference to this provision Ripert observed at the Conference: "pour la responsabilité en cas de retard, il importe peu que le voyageur ait pénétré ou non dans l'aérodrome: si on lui dit: l'avion que vous deviez prendre ne part pas, la responsabilité est engagée."[6] The provision was then redrafted at the Conference and eventually came to read as follows:

Art. 19 — "Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de voyageurs, bagages ou marchandises."

The new formulation, however, has evoked no fewer than three main currents of interpretation for the scope of application of the article. Some scholars have argued in favour of a very strict interpretation. The delay liability should be strictly qualified by the requirement "dans le transport aérien"; *i.e.* only that delay which occurred when the load was airborne was within the scope of the article.[7] Others have submitted the broader interpretation that the period of liability should be equal to that laid down in Articles 17 and 18 in respect of physical damage.[8] The supporters of this interpretation, however, are not always clear as to whether they mean that this interpretation should apply equally to passengers as well as to goods. The third interpretation advanced has entailed that delay in the sense of the article was established as soon as it affected the timely arrival at destination.[9]

[5] "Le transporteur est responsable du dommage survenu pendant le transport:. . . en cas de retard subi par un voyageur, des marchandises ou des bagages." See art 21 in Avant-Projet de Convention . . . adopté par le CITEJA au cours de sa Troisième Session, Mai 1928.

[6] RIPERT, *II Conférence* 53.

[7] GOEDHUIS, *La Convention* 166, 170—171; LE GOFF, *Traité Supplément* 200 no 1665-1 (opinion later revised, see note 8 *infra*); VAN HOUTTE, *La responsabilité civile* 85 no 43. Critical: Anonymous Note in 1959-60 69 Yale LJ 1006.

[8] LEMOINE, *Traité de droit aérien* 561 no 843, cf 540—541 nris 812 and 814; SAINT-ALARY, *Progrès aéronautique, protection de la victime et responsabilité du transporteur aérien*, in 2 *Mélanges offerts à Jacques Maury*, Paris 1960 (?) p 539—558, at 549 and note 31; SHAWCROSS & BEAUMONT *on Air Law* 2d 364 no 388 note c, p 385 no 409; COQUOZ, *Le droit privé* 131; LITVINE, *Précis élémentaire* 163—164 no 248; SCHWEICKHARDT, *Schweizerisches Lufttransportrecht* 75; SCHLEICHER-REYMANN 2d 356; SCHLEICHER-REYMANN-ABRAHAM 3rd 348—349. Critical, DÖRING, *Luftverkehrsgesetz und Verordnung über Luftverkehr*, München & Berlin 1937 p 354; Le GOFF, *La responsabilité du transporteur aérien pour retard*, 1958 66 Bulletin des transports internationaux par chemins de fer publié par l'Office central à Berne 229—235, at 233.

[9] RIESE, 1933 ZAIP 980, 1934 4 AfL 48; *Luftrecht* 449; DRION, *Limitation* 86 no 75; KOFFKA, BODENSTEIN & KOFFKA, *Luftverkehrsgesetz und Warschauer Abkommen* 321; RIESE & LACOUR, *Précis de droit aérien* 268 no 326; cf SULLIVAN, 1936 7 JAL 27. Further: German *Denkschrift* 41; Danish *Indberetning* 22; Swedish 1936 SOU

If guidance is sought in the other articles of the Convention as to what might be meant by delay in article 19, it is noteworthy that neither for the construction of article 26 on notice time limits,[10] nor for the construction of article 29 on suit time limits,[11] is it essential that the aircraft had in fact taken off.

The courts have not been given many occasions to clarify the point.[12] Recently, however, two French cases have indicated favour with the broader interpretations of the article. First, the Cour d'Appel de Paris, in *Transports Mondiaux v. Air France and Lufthansa,*[14] had to consider a case in which a consignment had spent about two months in transit from Frankfurt am Main to Paris (due to a detour via Rio de Janeiro). The decision made it clear that in respect to the goods, any delay which occurred while the carrier had the goods in his custody could render him liable under article 19.[15] Then, in *Robert-Houdin v. Panair do Brasil,*[16] the Tribunal de Grande Instance de la Seine had to consider a case of outright non-performance. In this case Robert-Houdin, who among other things was a famous playwright, was engaged to direct and perform one of his plays on June 20th, 1958, at Lisbon in the presence of Dr. Salazar and other prominent people. In order to arrive in Lisbon in time for the performance Robert-Houdin booked for a Panair do Brasil flight from Rome to Lisbon on the same day. Too late to be able to make other arrangements he learned from Panair do Brasil that the company had cancelled the flight. As a result he could not appear at the performance, returned directly home, lost his fee and incurred expenses. Panair do Brasil refused to compensate him, although in the end they refunded the ticket fares, and offered no explanation for the cancellation. Robert-Houdin then sued the company for damages and the court ordered the company to compensate him in full, basing liability upon Article 19. Thus, here, unlike Ripert and his colleagues at the Warsaw

no 54 p 48. These two latter works, however as well as DRION *op cit* 72 no 65, except the case of the aircraft not taking off with the passenger or goods.

[10] Art 26-2 ". . . from the date on which the luggage or goods have been placed at at his disposal."

[11] Art 29-1 ". . . from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."

[12] For a general review, see de RODE-VERSCHOOR, *La responsabilité du transporteur pour retard*, 1957 20 RGA 253—265; and SAINT-ALARY *op cit* 545—549.

[14] Cour d'Appel de Paris, 14 Mar 1960, 1960 14 RFDA 317.

[15] At 319.

[16] Tribunal de Grande Instance de la Seine, 9 Jul 1960, 1961 24 RGA 276; cf 1960 Rev trim dr com 925—926.

who considered the case of the aircraft never taking
f *inexécution* falling outside the ambit of the Conven-
ibunal went the other way and considered it to be
ay.[17]

thus does not appear to be very helpful in deciding
relation to the case of the unperformed air charter
As the commentators on the article are in conflict
rts oppose the views taken by the drafters, it is evident
principle can be deduced from this article alone. It
essary to resort to the general law.

## NON-PERFORMANCE AND DELAY AS A GENERAL PROBLEM

### *ıl discussion*

s delay? — absence of performance — not absence of ultimate per-
ce — delay *contra* impossibility — time terms and other contract
— delay as a mere variety of breach of contract

eral principles govern the distinction between non-
e and delay?

ssume that, while awaiting the debtor's performance,
r finds that it has not been rendered although it is
bsence of the performance at that point in time may
ed as a matter of delay. If in spite of this the creditor
erformance to be rendered the day after, he may
tell himself that the performance for one reason or

lowever, *Steiger v Nordisches Reisebureau*, decided by the Commercial
nna 21 Nov 1934, reported in GOEDHUIS, *National* 268.

of authors limit their comments on this article to indications of the
IATA clause that "Times shown in timetables or elsewhere are approxi-
ot guaranteed, and form no part of the contract of carriage . . ." (See
ılu GCP, Resolution 030 art 10-1): *i. a.* GRÖNFORS, *Godstransport med*
MIDT, WILKENS, GRÖNFORS & PINEUS, *Huvudlinjer i svensk frakträtt*,
1955 p 101—107, at 103, but compare *Befraktarens hävningsrätt och*
*ets konstruktion*, 1959 Gothenburg School of Economics Publications
ter utgivna i samverkan med Sjörättsföreningen i Göteborg No 16) p
IÈRE, 2 *Droit des transports* 270—271 no 654, 3 *Droit des transports*
); also authors cited in note 64 *infra*. Note Rodière's submission at 271
seul fait pour le voiturier d'avoir accepté de transporter par avion une
ınt il savait qu'il ne pourrait pas l'acheminer dans des délais raisonnables
en faute. Le voiturier a des éléments de connaissance que son client
n'a pas: état atmosphérique, disponibilité de ses appareils . . . Cette remarque
sévère trouverait particulièrement l'occasion de jouer dans les transports à la
commande."

another has merely been delayed. In fact, so long as he is unaware of the reasons for the absence of the performance and the resulting legal consequences, all absence of performance may in this way be considered as delay. This approach accordingly makes delay a very broad category covering all cases in which the performance under the contract is not rendered at the right time.

By adding the requirement of an ultimate performance, however, the notion of delay can be made a more limited notion. If the creditor himself expects to be able to compel ultimate performance, he can retain the idea of delay even if the true reason for the non-performance is that the debtor has changed his mind and now repudiates the contract. As a result, in the event that the expected performance is the delivery of a carload of beans, and the creditor receives a carload of peas instead, he still can consider the case as one of delay, because the delivery cannot mean performance and correct performance can yet be compelled. But this approach entails that the contract has as a sanction compulsion of performance. Where performance cannot be compelled, delay cannot be maintained. Since an impossible performance cannot be compelled, there arises a natural dualism between impossibility and delay. This dualism considerably restricts the ambit of the notion of delay. The delay in the execution of the contract may in itself amount to an impossibility in execution. If you instruct your advocate to appeal from a judgment, he knows that the appeal must be entered within a certain period of time, and if he delays too long, the fulfilment of the contract becomes impossible. If a merchant undertakes to send goods to be shipped by a certain vessel, he cannot fulfil his contract by sending them after the ship has sailed. In commercial matters, especially, there are many cases in which delay in the performance may amount to the impossibility of performing the contract according to the intention of the parties.

It is possible to limit the notion of delay in a third way. Agreement as to time is often not equivalent to the other terms of the contract. A recognition of this discrepancy is implicit in every legal system in which the normal contract sanction is to compel performance. To elect compulsion of performance as the prime contract sanction means setting delay aside in matters of breach. If a contract can be performed after the time when

it properly should have been performed pursuant to its own terms — and that is exactly what is involved when the court compels a performance that is not rendered voluntarily — then delay in performance is something that does not actually affect the performance as such. The time element, as it were, is not part of the contract.[19] This idea is supported by the general understanding that an agreement as to time can often be broken without producing any tangible financial loss with the creditor. The delivery of a perfect watch on Wednesday instead of Monday as promised, normally involves slight damage indeed, particularly when compared with the receipt of a defective watch on Monday. Under this approach, delay is a notion contrasted to non-performance and mis-performance generally and is characterized by the performance being rendered but without exactitude.

Finally, it is quite possible to consider the case of the unperformed contract without relying on any special notion of delay at all. Any untimely performance is simply considered as an instance of breach of contract, and every breach of contract whether delay or not is assessed in damages according to general principles. The difficulty arising under this approach is simply one of finding an appropriate sanction for time clauses which reasonably corresponds to the intention of the parties.

## § 2. *National law*

All variants of delay notion represented on the national law level — variations of notion seem to follow variations of specific performance remedy — Roman roots of Continental delay notion — modern distinctions between *mora* and non-performance — Scandinavian *mora* includes non-performance — *mora* principles in shipping — *Engström v Banco* — *mora* principles in aviation — German *mora* includes non-performance except if impossibility — impossibility as *Nichterfüllung* — *mora* principles in carriage — interpretation of *Nichterfüllung* — French *retard* and *demeure* — *retard* and *inexécution* — Code Civil art 1147 — delay and possibility of performance — delay treated as non-performance to suit the creditor — principles apply in carriage — Anglosaxon approach — any untimely performance is in breach of contract — timely performance a condition precedent — delay is non-performance — absence of the *mora* notion

In the legal systems subject to this inquiry all the variants of the notion of delay, which have been reviewed, appear. It is

[19] AMOS & WALTON, *Introduction to French Law*, 1935 p 176: "But if he [the debtor] does not perform it at the specified time, this does not, according to French law, constitute a breach of contract for which he becomes at once liable in damages, this at least is the general rule . . .; COHN, 1 *Manual of German Law* 68 no 209: "As a rule . . . delay of performance does not as such constitute a breach of contract."

interesting to note how the scope of the notion appears to vary according to the position of the specific performance remedy in the various legal systems. The notion seems to be humblest in Anglosaxon law where specific performance remains an exceptional remedy.[20] Among the Continental law countries, it is most limited in France where, according to Code Civil article 1142, "Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur", although, in modern times, the French courts have expanded the remedy of compulsion of performance by developing the doctrine of "astreinte".[21] In German and Scandinavian law, where compulsion of performance is a normal if perhaps not the most frequent remedy,[22] the notion of delay is very broad.

The notion of delay as developed in the Continental law systems is an adaptation of the Roman notion of *mora*. This notion is said to have been adopted mainly to support the so-called *perpetuatio obligationis*,[23] an institution which entailed that once the debtor failed to render timely performance, all risks relative to the performance, in particular that of the destruction of the goods to be delivered, were transferred to the debtor. But the notion of *mora* was used in *bonae fidei* obligations as well, as creating a right to special moratory damages.[25] This liability was distinguished from the liability arising under the *actio de recepto*.[26]

The distinction between the modern Continental law successors to the Roman *mora* and the non-performance notion, however, varies greatly in the different legal systems. Scandinavian law offers the broadest notion of *mora*. As established by the pan-Scandinavian Sales Act, the notion covers the case of non-per-

[20] POMEROY & MANN, *A Treatise on the Specific Performance of Contracts* 3rd Albany, NY, 1926 p 130 § 47. Note that specific performance has been refused in contracts with railway companies: *ibidem* note 1.

[21] See *e. g.* JULLIOT DE LA MORANDIERE, 2 *Précis de Droit Civil*, Paris 1957 p 236—239 nris 479—483. From the discussion arising when this remedy first was introduced by the courts may be mentioned: MEYNIAL, *De la sanction civile des obligations de faire ou de ne pas faire*, 1884 56 Revue pratique de droit français 385 sq; LABBÉ, *Encore l'affaire de Beauffremont*, 1881 50 Revue pratique de droit français 62 sq; ESMEIN, *L'origine et la logique de la jurisprudence en matière d'astreintes*, 1903 2 Rev trim dr civ 5—53.

[22] As to German law, see *e. g.* RABEL, 1 *Das Recht des Warenkaufs* 146 § 21-2, Sonderheft of 1936 19 ZAIP. As to Scandinavian law, see LJUNGMAN, *Om prestation in natura*, Uppsala 1948 p 26.

[23] GIRARD, *Manuél élémentaire de droit romain* 8th (edited by SENN) Paris 1929 p 690.

[25] GIRARD *op cit* 691.

[26] HILLIG, *Das Frachtgeschäft der Eisenbahnen*, Leipzig 1864 p 38 § 14.

formance as well as untimely performance.[27] *Mora* ("dröjsmål") thus means nothing but the absence of timely performance. Taken by itself it says nothing about the consequences of this absence. The notion of *mora* is said to be objective.[28] Although it is generally accepted that the Sales Act contains the general principles of the Scandinavian law of obligations,[29] the Swedish Supreme Court has hesitated to extend these *mora* principles to maritime carriage. Thus in the case *Engström v. Banco*[30] in which the charterer held on to the charterparty for some time after the shipping company had wrongfully repudiated it, the Court allowed the repudiator to get away with paying damages assessed as from the day of the repudiation and rejected the charterer's demand, based on the *mora* principles of the Sales Act, to have them assessed as from the day when he finally waived his right to have the charterparty compelled. Rodhe intimates that this decision should not be explained as a matter of principle.[31] Indeed, it is difficult to imagine what grounds a court could invoke to reject the charterer's action for compulsion of performance by setting a penalty for continued non-performance. When the Scandinavian Warsaw Acts were drafted, however, indications were given that Article 19 was not to apply to the case when the aircraft never took off[32] and that the Convention did not regulate the case of the carrier's failure to perform wholly or partly the contract of carriage.[33] In view of these indications it does not seem permissible to rely on the Scandinavian *mora* notion in the interpretation of Article 19.[34]

In German law, as laid down in the BGB, *mora* ("Verzug") is a narrower notion than in the Scandinavian law. BGB only provides two basic notions for the case of the unperformed contract, delay and impossibility.[35] The consequences attached to each notion

[27] RODHE, *Obligationsrätt* 184—186 § 19 and literature cited in note 4.
[28] HJERNER, *Främmande valutalag och internationell privaträtt* 562.
[29] RODHE *op cit* 186.
[30] Swedish Supreme Court 13 Apr 1922, *Aktiebolaget Carl Engström v Rederiaktiebolaget Banco*, 1922 NJA 205.
[31] RODHE *op cit* 502 § 46 and note 14.
[32] Danish *Indberetning* 22.
[33] 1936 SOU No 54 p 47 note 1. Also in WIKANDER (reprint) 40 note 1.
[34] Note, however, that GRÖNFORS, *Befraktarens hävningsrätt och sjöfraktavtalets konstruktion*, in 1959 Gothenburg School of Economics Publications No 2 (Skrifter utgivna i samverkan med Sjörättsföreningen i Göteborg No 16) p 9—10 relies on the Scandinavian *mora* notion when discussing the shipper's right to rescind a contract of air carriage ("luftbefordringsavtalet").
[35] CONSTANTINESCO, *Inexécution et Faute contractuelle en Droit comparé*, Stuttgart &

differ depending upon whether the delay or impossibility is imputed to either one or the other party, or, in the case of impossibility, to neither of them.[37] But non-performance as such is not a notion equivalent to delay and impossibility. It is merely distributed between the two other categories.[38] Non-performance ("Nicht-Erfüllung"), however, appears as a term in BGB § 325 designating the case under a mutual contract when the one party's performance "Wird ... infolge eines Umstandes, den er zu vertreten hat, unmöglich," and Ruckrigel treats the liability arising "bei Leistungstörungen" directly under the headings of "Verzug" and "Nichterfüllung".[39] The notion of delay is here, apparently, not broader than the possibility of compelling performance. — The BGB notions apply in carriage as well. This has been accepted both in maritime and in aviation law,[40] although some modifications may be necessary when the issue concerned is regulated by special rules.[41] As a result, there is a certain body of opinion on what is meant by *Nichterfüllung* in carriage. If these opinions may have to be discounted somewhat inasmuch as they refer to the term as adopted in private contracts, it must be kept in mind, on the other hand, that they generally deal with disputes in which the plaintiff finds it to his advantage to have the case classified as *Nichterfüllung,* rather than as *Verzug,* and accordingly courts and writers have been careful not unduly to expand the notion of *Nichterfüllung.* Capelle submits that *Nichterfüllung* may only be considered to exist "wenn ein Teil

Bruxelles 1960 p 51 no 23; COHN, 1 *Manual of German Law* 74 no 220; ESSER *Schuldrecht* 2d 320 § 75-4; VON MEHREN, *The Civil Law System* 685.

[37] BGB §§ 324 and 325 differentiate between "Vom Gläubiger zu vertretendes Unmöglichwerden" and "Vom Schuldner zu vertretendes Unmöglichwerden". §§ 284 and 285 establish a similar differentiation as to delay, although technically the term "Verzug" is not used when the delay of the debtor occurs "infolge eines Umstandes . . ., den er nicht zu vertreten hat." (§ 285). § 323 refers to the case of impossibility arising which shall not be imputed upon either of the parties. There is no equivalent as to delay. Cf however ESSER BGB Schuldrecht 1st 138 § 140. But compare same work 2d 336 § 78-2.

[38] VON MEHREN *op cit* 685.

[39] *Der luftrechtliche Chartervertrag* 28—29. Incidentally, Ruckriegel's reference in the first paragraph of the section on *Nichterfüllung* to BGB § 323 seems to be a misprint for § 325.

[40] PAPPENHEIM, 2 *Handbuch* 402 and note 7; CAPELLE, *Frachtcharter* 335 note 2; RUCKRIEGEL *op cit* 28; RÖSSGER, *Luftverkehr und Spedition* 33; SCHLEICHER-REYMANN-ABRAHAM 3rd 267 Anm 23, with the important indication that the contract type provisions, if any, precede the general law provisions in point, also p 350 Anm 5.

[41] See PAPPENHEIM *op cit* 403 note 7. Note that the German Warsaw Act deleted the delay provision. Note also SCHLEICHER-REYMANN-ABRAHAM 3rd *loc cit* (note 40 *supra*).

die Erfüllung des Vertrages vollständig unterlässt".[42] *E contrario,* then, as long as the possibility of performance is open, it cannot be non-performance but is delay.[43]

French law takes a more limited view of *mora.* It accepts a distinction between delay and impossibility. Delay is "retard" but impossibility is "inexécution".[44] Mere *retard* as such, however, does not entail liability. Liability is attached to the notion of "demeure", *i.e.* the French word for the Roman *mora.* "Tout *retard* dans l'exécution n'est pas nécessairement une *demeure,* au sens juridique du mot", said Planiol.[45] "La *demeure* est le nom que prend le retard du débiteur quand la loi en tient compte pour apprécier sa responsabilité". *Demeure,* in turn, is not permitted to arise unless the creditor has resorted to a certain precautionary procedure, the *mise en demeure;* until the *mise en demeure* there is a presumption that the creditor considers that the delay in performance does not cause him any prejudice, and that he consents to it.[46] *Inexécution,* however, is a larger notion than impossibility, and the line of distinction between delay and non-performance, accordingly, does not coincide with the line circumscribing impossibility. The line of distinction between delay and non-performance has been staked out in French law under the provisions of article 1147 of Code Civil which differentiates the award of damages between those provisions referring to non-performance and those referring to delay, and under article 108 of Code de Commerce to the extent that delay there was distinguished from *i.a.* loss of cargo[47] by the different method of calculating the period of prescription. As to principle, the French legal opinion seems agreed that so long as an eventual per-

[42] CAPELLE, *Frachtcharter* 572 and note 37. Note that mere refusal without excuse to deliver the cargo was treated as non-performance. Also RUCKRIEGEL *op cit* 29 (compare note 39 *supra*); cf RÖSSGER, *Luftverkehr und Spedition* 29.

[43] Refusal by the debtor to perform which formerly was treated as a case of delay, seems now generally to be classified in the category of "positive Vertragsverletzungen" which has been created by legal scholarship to supplement the dichotomy of delay and impossibility. See CONSTANTINESCO *op cit* 102—103 no 58—IV; cf COHN *op cit* 74 no 220.

[44] FUZIER-HERMAN & DEMOGUE, 3 *Code Civil Annoté* (nouvelle édition) Paris 1936 p 246, note 2 *ad* art 1147. Cf CONSTANTINESCO *op cit* 42 no 18.

[45] PLANIOL, 2 *Droit Civil* 8th 59 no 167.

[46] See WALTON, 2 *The Egyptian Law of Obligations — A Comparative Study With Special Reference to the French and the English Law,* London 1920 p 206—207; and CONSTANTINESCO *op cit* 44—48 nris 19—21 and literature there cited.

[47] As to this distinction, compare *Engeli, Pahud et Bigar v Swissair,* Tribunal de 1re instance de Genève, 8 Mar 1955, 1955 9 RFDA 335; and SAINT-ALARY *op cit* 547.

formance remains feasible, the case is one of delay rather than of non-performance.[49] However, in order to accommodate creditors whose interest in an ultimate performance, whether compelled or not, has become non-existent, there has developed the rule that the creditor may treat certain cases of extended delay as non-performance.[50] The creditor who takes advantage of this benevolence, however, by terminating the contract on the ground of the debtor's non-performance probably cannot benefit from the delay penalties occasionally provided in the contract; but this is so because once the contract is terminated the delay penalty clause is as extinct as the contract.[51] The benevolence extends to debtors as well. There is said to exist a tendency among the French courts to listen to the debtor's categorical refusal to perform and to consider this refusal as entailing the "inexécution définitive et irrevocable" not to be changed by the application of

[49] See CONSTANTINESCO *op cit* 42—43 no 18: "la notion de 'retard' a précisément le mérite de souligner que l'exécution ultérieure est encore possible; c'est-à-dire que l'inexécution n'est pas *définitive et irrévocable*. . . . Le débiteur peut la purger par une exécution ultérieure, toujours possible, si le créancier est d'accord. Et le créancier est d'accord du moment que malgré le retard, il met le débiteur en demeure d'exécuter, donc il continue à lui demander l'exécution . . . Lorsque cette possibilité d'exécution ultérieure s'évanouit par la suite, le retard, inexécution partielle et passagère quant à l'élément temps, se transforme en *inexécution définitive et irrévocable.*" See also *Chemin de fer de l'Etat v Sté des Entrepôts Dubuffet*, Req 18 Dec 1929, 1930 Gazette du Palais 1 p 334, in which the Court would not sustain the railway's invoking the suit time limit for delay when the delivery was still possible.

[50] Note that French law does not permit the termination of contract without court intervention. In *Cohade v Vallée*, 1856 Dalloz Périodique 1 p 246, the Court of Cassation held Vallée entitled to terminate the agreement because of Cohade's delay in fulfilling his undertaking and replying to the *mise en demeure*. Taking advantage of a faculty offered by the French law of these days, Vallée had bought a replacement from Cohade to enter the military service instead of Vallée Jr. When the Crimean War broke out before Cohade's performance became due, the number of recruits required by the government increased considerably and prices for replacements rose correspondingly. Vallée grew nervous when Cohade delayed performance, and bought his son another replacement, bringing an action against Cohade for the difference in price. Cass req 23 Apr 1856. In *Massey & Sawyer v Christie*, 1874 Sirey 1 p 213, 1874 Dalloz 1 p 387, the Court of Cassation assigned the 15 days of delay of the vessel "Northumbria" in arriving at the port of embarkation to non-performance of the charterparty because of the nature of the enterprise in which the charterer, an emigration agent, wanted to use her. The charterer was stuck in Le Havre, the port of embarkation, with all his emigrants, the expenses of whom he had to pay and who could dissolve their contracts of carriage with him after a short delay, as indeed they did, while no fill-up cargo could be found. The dispute between the owners and the charterers concerned whether damages should be awarded under the delay penalty clause or under the non-performance penalty clause. Cass 28 Jan 1874.

[51] See *Sté Ateliers Atlas v Sté l'Oyonnithe*, Cass civ 29 Jun 1925, 1925 Dalloz Hebdomadaire 594. Also DEMOGUE, *Effets des obligations*, 6 *Traité des obligations en général*, Paris 1931, explaining the non-application of the delay penalty in *Massey & Sawyer v Christie* (note 50 *supra*); FUZIER-HERMAN & DEMOGUE *op cit* 246—247. But see *Pottier v Boisnard*, Req 11 May 1898, 1899 Dalloz Périodique 1 p 310.

"astreintes".[52] These general principles are believed to apply in carriage as well.[53]

Anglosaxon law does not set the time element aside. It has no support for such a rule, for specific performance remains an exceptional remedy and the force of Roman tradition is non-existent. The dominating aspect therefore must be that any untimely performance is breach of contract.[54] The difficulties which beset English law on the point seem to relate to the fact that the contracts do not provide answers to the question: What did the creditor promise? Did he promise to accept performance to a condition precedent of delivery when stipulated, or was his promise free from that qualification? What is to be read into a contract which merely gives a naked reference to time for instance: "On Monday". Stoljar[55] sums up the English difficulty as follows: "If we construe the buyer's promise as limited by the words 'on Monday' we ascribe to the, perhaps perfunctory, mention of a date, the status of a condition precedent and the concomitant penalty of rejection; and if we tolerate a reasonable period of delay, we disregard a contractual stipulation which the parties must have meant to have at least some effect." Faced with this dilemma English courts have at times followed extremely strict canons of interpretation of time clauses and judges have even arrived at the conclusion that delivery on the wrong days involved non-performance, just as much as if peas had been delivered instead of beans.[57] This approach has particularly affected the interpretation of time indications in maritime charterparties, *e.g.* when the shipowner failed to provide the chartered ship for loading on the exact day specified.[58] Stoljar submits

[52] See CONSTANTINESCO *op cit* 42—44 no 18. Also SAGUÈS, *La rupture unilatérale des contrats*, thèse Paris 1937 p 354; LEBRET, *Suspension et résolution des contrats*, 1915—24 44 Revue critique de législation et de jurisprudence 604—605, cf 609.

[53] See JOSSERAND, *Les Transports* 2d 882 sq nris 854 sq. As to aviation, see HAMEL, *La loi du 1er juin 1924 sur la navigation aérienne*, 1925 Annales de droit commercial 5 sq, 106 sq, 195 sq, at 200.

[54] In the Law Merchant, however, delay was a ground of liability, and FLETCHER, *The Carrier's Liability* 56, submits that "we not infrequently find that a sentence for non-delivery contains (for us) an ambiguity as to whether the master in fact converted the cargo or was guilty of delay."

[55] STOLJAR, *Untimely Performance in the Law of Contract*, 1955 71 LQR 527—561, at 529—530.

[57] See Lord Blackburn in *Bowes v Shand*, 1877 2 App Cas 455, at 480—481.

[58] A date specified in the charterparty has consistently been regarded as a condition precedent and the charterer could therefore withdraw from the contract even though the vessel's delay was completely harmless. See *Shubrick v Salmond*, 1765, 3 Burr 1637; *Shadforth v Higgin*, 1813, 3 Camp 385, (both dealing with late

that "these extreme solutions directly result from the approach . . .[59]

This being the Anglosaxon background, it becomes apparent that delay cannot be a legal notion with a separate, singular status equivalent to that of Continental *mora,* but is limited to function as a mere factual basis for appreciating breach, whether misperformance or non-performance.[61]

## SECTION 4. CONCLUSIONS

Conceptualism and the interpretation of art 19 — importance of interpretation because of refund rule — Which one of the parties shall control the classification? — compulsion of performance — harmonizing interpretation based on French law — categoric and persistent refusal to perform is non-performance — principle applied to Robert-Houdin Case — general remarks

In view of the background of national law surveyed in the preceding section it seems not unnatural that German lawyers[62] in general have arrived at a broader notion of delay in air carriage than have French lawyers[63] and that Anglosaxon lawyers[64] seem to limit their discussion to the issue of whether or not there is any point in time when the performance is due, *i.e.* when the arrival is timely.

arrival). Further *Glaholm v Hays*, 1841, 2 Man & G 257, (failure to sail to the port of loading on the agreed date). Further indications in STOLJAR *op cit* 547—548. — For an attempt to transfer the English conceptualism into Norwegian maritime law *via* the charterparty clause: "penalty for non-performance estimated amount of freight", see *Thoresen v Jens Gran & Søn*, Bergens Sjøret, 21 May 1909, 1909 NDS 302.

[59] STOLJAR *op cit* 551.

[61] Cf CONSTANTINESCO *op cit* 124—126 no 69; at 125 he submits: "le droit anglais connait l'inexécution due au retard . . . mais non pas le retard en tant que notion juridique générale, et nettement définie."

[62] RIESE, DÖRING, KOFFKA, BODENSTEIN & KOFFKA (but also DRION and LACOUR) see note 9 *supra*, cf note 8.

[63] LEMOINE, COQUOZ, LITVINE, LE GOFF, VAN HOUTTE, SAINT-ALARY, GOEDHUIS (but also SCHLEICHER-REYMANN-ABRAHAM, SCHWEICKHARDT and SHAWCROSS & BEAUMONT), see notes 7—8 *supra.*

[64] ASTLE, *Air Carriers' Cargo Liabilities and Immunities*, London 1958 p 58; MOLLER, *The Law of Civil Aviation*, London 1936 p 313, 315—316; NATHAN & BARROWCLOUGH, *Civil Aviation*, in 5 Halsbury's Laws of England 3rd London 1953 p 233—234 no 545. Article 19 is not even commented upon in MCNAIR (KERR & MAC CRINDLE), *The Law of the Air* 2d London 1953. Also SACK, *International Unification of Private Law Rules on Air Transportation and The Warsaw Convention*, 1933 4 ALR 345—388, at 370. See also note 18 *supra.* Note however that SHAWCROSS & BEAUMONT 2d 472 no 513 E consider that the refund of freight as the limit of carrier's liability clause may conflict with the British Warsaw Act. It cannot be concluded from the text submitted by the editors of this work whether they have non-performance as well as mis-performance in mind, but as will be seen *infra* non-performance cases are the normal ambit of this clause. Cf DRION, *op cit* 73 no 66.

The problem of what is meant by delay, however, must be seen against the background of the refund rule in the common non-performance clauses. To these clauses I will revert later; suffice it here to indicate that the rule severely restricts the amount of damages to be paid in case of non-performance. Sometimes the sum to be paid will be an amount much below the limits established by Article 19 and the connecting articles of the Warsaw Convention. It therefore may become a matter of great economic importance to determine whether the case disputed is one of delay or of non-performance.

If we accept that the airline's wrongful repudiation of the contract is non-performance rather than delay, we confer upon the airline the right to have its case classified as delay or as non-performance at its pleasure. If we accept that the case is one of delay as long as the creditor can compel performance, we confer a similar right upon the charterer or passenger/shipper, as the case may be.

Compulsion of performance may here appear to be the basic issue. If the airline can be compelled to perform when the creditor elects this remedy against a wrongful repudiation, we confer the crucial power upon the innocent party. This in itself would seem to be an argument for the solution and there are further arguments as well. Certainly there is no reason inherent in the nature of business why the courts should refrain from administering the remedy of compelling direct performance against an airline, where the local law permits, once such a demand is made and is procedurally acceptable. Airlines have no legitimate need for protection against such compulsion, indeed, given their small numbers, it may be important that such a remedy exists to check abuses of a factual monopoly situation. However, this construction of Article 19 cannot prevail. As it is desirable to arrive at a harmonizing interpretation of the Warsaw Convention centring on French law, it becomes necessary to take account of the French tendency to let the debtor's categorical refusal to perform change the situation from *retard* to *inexécution*. This tendency, in effect, confers the crucial power upon the debtor. To let the wrongful debtor's decision become relevant in this case may be objectionable from the point of view of general principles of law. Its merits, however, seem important. It continues a long Continental tradition to decide doubtful points in favour of the debtor, and

it reflects in all likelihood the practice in everyday life and thus involves little change. Furthermore, it is fully reconcilable with the *Robert-Houdin Case*.[65] The cancellation of flight involved in this case, meant only a temporary refusal to perform the contract of carriage and was definitely not the categorical, persistent refusal which so has impressed the French law that it transfers the case from delay to non-performance. The airline had in all likelihood enthusiastically agreed to carry the passenger on the next flight.

Having arrived at this result as a direct corollary to the harmonizing method of interpretation here advocated, it may be proper to note that the *Robert-Houdin Case* can seldom be relied upon in air chartering. Since no continuous air line service is involved, the airline's refusal to perform the contract is likely to be of the categorical and persistent kind.[66]

[65] *Robert-Houdin v Panair do Brasil*, 1961 24 RGA 276.

[66] LEVI-TILLEY advises me (by letter 5 Apr 1961) that in British air chartering direct repudiations by carriers seldom occur. He gives the instance however, of a carrier repudiating a contract made with an English inclusive tour operator (*i. e.* a travel agency) when the latter was not able to confirm within a period of time stipulated that he had been officially notified of his appointment as an approved IATA Sales Agent. In some countries perhaps this would not be considered as a wrongful repudiation.

SUB-CHAPTER 2

# TERMINATION AND MODIFICATION OF CONTRACT GENERALLY

## SECTION 1. GENERAL DISCUSSION

Unperformed carriage — principal cases — originality of clausal law — requirement of uniform notions — *pacta sunt servanda* — termination and novation — general rules for adjustment — the contract sanction — compulsion of performance — pecuniary damages — rescission and damages — uniform notion of "termination" adopted — wrongful repudiation — importance of notion — termination *ex justa causa* and *sine causa* — plan for text

Cancellation and non-performance clauses deal with cases of unperformed carriage. These cases may arise either because the passengers never embarked and the goods were never loaded, or because they were respectively disembarked and unloaded before reaching their destination.[67] The clauses operate either to put an immediate end to the relationship between the parties to the contract, or to modify the contents of the contract in order to safeguard the carrier's economic interest in the carriage. The principal cases which this clausal law concerns are understood to be as follows: Firstly, there are the cases where the *charterer* cancels the flight. The relevant circumstances here may refer to the airline's operation, *e.g.* where operational authority has not been obtained as anticipated, or to the charterer's operation outside the ambit of the airline's operation, *e.g.* where the charterer's interest in the venture has ceased to exist because of cancellations which he has received from his other business partners. Secondly, there are the cases where the *airline* abandons the flight either before commencement or at some intermediary point, because it finds another more attractive transaction, or because supervening events have obstructed further performance.

This clausal law would not merit special study unless it modified the rules which would otherwise govern the relationship of the parties to the charter contract. In order to show that this clausal law introduces something new, it will become necessary to compare the rules supplied by this law with the regulations provided by the various systems of local law within the scope of this inquiry. A fruitful comparison of the five different legal systems with the body of clausal law requires some sort of com-

[67] See *supra* page 399.

mon denominator, a pattern of uniform notions onto which they all could be projected and thus compared. What notions, then, can serve as a basis for this comparison?

The principle *pacta sunt servanda* may serve as a point of departure. It is well to remember that this principle arose "d'une contrainte théologique exercée sur la volonté et non pas d'une autonomie de celle ci."[68] Once bound by a contract, one cannot change its provisions by a change of mind. Theoretically, therefore, in the absence of agreement to the contrary, the obligation to carry passengers or goods to their destination, as well as any other obligation which derives its force from the contract, persists despite obstacles raised to performance and desires contrary to performance entertained by either party until both parties agree that the original contract shall be at an end, *i.e.* termination, or a new contract shall be substituted in which the undertakings of the parties are adjusted to the new situation, *i.e.* novation. *Jura eodem modo dissolvi quo colligata sunt.*

At the present stage of legal evolution, however, these basic principles are generally interspersed with a number of other rules which permit the contract to be ended or its terms to be modified at the motion of only one of the parties to it. These rules represent a means of adjustment to new conditions and as such are parallel to the cancellation and non-performance clauses. These latter clauses, however, have an even wider scope and in order to arrive at a full comparison it becomes necessary to take into consideration the rules of contract sanctions as well. The principle *pacta sunt servanda* is of slight avail unless supported by a sanction against non-performance. Thus, when direct performance under the contract is not willingly rendered, it should be compelled. Such a rule for compulsion of direct (or specific) performance became a normal remedy under the late Roman Empire,[69] and has been a basic assumption of Continental law, it would seem, since the glossators.[70] This basic assumption supports the idea that the contract persists

[68] TISON, *Le principe de l'autonomie de la volonté dans l'ancien droit français*, thèse Paris 1931 p 23.

[69] Classical Roman law knew only a pecuniary sanction, *condemnatio pecuniaria*. The court decree for performance *in natura* (*ipsam rem*) developed in the proceedings *extra ordinem causae cognitio* in the Late Empire. See generally WENGER, *The Bureaucratic Cognitio Procedure*, in *Institutes of the Roman Law of Civil Procedure* (translated by Otis Harrison Fisk) 2d New York 1955 p 255—336.

[70] See page 406 *supra* and notes 20—22. Cf Code Civil art 1184-2; BGB § 249. The principle is subject to the generally recognized exception relative to personal labour services. This exception stems from a Latin maxim *nemo praecise cogi potest*

until terminated or novated by the agreement of the parties. However, resort to a contract sanction consisting merely of pecuniary damages introduces an ingredient of uncertainty. Such damages represent a surrogate performance which may also be compelled, and, indeed, often with greater ease than direct (specific) performance. When this surrogate performance is compelled, the contract may be said to be carried out, at least on the economic level. This confronts the observer with the question: Does the creditor's option between the direct performance and the surrogate performance represent a perpetuation of the contract or its termination? Should the damages be considered as an effect arising directly from the contract, or should the contract be considered terminated and the damages be construed as arising from some other phenomenon? There cannot be any useful answer in the abstract to these questions.[71] Some legal systems avoid the issue in so far as they treat rescission and damages as elective remedies.[72] If one rescinds the contract, one cannot sue upon it. In legal systems where these remedies are not elective but cumulative,[73] however, the significance of the problem becomes more acute. In some quarters, for example, rescission has been defined in terms of a refusal to accept direct (specific) performance.[74]

In view of the various legal issues involved the present work will adopt a uniform notion of contract termination having the following characteristics: The contract will be considered to be in force so long as the parties comply with its terms or direct compliance with its terms can be compelled. As a corollary to this, the contract will be considered as terminated when direct (specific) compliance with the contract terms can no longer be compelled, and direct performance has not been rendered in accordance with the contract's terms. Thus, the contract will be considered terminated even when the possibility remains of exacting

*ad factum*, supported by the idea that in such cases compulsion of performance entailed a suggestion of servitude. As to the origin of the maxim, see PLANIOL, 2 *Droit civil* 8th 61—62 no 173 note 1. Cf FOYER, *Les obligations*, in DAVID, 2 *Le droit français, Principes et tendances du droit fr nçais*, Paris 1960 p 144.

[71] See generally CONSTANTINESCO *op cit* 30—31 no 12 (French law) and p 50—51 no 24 (German law). Cf HJERNER *op cit* 570—571.

[72] See *infra* page 442.

[73] See *infra* page 442.

[74] See *e. g.* HJERNER *op cit* 562—563 note 12 and literature there cited.

[75] Damages are thus viewed as after-effects of a contract rather than direct effects, and these after-effects result not from the contract itself but from its non-performance. See generally CONSTANTINESCO *op cit* 30—31 no 12 (French law) and p 50—51 no 24 (German law). Cf in Scandinavian discussion HJERNER *op cit* 570—571.

damages from the debtor for non-performance. As thus conceived, termination may also result from one party's wrongful repudiation of the contract where the applicable law permits only the payment of damages and not the compulsion of direct performance.[75] Furthermore, at times, damages may be limited by the contract. As the possible discrepancy between direct performance and surrogate performance increases, the importance of the notion of termination here presented increases. For where the discrepancy is great it is often illusory to speak of the contract as being performed on the economic level.[76]

The issue of whether or not the terminating party incurs liability to pay damages is sufficiently important to subdivide termination rights into those which cannot be exercised unless the terminating party pays damages, and those which have no such prerequisite. This distinction may be conveniently indicated by classifying the termination as taking place *ex justa causa* when no damages are due, and *sine (justa) causa* when damages must be paid.

The comparison may now proceed by use of these uniform notions of termination *ex justa causa,* and termination *sine causa.* Of course neither the clausal law nor the local laws concerned do immediately lend themselves to a comparison on these terms. While it is theoretically possible to describe the individual systems solely in terms of the uniform notions, this will not be the method here employed. Instead, the exposition will put forth the law in the setting in which the institutions have developed, and within this framework the comparison will be attempted. This method will facilitate an understanding of what the rules in point are as well as why they are the rules in point. As far as the local law is concerned, then, this is best accomplished by following the broad pattern of contract type regulations, general doctrines and wrongful repudiation which characterizes its present materials. Furthermore, wrongful repudiation should not be considered alone but rather should be seen in its normal context of damages. This can be supplemented by a further survey of the interrelationship between damages and termination: *viz.,* when will damages be payable as a sanction supplementing termination, and, in view of the frequent occurrence of termination fees, what is the law of advance settlement of damages?

As far as the clausal law is concerned, similarly, the natural

[76] Note the *refund rule, supra* at page 413 and *infra* at pages 494 sq.

pattern of cancellation clauses[77] and non-performance clauses will be followed. The comparative approach instead throughout the remainder of the chapter will be served by intermittent projections of the institutions reviewed onto the pattern of the basic notions of termination *ex justa causa* and termination *sine causa.*

## SECTION 2. CONTRACT TYPE REGULATIONS

Termination rights among *naturalia negotii* — termination *ex justa causa* and termination *sine causa* — *lex commissoria* — Code Civil art 1184 — interrelationship between dogmatical and practical approach to termination — Danish development — *lex commissoria* as *naturalia negotii* — ADHGB — BGB — *Rücktrittsklausel* — Scandinavian laws — pan-Scandinavian Sales Act — Act expresses general principles of the law of obligations — modern rule — right to terminate for undisclosed reasons — *naturalia negotii* negotii of the contract for work — Code Civil art 1794 — Swedish 19th century Civil Code Bills — right to countermand — recognition of right to countermand — German law and the Roman books — BGB — summary

While the Roman law, broadly speaking,[78] never developed a general theory for the termination of contract, termination rights developed in the sphere of the contract type regulations, the so-called *naturalia negotii,* and in particular those belonging to *locatio conductio.*[79] This feature of termination rights as part of the *naturalia negotii* exerted an influence upon the approach of the Continental law systems to termination problems in general. These termination rights may be differentiated between those arising *ex justa causa,* and those arising *sine causa.*

Termination *ex justa causa* is closely tied to the history of *lex commissoria*[81] and the metamorphosis of this latter institution from an express contract term in sales contracts, to status as an implied term in such contracts, and then to the status of a general principle of the law of all bilateral contracts. *Lex commissoria* (as appearing in a contract for the sale of land) used

[77] Note that not all institutions of cancellation in air chartering are surveyed in this Chapter. Charterparties *e. g.* commonly contain also clauses permitting the airline to cancel the charter in the event of the charterer going bankrupt, or violating the IATA clause or some other terms of the agreement (*i. e.* termination *ex justa causa*). I have considered this part of the clausal law not to be sufficiently singular to merit treatment in this Chapter.

[78] As to obligations arising from *stipulatio,* the impossibility rule prevailed (see further *infra* page 430). The notion of *bona fide* introduced a certain mitigation of the rule that contracts must be honoured, but only in relation to the *bonae fidei* contracts. The *exceptio non adimpleti contractus* furthermore meant a certain modification of this rule.

[79] LEPELTIER, *La résolution judiciaire des contrats pour inexécution des obligations,* thèse Caen 1934 p 15.

[81] *Lex,* it is recalled, does not only mean statute but contract or clause as well.

to read: "si ad diem pecunia soluta non sit ut fundus inemptus sit."[82] It is easy to understand how favourable such a clause was to the seller. However, since the Roman law in principle required each party to a sales contract to honour his obligation whatever the conduct of the other party, the clause was often a necessity. The insertion of the *lex commissoria* became a standard form of notarial practice in old French law, so much so that the ancient French *parlements* read the clause into contracts by implication when omitted.[83] The compilers of the Code Civil continued this practice inasmuch as the following principle was formulated in article 1184, paragraph 1: "A condition of resolution is implied in all mutual contracts where one of the parties does not perform his obligation."[84] In the end, however, as will shortly be explained, the development of the theory of *cause* made resort to this article no longer necessary.

*Lex commissoria,* however, was all the more necessary in those systems more impressed than the French with the orthodox Roman law pattern. An illustrative instance of this inter-relationship between the dogmatic and the practical approach to termination is found in the 18th century Danish-Norwegian law. During the first part of the 18th century the impact of the school of natural law (to which I will later revert) had made the Supreme Court recognize a general right to rescind contracts in the case of a failure of performance by the other party to the contract.[85] After 1770, however, the Court was more impressed with the Roman principles and denied (but not without exceptions) termination referring to the absence of any *lex commissoria,* particularly in relation to sales.[86] Nielsen submits that "Danish

[82] Dig 18.3.2.

[83] See *e. g.* the judgment by the Parlement de Paris, Quatrième Chambre des Enquêtes, rendered 27 Nov 1574, reported in Barnabé Le Vest, *Arrêts célebrès et mémorables du parlement de Paris, recueillis par Barnabé Le Vest, publiés par Barnabé* Le Vest, *son fils,* Paris 1612 p 658 no 137. See generally Boyer, *Recherches historiques sur la résolution des contrats (origines de l'Article 1184 C. Civ)*, thèse Bordeaux 1924 p 363. Cf Saguès, *La rupture unilatérale dans les contrats,* thèse Paris 1937 p 271. See also 2 Planiol 8th 434 no 1310; 2 Ripert & Boulanger 200—201 no 519.

[84] The article continues: "In such a case the contract is not resolved as of right. The promisee may either compel performance or seek resolution and damages. Resolution must be sought in court, and time may be given the defender according to circumstances." (Translation as in Amos & Walton, *Introduction to French Law* 181—183) Cf *infra* page 427 and note 117, page 428 note 118.

[85] Nielsen, *Studier over ældre dansk Formueretspraksis,* Copenhagen 1951 p 270: "about the middle of the 18th century one will find formulations of a general rule that breach on the part of one of the contracting parties in a mutually obligating contractual relationship, must result in unenforceability"

[86] Nielsen *op cit* 273 sq.

law did not recognize any general faculty to terminate a contractual relationship because of unsatisfactory performance, and that the result was arrived at under the impact of Roman law"[87]

In Continental legal systems other than the French, therefore, the *lex commissoria* had difficulty in achieving the transition from an express contract term to a general doctrine of termination. It did, however, complete its development into part of the *naturalia negotii* of the sales contract. The most important statutes developing these *naturalia negotii* were the pan-German ADHGB and the pan-Scandinavian Sales Act.

For Germany, the ADHGB extended a right to dissolve the contract to the seller, when the buyer delayed payment and the goods were yet to be delivered (Art. 354); and to the buyer, when the seller delayed delivery of the goods (Art. 355). In both cases, the party entitled to terminate the contract needed only to make his decision and then notify the other party. The termination worked as *resolutio ex tunc* and could not be coupled with damage payments.[88]

The regulation eventually adopted by the drafters of BGB entailed that each party to the contract possessed a right to terminate the contract (with the requirement that he must place the other party, as far as possible, in the same position in which that party would have been had the contract never been concluded) if such a right had been reserved for him in the contract, or if some legal provision subsequently brought such a right into existence.[89] The latter alternative corresponded to the broad general notions of non-performance in the BGB. The Code permitted a general right of the creditor to repudiate his contract in the case of an impossibility for which the debtor must answer (§ 325) as well as in the case of the debtor being in *mora* (§ 327). With respect to termination rights reserved in the contract, the BGB rules for termination supplemented the contractual dis-

[87] NIELSEN *op cit* 278. Nielsen's text convincingly repudiates the statements of the law given by contemporary authors in reference to the legal practice, see p 281 sq. Whatever the criticism of these statements on the grounds of historical inaccuracy, the authority of these authors' names ensured that the doctrine which they elaborated would be accorded steady and faithful respect for the following century.

[88] KEYSSNER, *Allgemeines Deutsches Handelsgesetzbuch nach Rechtsprechung und Wissenschaft*, Stuttgart 1878 pp 374, 379. See also the decisions of the Reichs-Oberhandelsgericht, in *Gumpertz v Hertz*, 10 May 1876, 20 Entsch ROHG 299 (recovery of payment with interest reckoned from day of original payment) and *Fuchs v Kiepenheuer*, 13 Feb 1875, 17 Entsch ROHG 422 (no damages).

[89] COHN, 1 *Manual of German Law*, HMSO London 1950 p 74 nc 218.

solution clauses (*Rücktrittsklausel*).[91] Such clauses now appeared among the *naturalia negotii* of not only the sales contract but also those of some other contract types, regulated by the Code.[92]

While a widespread uncertainty over the existence of any general right of termination for good cause, characterized the 19th century Scandinavian laws,[93] termination rights approached recognition, primarily in the sphere of *naturalia negotii*.[94] It was left to the pan-Scandinavian Sales Act, however, to establish safe bases for this right. The Act rules that the seller's delay in performance and the buyer's delay in payment entitles the other party to terminate the contract subject to certain reservations, the most important of which is that the delay must be more than trifling.[95] Similarly, in the event of defective or incomplete delivery of goods, the buyer is entitled to terminate, subject to certain reservations.[96] These rules have received an extensive application by analogy to other contracts.[97] In the absence of any general codification relating to the problem, the pan-Scandinavian Sales Act was believed to express the general principles of the law of obligations which could be applied whenever contractual problems arose. Rodhe submits that the rule now is that failure to perform or deviation from promised performance in principle always create a right to terminate the contract on the part of the innocent party.[98]

While a general right to terminate the contract for good reason thus laboriously fought its way, wholly or partly, to recognition in the German and Scandinavian areas, *via* the sales contract, a right to terminate *sine causa*, for undisclosed reasons, advanced to recognition in the Continental law area generally as part of the *naturalia negotii* of the contract for work. In the course of

[91] BGB §§ 346—361.
[92] *E. g.* sale in § 454, lease in §§ 542—544, contract for work in § 636.
[93] Hesitation as to the existence of any general right of termination can be seen in Swedish law as late as in the 20th century. See examples collected by RODHE, *Obligationsrätt* 426 § 37 note 55.
[94] See WINROTH, 1 *Strödda uppsatser* 13, also *verbo* "Kontrakt" in *Nordisk familjebok*: "Härtill kommer i vissa fall såsom i allmänhet vid leverans- och tjensteaftal, en alternativ rättighet att betrakta kontraktet såsom häfdt under åtnjutande af skadestånd."
[95] §§ 21, 28. Cf 1 ALMÉN 4th 249—250.
[96] §§ 42—43.
[97] For instance, even to the advertising contract, see NIAL, *Annonsavtalet* 40.
[98] *Obligationsrätt* 427 § 37. NIELSEN, *op cit*, submits at p 285: "Med Købeloven af 1906 blev de forudsætningsmæssige Misligeholdelsebeføjelser lovfæstet før Køb- og Salgsomraadet og dermed i Realiteten for de fleste Kontraktsforhold, der gaar ud paa Udveksling af Formueydelser."

# AIR CHARTER

## A Study in Legal Development

ACADEMIC DISSERTATION

With the permission of the
Learned Faculty of Law in Stockholm
To Be Defended in Public in the English and
Swedish Languages in Fulfilment
of the Requirements for the Degree of Juris Doctor.
The Act Will Take Place in Lecture Room C at
the University Building, Norrtullsgatan 2,
at 10 a.m. on Friday, 15th December, 1961,

by

JACOB W. F. SUNDBERG
JUR. LIC.

*A limited number of reprints of case reports not yet published, and of the Guadalajara Convention, are available on application to the Faculty of Law*

STOCKHOLM 1961

# FLYGCHARTER

## En studie i rättsutveckling

AKADEMISK AVHANDLING

avfattad å engelska språket
vilken med tillstånd av vittlagfarna juridiska fakulteten
i Stockholm för vinnande av juris doktorsgrad till
offentlig granskning framställes
och försvaras å engelska och svenska språken
å universitetets lärosal C
fredagen den 15 december 1961 kl. 10 f. m.

av

JACOB W. F. SUNDBERG
JUR. LIC.

*Ett begränsat antal särtryck av åberopade rättsfallsreferat, vilka ännu icke utkommit i bokhandeln, samt av Guadalajarakonventionen, finnas på begäran tillgänglig hos juridiska fakulteten*

STOCKHOLM 1961

the development of this contract type such a right emerged as incumbent upon the *locator operis*. Article 1794 of the Code Civil contained the following principle: "Le maître peut résilier, par sa simple volonté, le marché à forfait, quoique l'ouvrage soit déjà commencé . . ." The exceptional character of the rule originally led interpreters to attach to it the same hypothesis upon which its precursor, article 1793, proceeded: the erection of a building under the orders of the owner of the land upon which it was to be built.[99] In the course of time, however, this faculty of termination was considered to enunciate a principle peculiar to the *entreprise* as a general notion: "à toute espèce d'entreprise, pour tous travaux effectués à forfait."[100]

The French development was soon reflected in the Swedish 19th century drafts of a new Civil Code. The Code of 1734 did not even know the *locatio operis* contract; it referred only to the neighbouring contracts of lease of chattels, land or houses and the hiring of labour. The 19th century drafters, however, provided a regulation for a contract type called "entreprenade, accord, beting" which was characterized by the commissioning of one party by another to perform a certain piece of work, and the party agreeing to complete the commissioned performance for

[99] Se POTHIER, *Traité du contrat de louage* 341 no 440, and 3 RIPERT & BOULANGER 682 no 2074.

[100] ROUAST, *Contrat d'entreprise*, in PLANIOL & RIPERT, 11 *Traité pratique de droit civil français* 2d Paris 1954 p 178 no 937; AUBRY & RAU, 5 *Droit civil français* 6th (by ESMEIN) Paris 1946 403 § 374 note 11; LAURENT, 26 *Principes de droit civil* 4th Paris & Bruxelles 1887 p 21—23 nris 17—19; but GUILLOUARD, 2 *Louage* 3rd 1891 p 369 no 803. See also 2 PLANIOL 8th 617 no 1907. — The importance of this text must be seen in relation to two matters. First, the French law normally did not permit the termination of a contract without court intervention (see *infra* page 427). The *entreprise* rule deviates from this principle. Secondly, a specific performance could prevent wrongful repudiation from acquiring the status of termination. The *entreprise* rule was a defence against any specific performance action. These matters are inadequately covered by SAGUÈS, *La rupture unilatérale des contrats*, thèse Paris 1937, and his conclusion, at p 29, that art 1794 in no way deviated from the general contract principles of the Code Civil "puisque le maître indemnise entièrement l'entrepreneur" accordingly does not merit support. — When the extension of the right to countermand went so far that the Court of Cassation applied it to a ship-building contract, however, merchants began to feel uneasy. Up to that time they had considered that type of contract to be a closed sale and purchase. Their complaints, however, led to nothing but the advice that they protect themselves by adequate contract clauses. See Circulaire du Ministre du commerce 10 Aug 1899: Les lois nouvelles 15 Mar 1900 p 87. As indicated by 2 PLANIOL 8th 617 no 1907. See also ROUAST *op cit* 178 no 937 and note 4. — It is noteworthy that, by contrast to the right of termination in sales which worked *ex tunc*, the right to countermand the contract for work worked *ex nunc*. This difference, in French law, is sometimes expressed in a distinction between having the contract terminated by *résolution* and by *résiliation*.

a fixed price. The drafters were in agreement that circumstances could change in such a way as to make it equitable to accord the commissioning party a right to change his mind and cancel the contract.[101] In spite of the wrecking of the legislative project this right to countermand came to be recognized in the general law as a principle peculiar to contracts for the manufacture of goods and the construction of buildings, and this recognition extended to the whole jurisdictional area of Scandinavian law.[102]

The German development reached similar results but garnered its arguments from the Roman books. Pursuant to the Institutiones 3. 26. 9. the party to a contract of mandate could withdraw from the contract at will[103] and there were other texts of the Digests which intimated that the employer could avoid the labours of the employee.[104] The enactment of the BGB regularized the situation and left the ordering party with two faculties of termination ("Kündigung"). He could cancel generally *ex nunc*, but such cancellation left the contractor entitled to his full fee, subject only to a deduction of what he could earn of profits and save of costs in the remaining period of the contract time (§ 649). He could furthermore cancel the contract in certain cases of miscalculation of the price, but the contractor was then entitled to a proportionate fee (§ 645-1).

To summarize, then, at about the turn of the century some of the Continental systems had arrived at a general right to terminate the contract for good reason, and furthermore, within the ambit of the contract for work, they all recognized a right of the ordering party to terminate at will.

[101] 1826 HB 12: 7 and Motiver p 197—198.

[102] See WIKANDER, *Det materiella arbetsbetinget* 336 sq, cf 260 sq; 9 HASSELROT 2005 sq; RODHE *op cit* 707 § 59; PEDERSEN, *Entreprise — Bygge- og Anlægsarbejder*, Copenhagen 1952 p 116, and *Afbestilling*, 1952 Juristen 257—276; TAXELL, *Om avbeställningsrätt vid leverans och arbetsbeting*, 1949 JFFT 151—164; PALMGREN, *Avbeställning av entreprenad- och leveranskontrakt*, 1949 "Mercator" — Tidskrift för Finlands Näringsliv 107—108, 124, 159—161, 176; USSING, *Enkelte Kontrakter* 1940 p 379 § 49-2-D

[103] "recte quoque mandatum contractum, si, dum adhuc integra res sit, revocatum fuerit, evanescit."

[104] DANKWARDT invoked, besides Inst 3. 26. 9. Dig 19. 2. 38 pr and § 1; see 1874 13 JhJ 331—331 and note 2. The classic example of revocation, later to receive enunciation in BGB § 650 (see also 2 Protokolle der Kommission für die zweite Lesung des Entwurfs p 335—336; cf INGSTAD, *Leie efter Romersk Rätt* 251. Cf POTHIER, *Traité du contrat de Louage* 341 no 440) is found in Dig 19. 2. 60. 4. The passage concerns the revocation of the mandate to erect a villa when the mandant found out that, while he had calculated a cost of 200,000 sestertii, it would in fact cost 300,000.

SECTION 3. GENERAL PRINCIPLES OF CONTRACT

## § 1. *Principles of equivalence of contractual performances.*

Roman law: general principle and *naturalia negotii* — school of natural law-Pufendorf — French doctrine of cause — art 1131 — *Fornier v Gras* — Capitant — modern state of doctrine — function of courts — Anglosaxon doctrine of consideration — historical development — meaning of doctrine — *Giles v Edwards*

The Roman law did not conceive of contract as a general notion until quite late in its development, and apart from the limited sphere of *naturalia negotii* of certain contracts types it remained strictly opposed in principle to a general right to terminate the contract. In the Roman-inspired Continental legal systems the particular remedies of the Roman law which involved rather far-reaching deviations from this strict principle, have generally attracted less attention than the principle itself.[105] Persons eager to find a way to arrive at a general right of termination compatible with the general notion of contract therefore have looked for other ways in which such a right could be given a doctrinal justification.

The school of natural law taught that the performance of the one party to the contract was a condition for the other's performance. Said Pufendorf: "For whoever promises another something by a pact, does so not absolutely and gratis, but in consideration of what the other has undertaken to perform; and so the performances of each for the other take on the form of a condition, as if it had been said: 'I will perform my part, if you perform yours first'. But it is fixed that whatever is built upon a condition falls to the ground when the condition does not appear."[106]

[105] GOTTSCHALK, *Impossibility of Performance in Contract*, London 1938 p 73, submits that the *exceptio doli* became the means of refusing the fulfilment of a contract until the other party had fulfilled certain claims. See also German *Pandekten* literature cited by Gottschalk *ibidem* in note b. — The *exceptio non adimpleti contractus* operated equally to relieve the debtor of his obligation when the other party failed to perform his part of the contract. See generally SCHULZ, *Classical Roman Law* 35 sec 60 sq, p 531 sec 916; BUCKLAND, 1932-33 46 Harv LRev 1286. As to modern French law, see generally CASSIN, *De l'exception tirée de l'inexécution dans les rapports synallagmatiques (exception non adimpleti contractus) et de ses relations avec le droit de retention*, thèse Paris 1914 p 440. In modern German law the exception recurs as BGB § 320—1. As to Scandinavian law, see RODHE *op cit* 399—404 § 35-C-1. — The principle of the dependency of mutual contractual undertakings *inter se* was introduced in English law by Lord Mansfield in *Kingston v Preston*, 2 Doug 684, 99 ER 437.

[106] *De Jurae Naturae et Gentium Libri Octo*, Book V Ch xi no 9. Similarly NØRRE-

About the end of the 19th century the French courts arrived at similar results to those of the school of natural law but based upon the theory of *cause*.[107] Its roots go down to the late introduction in Roman law of the *condictiones since causa* and *ob turpem causam*.[108] Domat expounded his theory in a way that eventually was adopted by the Code Civil.[109] The Code rule was as follows: "L'obligation sans cause ... ne peut avoir aucun effet." (Art. 1131). This *cause* was an essential condition for the existence of an obligation. The *cause* induced the parties to enter into the contract. If the *cause* was not present, the contractual ties must be broken because they did not correspond to the will of the parties.[111] In bilateral contracts the *cause* of obligation was naturally the counterperformance of the other party to the contract. That was what induced each party to obligate himself.

While the notion of the *cause* has been continuously worked upon by the French ever since its adoption into the Code[112] and changes in theory have particularly affected the doctrine as applied to gratuitous undertakings, yet, essentially, this notion within the context of the bilateral contract remains the same. In *Fornier v. Gras* the Court of Cassation described how *cause* could be used to terminate the contract, as follows: "In synalagmatic contract the obligation of one party has for its cause the obligation of the other, in such a manner that if the obligation of one is not fulfilled, whatever the reason was, the other obligation's cause will fail. There is no possibility of distinguishing between the reasons for freeing the parties from contractual duties and of admitting superior force as an obstacle to the rescission if one of the parties has not fulfilled his obligation."[113]

GAARD, *Naturrettens første Grunde*, 1784 p 262: "naar den ene Contrahent handler imod de Pligter, Contracten paalægger ham, saa staar det til den anden Contrahent, om han vil vedblive Contracten eller ikke."

[107] This development had for long been proposed in legal scholarship, in particular DEMOLOMBE, *Traité des Contrats ou des obligations conventionelles en général* 25 *Cours de Code Napoléon* 469, whose formula was the one adopted by the Court of Cassation, Chambre Civile, in the leading case *Ceccaldi v Albertini*, decided 14 Apr 1891, 91 Dalloz Périodique 1 p 329, 94 Sirey 1 p 391. See CAPITANT, *De la cause des obligations*, Paris 1923 p 328 no 152. Cf BOYER *op cit* 41 and literature cited in note 3.

[108] LEPOINTE & MONIER, *Les obligations en droit romain et dans l'ancien droit français* 1954 p 336.

[109] DOMAT, 1 *Les Loix Civiles dans leur Ordre Naturel: Le droit public et legum delectus*, Paris 1767 p 20, 1re Partie, Liv 1, tit 1, sec 1 no 5.

[111] See *e. g.* CATALA, 1958 32 Tulane LRev *The Cause of Obligations in French Law*, 476.

[112] CATALA, 1958 32 Tulane LRev 475—484.

[113] Cass 5 May 1920, 1921 Sirey I p 298. As translated by SZLADITZ, 1953 2 AmJ

Capitant's important analysis better illustrates the working of *cause* in the case of failure of performance. He says: "Tout se simplifie ... du moment que l'on identifie bien les notions de cause et de but, car il suffit alors de rechercher quel est le but visé, ou la fin voulue par chacune des parties, et cette fin n'est pas difficile à préciser. En effet, il est bien évident que si le contractant s'engage, ce n'est pas seulement pour obtenir que l'autre s'oblige de son côté. Les deux obligations corrélatives ne sont qu'un premier stade destiné à préparer le résultat définitif qui est l'exécution des prestations promises ... Ainsi, dans un contrat synallagmatique, la cause qui détermine chaque partie à s'obliger est la volonté d'obtenir l'exécution de la prestation qui lui est promise en retour".[114] This theory may then be applied with far-reaching results in the following way: "... si par suite d'un évènement postérieur à la naissance de l'obligation (cas fortuit ou force majeure, faute de l'autre partie), la fin voulue par le débiteur ne peut pas se réaliser, celui-ci cesse d'être obligé, il est liberé. En effet, l'obligation disparaît nécessairement avec sa cause."[115] While this reasoning has been strongly attacked by the "anti-causalistes" school in French legal scholarship[116] it appears generally to command faithful respect among the courts.

When the doctrine of *cause* replaced the prior reliance on article 1184 and the implied *lex commissoria* in cases of termination of contract, it introduced a dispute as to the function of the courts in these cases as well. A strong tradition from the Canon Law supported the rule that the parties to the contract, in principle, had no power to terminate the contract. The dissolution of the contract should be decreed by the court.[117] This rule was also upheld by the courts when using the doctrine of

CompL 341 note 28.

[114] CAPITANT *op cit* 30—31 no 14. A condensed translation into English is given by Gow in 1954 3 ICLQ 304 note 40 and p 304—310.

[115] CAPITANT *op cit* 18 no 7.

[116] For a bibliography over the "anti-causalistes" school, see 2 RIPERT & BOULANGER 109—110 no 274. See also MAZEAUD, MAZEAUD & MAZEAUD, 2 *Leçons de droit civil* 212 no 266.

[117] Under the Canon Law the resolution of a contract had to be by the ecclesiastical court because nobody could take the administration of justice into his own hands and only the Church could absolve a person from his oath, the essence of the notion of the binding contract. See DECLAREUIL, *Histoire générale du droit français à 1789*, p 341—342; also the historical account in LEPELTIER, *La résolution judiciaire des contrats pour inexécution des obligations*, thèse Caen 1934 p 11—40 nris 5—17. Cf 2 RIPERT & BOULANGER 205 no 534. Cf page 420 note 84 *supra*.

*cause* as a means of termination, in spite of an embittered opposition from legal scholars.[118]

In Anglosaxon law, termination could be arrived at by the doctrine of *consideration (quid pro quo)*. Consideration, in a way, is a theory very similar to that of *cause*.[119] In fact, at one

[118] *Ceccaldi v Albertini* (1891 Dalloz 1 p 329; 1894 Sirey 1 p 391) inaugurating the new era in the matter of termination of contract inaugurated at the same time the dispute as to whether the termination could be brought about *ipso facto* or must be established by court decree. This latter dispute was brought into focus by PLANIOL in an important note in Dalloz to the decree. In this note he pointed out that, if one obligation was extinguished by *force majeure* and the corresponding one thereby was deprived of its cause and thus must fall away, there was no room for the intervention of the court. "L'idée d'un défaut de cause fait bien comprendre la disparition simultanée des deux obligations, lorsqu'il survient pour l'exécution de l'une d'elles un empêchement de force majeure. La force majeure a un effet direct; elle produit la suppression immédiate et définitive de l'obligation dont elle empêche la réalisation (c. civ. 1148 et 1302 et arg. de ces art.). Cette suppression a lieu sans que le créancier ait été satisfait ou se tienne pour satisfait. Par la disparition de sa créance, sa propre obligation, d'ont l'exécution est encore possible, reste, pour ainsi dire, en l'air. Sa contrepartie nécessaire lui fait défaut, et on peut dire d'elle qu'elle est désormais sans cause. Par conséquent, elle disparaît." (At 330 col 1). But this reasoning only applied to *force majeure*. As to non-performance which was due to the fault of the debtor, it was otherwise: "une obligation inexécutée n'est pas une obligation inexistante. Elle en est plutôt l'opposé; elle subsiste avec toute sa force, et la preuve, c'est que la loi elle-même réserve à l'autre partie le choix entre l'exécution du contrat et sa résolution. Il est alors manifestement inexact de dire que les obligations du demandeur en résolution sont sans cause; ses obligations ont une cause puisqu'il a encore en face de lui un débiteur tenu en vertu du même contrat. Ainsi le fondement théorique de la libération des parties ne peut pas être le même dans les deux cas . . . S'il y a faute ou fait imputable à l'une des parties, l'action en résolution dérive d'une convention de résiliation sousentendue . . . S'il y a cas fortuit ou force majeure, la libération simultanée des deux parties est imposée par la théorie de la cause, et elle s'opère sans qu'on ait besoin de sousentendre aucun pacte résolutoire." (At 330 col 1) "Au cas de faute du débiteur, la résiliation est prononcée par le juge; c'est un acte d'autorité qui délie les parties. Au cas de force majeure, la libération des contractants s'opère *ipso facto.*" (at 330 col 1). In spite of this criticism, however, the French courts continued "d'exercer son pouvoir souverain d'appréciation" as required by the Chambre Civile in *Ceccaldi v Albertini*. Thus, while article 1184 was discarded as the basis of termination, it was nevertheless upheld to support the principle of the court decree being the exclusive means by which a contract could be terminated in the absence of express statutory provision to the contrary (See *Ville de Lorient v Zimmerman et al.*, Chambre des requêtes 2 May 1892, 1893 Dalloz Périodique 1 p 501; *Mallet v Calmet*,Chambre des requêtes 19 Oct 1897, 1901 Sirey 1 p 503; *Fornier v Gras*, Chambre Civile 5 May 1920, 1921 Sirey 1 p 298). Indeed, in 1897 in *Mallet v Calmet*, the Chambre des requêtes said that "l'action en résolution d'un contrat pour défaut d'exécution est recevable, quel que soit le motif qui a empêché l'autre partie de remplir ses engagements, et alors même qu'elle se serait trouvée dans un cas de force majeure." (At 504). — Planiol was followed by a considerable number of legal writers, *e. g.* CAPITANT *op cit* 291 no 139; JOSSERAND, 2 *Cours de droit civil positif français* 2d Paris 1933 p 196 no 381. ESMEIN, 1 *Obligations*, in 6 *Traité pratique de droit civil français par Marcel Planiol & Georges Ripert*, Paris 1952 p 562 no 413, is more considerate towards the judicature: "Toutefois il peut y avoir débat sur le point de savoir s'il y a vraiment force majeure, ou si l'empêchement est momentané et dans ce cas doit seulement entraîner une suspension du contrat."

[119] Comparisons between the doctrines of *cause* and of consideration have for long been a favourite subject among comparative lawyers, see *e. g.* LORENTZEN, *Causa*

time it was believed to represent an English adaptation of the Roman *causa*.[121] It developed as a requirement for bringing actions, first in debt and later in assumpsit and eventually, when the structure of contract was complete — *i.e.* about 1773 when Lord Mansfield decided *Kingston v. Preston*[122] — consideration was considered a prerequisite to the enforceable promise.[123] The present teaching would be as follows: "Our law divides all promises into two categories: gratuitous promises, for which no price is requested or paid, and promises conditioned upon the giving of an agreed exchange. The former, the law does not enforce."[124] Failure of consideration thus could be maintained to strip a promise of its enforceability and thereby the contract of its rule-making effect.

In *Giles v. Edwards* in 1797, it was held by the King's Bench to be settled law that a man who had advanced money on a contract of sale had a right to put an end to his contract for failure of consideration (and recover in an action for money had and received) if the vendor failed to comply with his entire contract.[125] Advancing along the path staked out by the doctrine of consideration, the Anglosaxon law thus arrived at termination of the contract as a result of the other party's failure to perform.[126]

*and Consideration in the Law of Contracts*, 1919 28 Yale LJ 621; WALTON, *Cause and Consideration in Contracts*, 1925 41 LQR 306; SMITH, *A Refresher Course in Cause*, 1951-52 12 La LRev 2—36; recently DAVID, *Cause et Consideration*, in 2 *Mélanges offerts à Jacques Maury*, Paris (1960?) p 111—138 (in collaboration with LAWSON).

[121] HOLMES, *The Common Law* 253, cf 286; BARBOUR, *History of Contract in Early English Equity*, 4 Oxford Studies in Social and Legal History (edited by Vinogradoff), at 164.

[122] The report will be found in the report of *Jones v Barkley*, 2 Doug 685, 99 ER 437.

[123] Cf HOLMES *op cit* 285—288; RADCLIFFE & CROSS, *The English Legal System* 3rd 161; FULLER, *Basic Contract Law* 303—312. HOLDSWORTH, *The Formation and Breach of Contract*, 1932—33 7 Tulane LRev 165—182, at 169, submits the general view that "the doctrine of consideration . . . is, for the most part, simply the compendious word which describes the different conditions under which the action of assumpsit lay."

[124] SIMPSON *on Contracts* 88 sec 33. See generally 1 WILLISTON 3rd 385—396 § 103; STOLJAR, *The Doctrine of Failure of Consideration*, 1959 75 LQR 53—76; and literature cited in both works.

[125] 7 Term R 181, 101 ER 920.

[126] 3 WILLISTON 2d 2289—2290 § 813. In present times the rule is said to be showing signs of liberating itself from its doctrinal foundations. SIMPSON submits that a tendency exists that, where a promisor has failed to receive the counterperformance for which he bargained to a material extent, this is assigned as a sufficient reason why his promise should not be enforced, without saying anything about failure of condition. See *op cit* 440 sec 120.

## § 2. *Impossibilium nulla obligatio*

*Stipulatio* — general rule in mediaeval Europe — impossibility and *casus* — *periculum operis* — *Gemeines Recht* — BGB trichotomy

A celebrated rule of the Roman law effecting the termination of contract was enunciated in the maxim: *impossibilium nulla obligatio est.*[127] This rule was developed in relation to the *stipulatio* and did not apply to the consensual contracts.[128] As received in the law of mediaeval Europe, however, which did not work with multiple contract systems as did the Romans, the principle was erected into a general rule.[129] The principle thereby came to include not only original impossibility (*e.g.* to touch the moon) but supervening events as well. To let impossibility include supervening events was perhaps logical, but it was certainly contrary to the Roman conceptions. To the Romans, supervening impossibility was *casus.*[130] The effects of *casus* in different transactions were not always the same.[131] The contract type of *locatio operis* contained rules for this situation, generally included in the notion of *periculum operis;* and these rules certainly did not rely on the impossibility rule.[132] Other contract types included rules of their own covering the situation. The notion of *casus* in many respects coincided with the notion of *vis major.*[133]

The *Gemeines Recht* of Germany succeeded in combining these particular regulations with the general impossibility rule and thus developing the doctrine that supervening impossibility automatically discharged the debtor, provided that he had not been responsible for it.[134] On the other hand, supervening impossibility was considered as a breach of contract rendering the debtor liable in damages if he had been responsible for it.[135] In fact,

[127] Dig 50. 17. 185 (Celsus).
[128] SOHM—MITTEIS—WENGER, *Institutionen* 17th 488 § 78 note 17.
[129] RABEL, *Unmöglichkeit der Leistung, in Aus Römischem und Bürgerlichem Recht, Festgabe für E. I. Becker* p 193; PRINGSHEIM, 1935 5 Cambridge LJ 362.
[130] BUCKLAND, 1932—33 46 Harv LRev 1281.
[131] BUCKLAND & MCNAIR, *Roman Law and Common Law* 2d 239 and note 1; MACKENZIE, *Roman Law* 7th 278 note 6.
[132] On *periculum operis,* see Dig 19. 2. 36 & 37 & 59 & 62. Cf Dig 19. 2. 33; also 19. 2. 15. 6 and 14. 2. 10 pr. Cf GOTTSCHALK, *Impossibility of Performance in Contract,* London 1938 p 62—63; INGSTAD, *Om Leie Efter Romersk Ret,* Kristiania & Kjøbenhavn 1911 p 194 and note 2, pp 195—196.
[133] See *e. g.* VON HOLLANDER: *Vis major als Schranke der Haftung nach römischem Recht,* Jena 1892.
[134] Se generally CONSTANTINESCO *op cit* 427—431 nris 269—272.
[135] HECK, *Grundriss des Schuldrechts* 92 § 30—8; COHN, 1946 28 JCLIL 3rd Parts

the approach influenced the BGB to adopt a trichotomy of situations: impossibility for which the debtor was responsible, impossibility for which the creditor was responsible, and impossiblity for which neither one of the parties was responsible.

## § 3. *Force majeure*

Art 1148 — art 1302 — *force majeure* and *cause* doctrines combined — theory of risks — judicial administration of doctrine — suspension of contract by *force majeure* — modification of contract by *force majeure*

Of the various legal notions relied upon in commercial contracts to provide for the case of impossibility of performance the French notion of *force majeure* is by far the most successful.[136] However, this notion only represents the French variant of the Roman *vis major* notion and finds its basis in article 1148 of the Code Civil. This article exonerates the debtor from damage liability when his performance has been prevented by a *cas fortuit* or by *force majeure*.[137] The article should be seen in connection with article 1302 which enunciates in relation to obligations *de certo corpore* a rule to the effect that the obligation is extinguished if its object is lost. On the basis of these two articles French lawyers have developed a general doctrine of *force majeure* which involves that *force majeure* excuses the non-performance of an obligation and normally destroys the obligation as well. Often, French authors consider this doctrine as a mere French

III—IV p 15. — RINCK, *Gefährdungshaftung*, 29 Göttinger Rechtswissenschaftlichen Studien, Göttingen 1959 p 16—18 surveys some of the *vis major* regulations in contractual relations.

[136] GUTTERIDGE, *Contract and Commercial Law* 1935 51 LQR 91—141, at 112, supplied the information that English businessmen frequently had *force majeure* clauses inserted in their contracts. He added the reflection that the English law relating to impossibility of performance "is essentially 'lawyers' law.' The layman could not understand it if he wished to do so and, consequently, he is prone to adopt his own methods of dealing with the question . . . The fact that businessmen import into their contracts a concept taken from a foreign system of law is, nevertheless, not without significance." (*Sic!*) — The term (which recurs in several Swedish statutes, see RODHE *op cit* 355 note 33, cf his article on *Adjustments of Contracts on Account of Changed Conditions*, 1959 3 Scandinavian Studies in Law 160 and note 9) enjoys a widespread distribution in Scandinavian commerce as is evidenced *e. g.* by the volume *Om force-majeure klausuler i köpeavtal och befraktningsavtal*, Stockholm 1940.

[137] Whether these two notions *cas fortuit* and *force majeure* mean the same or different things has been a matter of dispute. The present tendency, however, appears to be to consider them as synonymous, see JULLIOT DE LA MORANDIÈRE, 2 *Précis de droit civil*, Paris 1957 p 224 no 454,

variant of the *impossibilium nulla obligatio* principle.[138] Coupled with the doctrine of *cause,* the *force majeure* principle has come to entail that where *force majeure* destroys the obligation of one of the parties to a bilateral contract, it at the same time destroys the obligation of the other party.[139] A successful plea of *force majeure* as a defence to an action upon the contract thus entails a termination of the contract without any liability in damages.

French legal scholarship has developed this approach into the so-called theory of risks.[141] The reasoning underlying this theory would seem to be that the party whose performance is obstructed by the *force majeure* must bear the risk of the supervening event at least in so far as the court will not compel the other party to counterperform and any money paid by that party under the contract must be refunded.[142] On the other hand, of course, the party whose performance is so obstructed is spared the risk of being compelled by the other party to render surrogate performance in damage payments.

While in theory the finding of *force majeure* is limited by the strict requirements that the occurrence to be so qualified must be "imprévisible" and "insurmontable",[143] in fact, it appears that French courts at times have followed rather broad principles in their administration of the *force majeure* doctrine.[144]

In the course of its development, the *force majeure* doctrine has been applied so as to soften strict adherence to the principle

[138] See *e. g.* 2 PLANIOL 8th 198 no 620; RIPERT, *La force majeure dans les transports aériens*, 1928 RJILA 1—9, at 1. For a general discussion, see CONSTANTINESCO *op cit* 431—435 nris 273—278.

[139] 2 RIPERT & BOULANGER 699 no 1966; AUBRY & RAU, 4 *Cours de droit civil français d'apprès la méthode de Zachariae* 6th (by BARTIN) Paris p 489—490 § 348. See also, in 1887, the advocate of the doctrine of *cause*, DEMOLOMBE, *Traité des contrats ou des obligations conventionelles en général*, in 28 *Cours de Code Napoléon*, 1887 p 607—608 nris 787—788.

[141] MAZEAUD, MAZEAUD & MAZEAUD, 2 *Leçons de droit civil* 900—902 nris 1107—1110.

[142] FIATTE, *Les effets de la force majeure dans les contrats*, thèse Paris 1932 p 105.

[143] See *e. g.* JULLIOT DE LA MORANDIÈRE, 2 *Précis de droit civil* 225 no 455; cf VON MEHREN, *The Civil Law System* 706.

[144] SMITH, *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, 1935—36 45 Yale LJ 452—467, gives a number of examples of a surprisingly broadminded use of the doctrine; and cf DAVID, *Frustration of Contracts in French Law*, 1946 28 JCLIL 3rd Parts III—IV p 11—14. CHAUVEAU, *Les responsabilités des transporteurs*, in 2 *Le droit privé français au milieu du XX^e siècle — Etudes offertes à Georges Ripert*, Paris 1950 p 398—411, submits at 406 that as applied to surface carriers the notion of *force majeure* has been interpreted most strictly, while at the same time (at 409) it has been used in the Act of 2 Apr 1936 implementing the Hague Rules to designate the same matters as are covered by the enumeration in art 4-2 of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading.

that its existence destroyed the obligation.[145] Part of the less strict application of *force majeure* has affected the time element. It may be recalled that the time element enjoys a special status in Continental law. It was thus easy for the courts to find, where an event of *force majeure* was only temporary, that the contract was not to be dissolved but merely delayed as to its performance. Early cases of this doctrine of "suspension" arose during the 1870—71 war[146] but its full recognition was delayed until the 1920's.[147] The theory was primarily applicable to contracts for so-called "successive" performance, *e.g.* leases. Thus, the theory came to be a superstructure on the contract type regulation. This appears to have been strictly limited to the time element: once performance had again become possible, no modifications in the contract were allowed.[148]

The doctrine of *force majeure,* however, in certain circumstances could work modifications into the contract terms other than those relating to time. Where an event of *force majeure* permits only a partial performance of an obligation, termination may be denied and a proportional diminution allowed in the performance promised in return.[149] In carriage matters, however, this principle appears to have met with resistance. When the carrier has been forced by *force majeure* events to take extraordinary measures to deliver the cargo to the destination in time, the French courts have refused to let him exact extra payments from the shippers for these measures.[150]

## § 4. *Scandinavian discussion*

§ 24 of the Sales Act — the courts — the theoretical discussion

Scandinavian law lacks general code rules dealing with the case of termination of contract. It is not uninfluenced, however, by

[146] *Sté d'Assurances Mutuelles du Languedoc v Guilhem*, Cass Civ 15 Feb 1888, 1888 Sirey I p 456. Cf FIATTE, *Les effets de la force majeure dans les contrats*, thèse Paris 1932 p 58; WALTON, 2 *The Egyptian Law of Obligations* 296; SMITH *op cit* 462—463.
[147] SMITH *op cit* 463 and case sequence cited in note 70.
[145] SAGUÈS, *La rupture unilatérale des contrats*, thèse Paris 1937 p 359, explains that "Des arrêts anciens avaient admis que la force majeure même temporaire mettait inévitablement fin au contrat." Cf work there cited.
[148] SMITH *op cit* 465; LEBRET, *Suspension et résolution des contrats*, 1915—24 44 Revue critique de législation et de jurisprudence 609—610; FIATTE *op cit* 63.
[149] SMITH *op cit* 462.
[150] FIATTE *op cit* 143—163.

the relevant Continental teachings[151] and, probably, the pan-Scandinavian Sales Act must be considered to express in its § 24 a principle applicable generally to bilateral contracts.[152] The section lays down as a main rule that in the event of non-delivery of generic goods the seller must pay damages even if he can prove that he has not been guilty of negligence. This rule is subject to the following exception: the seller is free from liability "if performance can be considered to be impossible owing to a circumstance that the seller could not reasonably have foreseen at the formation of the contract, such as the destruction of all goods of the kind in question or of the parcel to which the purchase refers, or war, import prohibition, or other similar occurrence."[153] However, because of the clausal law generally resorted to in commerce, the Scandinavian courts have seldom had occasion to construe this provision. Discussions concerning the termination of contract therefore have either centered on the theoretical construction of § 24 or have included the subject in a general discussion of the problem of adjustment of contracts to changed conditions, at times taking Heck's approach of the "Opfergrenze"[154] as a point of departure.[155]

## § 5. *Life of contract dependent upon undisturbed conditions*

Need for supplementing doctrines — Anglosaxon law — *Jane v Paradine* — Act of God in common carriage — Continental situation — *clausula rebus sic stantibus* — tacit assumption theory behind pan-Scandinavian Sales Act? — Ussing — *Coronation Cases* — societal problems of 20th century central Europe — French system undisturbed — *doctrine d'imprévision* — French private law courts — Germany — Windscheid — Oertmann — contractual basis — lapse of contractual basis results in faculty of *Rücktritt* — Windscheid and the Scandinavian law — Lassen — Ussing — Scandinavian doctrine explained — British doctrine — the implied condition — *Taylor v Caldwell* — *Coronation Cases* — Law Reform (Frustrated Contracts) Act, 1943 — Parry — United States situation

About the 18th century, a new development in general doctrines governing the adjustment of the contract to new conditions began.

[151] Jul. LASSEN, *Haandbog i Obligationsretten, Almindelig Del*, 3rd 1917—20 p 822—826; USSING, *Dansk Obligationsret, Almindelig Del*, 4th 1961 p 62 sq § 9-1-C-2, p 419 § 44-III-A & B ROOS, *Om prestations omöjlighet*, diss Lund 1915.

[152] It is not unusual that litigants invoke the general *force majeure* rule without any explanations.

[153] Translation as per RODHE, *Adjustments of Contracts on Account of Changed Conditions*, 1959 3 Scandinavian Studies in Law 159.

[154] For instance RODHE, *Obligationsrätt* 711 § 59-A-3.

[155] RODHE, *Obligationsrätt* 711—717 § 59-A-3; *idem* in 1959 3 Scandinavian Studies in Law 153—197; HJERNER *op cit* 558—604; and literature cited in these works.

These doctrines were much needed in those jurisdictions having no codified general rules which, when necessary, could be effectively — if not professedly — stretched to render the services necessary to meet the demands of a commercialized age relying on the notion of contract. The Anglosaxon area was particularly in need of such rules. It had been established by *Jane v. Paradine,*[156] in 1647, that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[157] As explained by Chief Justice Kent in *Palmer v. Lorillard,*[158] "as long as the contract remains in force, it will undoubtedly be conceded that neither party can, by his own act or volition, dissolve it without the assent of the other." Faced with this approach which followed the general notion of contract in Common Law, the prior rules of the Law Merchant resembling those prevailing on the Continent (or perhaps *vice versa)* disintegrated,[159] although part of them survived in so far as they inspired the introduction of the Act of God exception in common carriage.[161] Similarly the maxim *lex non cogit ad impossibilia,*[162] while equivalent to the Continental *impossibilium* and *force majeure* rules and certainly as good a source of law as the Old Testament at times relied upon by British courts,[163] had difficulty in expanding into anything equivalent to the Continental doctrines.

But even Continental law felt the shortcomings of its approach when the performance was not in fact impossible but only too burdensome or too unprofitable for one of the parties.

[156] KB 1647, Aleyn 26, at 27.
[157] GOTTSCHALK *op cit* 91, 4 sq; VON MEHREN *op cit* 704.
[158] Ny 1809, 16 Johns 348, at 354.
[159] FLETCHER, *The Carrier's Liability* 69, submits that in 1571 the shipowner was entitled to rely on bad weather as a defence, but that this exception was expelled from the maritime law by the common law courts until reinstated by clausal law (*op cit passim*).
[161] FLETCHER *op cit* 146—147, submits that the introduction of the exception "Act of God" into the law of common carriage stemmed from the conception of *damnum fatale* as originally applied in Admiralty.
[162] Hobart's King's Bench Reports, 1603—1625 p 96. Cf BUCKLAND & MCNAIR, *Roman Law & Common Law* 2d 242. In *Baily v De Crespigny,* 1869, 4 QB 180, the maxim was applied to the case of the defendant being put out of power to perform his covenant by a subsequent Act of Parliament. See Hannen J, at 185.
[163] *Williams v Lloyd,* 1 W Jones 179, also reported as *Williams v Hide,* Palmer 548.

During the 17th and 18th centuries a number of legal writers had contended that every contract had to be considered as being concluded under the implied condition that there would be no essential change in the circumstances under which it had been concluded. This condition was given the name of *clausula rebus sic stantibus* and met with such success that it was reflected in several contemporary statutes such as the Prussian Allgemeines Landrecht.[164]

The general idea behind the *clausula rebus,* of course, could be seen in the *quid pro quo* skeleton of the *causa* and consideration theories. It could provide a plausible theory for the conferrence of a right of termination upon the other party in the case of non-performance. This was elaborated in the Scandinavian law towards the end of the 19th century and received its consecration in the pan-Scandinavian Sales Act at least as far as results were concerned.[165] Ussing, particularly, sought in his theories to build the whole notion of a binding contractual obligation around the idea that the bond of contract was dependent upon conditions and that failure of such a condition destroyed this bond.[166] A corollary to Ussing's teaching was that in the mutual contract one party might occasionally be entitled to cancel the contract when he would not derive the benefit from the other party's performance which he had anticipated. Ussing, here, gives an example closely based on the celebrated English *Coronation Cases.*[167]

The Coronation of King Edward VII of England and the naval review at Spithead, it will be remembered, were cancelled at short notice due to the illness of the King. In subsequent litigation parties disputed whether the contracts made for the sole purpose of seeing the procession and review were to be honoured.[169] Per-

[164] See Cohn *op cit* 19—20 and note 27. As to *clausula rebus*, see generally Schoop, *Die clausula rebus sic stantibus in deutscher Zivilgesetzgebung der deutschen Sprachkreises seit dem allgemeinen preussischen Landrecht*, Archiv für Beiträge zum deutschen, schweizerischen und skandinavischen Privatrecht Nr 6, Leipzig 1927. Also bibliography in 2 Ripert & Boulanger 183 no 470.

[165] Nielsen *op cit* 285.

[166] Ussing, *Aftaler* 2d 477 sq § 41-iv-2; see Vahlén, *Om formkravet vid fastighetsköp* 189.

[167] Ussing *op cit* 478. See further *infra* notes 169 and 188.

[169] *Krell v Henry*, 1903 2 KB 740; *Herne Bay Steam Boat Co v Hutton*, 1903 2 KB 683; *Chandler v Webster*, 1904 1 KB 493; *Lumsden v Barton*, KB 1902, 19 TLR 53; *Civil Service Co-operative Society v General Steam Navigation Co*, 1903 2 KB 756;

formance under these contracts was perfectly possible and there was nothing wrong with the intention of the parties making them. The only disturbing matter was that there was nothing to be seen and the performances were thus completely useless to the parties on the one side. The amazing fact was that the English courts allowed this circumstance to be relevant.

In the course of European events and the upheavals which followed upon the delayed peace in the first World War, the somewhat trifling disputes of these cases came to reflect one of the prime societal problems of 20th century central Europe. The second World War did little to remove them from that position.

In France, resistance to change was sufficiently strong to allow the French legal system to remain almost undisturbed. Legal scholarship, it is true, argued the introduction of a doctrine of *"imprévision"* to the effect that the *clausula rebus sic stantibus* should be implied into contracts.[170] The reading in by implication of such a clause could well derive some support from article 1134 of the Code Civil which said that contracts must be performed bona fide. However, the French private law courts refused to "substituer sa volonté à celle des contractants."[171] Possibly, the failure of the *doctrine d'imprévision* was due to the number of other remedies to the changing situation, which were offered by special legislative action and resort to arbitration.[172]

It was otherwise in Germany. The recognized legal tools were evidently insufficient. Even if impossibility was stretched to include both economic and legal impossibility, it was apparently inadequate to cope with the problems which followed upon the German defeat in the first World War and consequent destruction of the Empire. In 1852, Windscheid had pleaded for the adoption of the conception of *Voraussetzung*.[173] This has been translated as underlying assumptions of the contract,[174] requirement[175] or

*Elliot v Crutchley*, 1903 2 KB 476; *Victoria Seats Agency v Paget*, KB 1902, 19 TLR

[170] DAVID, 1946 28 JCLIL 3rd Part III—IV p 12 no 4, and 13 no 7. Bibliography in 2 RIPERT & BOULANGER 182 no 469.

[171] 1921 Sirey I p 193. Cass Civ 6 Jun 1921, *Bacou v Sainte-Pé*. JULLIOT DE LA MORANDIÈRE, 2 *Précis de droit civil Paris* 1957 p 229 no 463.

[172] DAVID *op cit* 14 no 7.

[173] *Die Lehre des römischen Rechts von der Voraussetzung*, 1850.

[174] RODHE, 1959 3 Scandinavian Studies in Law 165. See also FULLER, *Basic Contract Law*, St Paul 1947 p 666.

[175] COHN, 1946 28 JCLIL 3rd Parts III—IV p 20.

understood condition.[176] The first rendering will be preferred here. Where the other party is in a position to conclude from the circumstances of the transaction that one certain tacit assumption forms an element of his counterpart's intention, the latter can, according to Windscheid, refuse performance or recover any performance made by him, if this underlying assumption is not complied with.[177] While Windscheid's doctrine had met with slight success when first presented and indeed had lain dormant, it now, in 1921, was revived by Oertmann who modified and re-introduced it under the name of "Geschäftsgrundlage", that is to say, contractual basis.[178] Oertmann defined his concept as follows: " 'Contractual basis' is an assumption made by one party that has become obvious to the other during the process of the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence, of circumstances forming the basis of the contractual intention. Alternatively, 'contractual basis' is the common assumption on the part of the respective parties of such circumstances." Oertmann's teaching met with success[179] and his definition was repeated in hundreds of decisions of the Reichsgericht. The new doctrine took care of the case when both parties had proceeded on an assumption relating to basic circumstances and made their promises accordingly. When these circumstances had drastically changed, the whole basis for performance under the contract was non-existent. The doctrine then permitted each of the parties to rescind the contract in accordance with the rules of the Code for *Rücktritt*.[181]

In the Scandinavian countries, peculiar though it may seem, the Windscheid theory had been much more appreciated than in Germany.[182] The Danish scholar Lassen erected a subjective doctrine about 1900 which was followed for two decades and was thereupon replaced by the objective theory which had been constructed by his compatriot, Ussing.[183] Ussing's teachings are

[176] Gow, 1954 3 ICLQ 317.
[177] Cohn *op cit* 20.
[178] *Die Geschäftsgrundlage, ein neuer Rechtsbegriff*, 1921.
[179] Within six months after the publication, Oertmann's formula was adopted by the Reichsgericht, 103 RGZ 332.
[181] Oertmann *op cit* 161 sq. 103 RGZ 177; 106 RGZ 7; 107 RGZ 124.
[182] Vahlén, *Formkravet vid fastighetsköp* 179. Vahlén suggests that this success had to do with the absence in Scandinavia of any modern code.
[183] Lassen, *Haandbog i obligationsrettens allm. del*, 1892 § 18; Ussing, *Bristende forudsætninger*, 1918. Further in Vahlén *op cit* and literature there cited. In-

still influential.[184] The essence of the doctrine is that where circumstances exist which might have influenced the promisor's decision had he known of them at the time of making the decision, these will be allowed relevance in deciding the legal consequences which shall follow upon the promise. The mentioned circumstances may relate to factual or legal conditions, past, present or future happenings. They can be incorrect, if they already existed at the time of the promise, or they can fail if they relate to such subsequent conditions as were not in the party's mind at the time of promise.[185]

The British conceptions were quite different. It was a very long time before English law could develop beyond the stage of the implied condition. Indeed, the implied condition itself was a bold departure from the foundations of the early common law of contract.[186] The stage of the implied condition was arrived at in 1863, when Justice Blackburn explained that the contract was "to be construed subject to an implied condition that the party shall be excused in case performance becomes impossible by the perishing of the thing."[187] The *Coronation Cases*[188] pushed the doctrine another step further, making it clear that the implied condition took effect *ex nunc*, so that the contract remained in full force up to the moment of *frustration*. The contract was in fact not resolved but discharged.[189] Furthermore, the doctrine of failure of consideration was brushed aside and the solution diverged from that chosen for the discharge by breach.[191] The strict adherence of the courts to the implied condition theory lasted until the Law Reform (Frustrated Contracts) Act, 1943, at least verbally if not in fact. Since the Act relies for its administration on an extensive third party discretion which is

formation in English is supplied by RODHE, *Adjustments of Contracts on Account of Changed Conditions*, 1959 3 Scandinavian Studies in Law 153 sq.

[184] VAHLÉN *op cit* 180.

[185] VAHLÉN *op cit* 188. — Note the statement by BRAEKHUS, *Ishindringer ved reisebefraktning*, 1949 Gothenburg University College of Economics Publications No 3 (Skrifter utgivna i samverkan med Sjörättsföreningen i Göteborg No 2) p 16 that "Generally speaking it must be said that the doctrine of underlying assumptions only plays a limited role in the law of [maritime] carriage."

[186] *Supra* pages 171 sq.

[187] *Taylor v Caldwell*, 3 Best & S 826, 122 ER 309.

[188] For a general discussion from 1940 of the *Coronation Cases*, se MCELROY & GLANVILLE WILLIAMS, *The Coronation Cases*, 1940 4 Mod LRev 241—260, 1941 5 same review 1—20.

[189] Gow, *Some Observations on Frustration*, 1954 3 ICLQ 310.

[191] Court of Appeal in *Chandler v Webster*, 1904 1 KB 493.

irreconcilable with the logical consequences of reliance on an implied condition, it appears to follow that the implied condition theory is at least partly abandoned.[192] Although the older theory is not dead[193] it has been submitted by a recent observer, Parry, that "it must now be taken to be the law that the contract is frustrated by the occurrence of the frustrative event immediately and irrespective of the volition or the intention of the parties or their knowledge as that particular event... The doctrine of frustation is now so well recognized and established that it no longer needs the fiction of an implied term to support it."[194]

The same approach has been used in the United States to arrive at the termination or modification of a contract, generally under the name of the doctrine of impossibility of performance.[195] The doctrine has been applied under a variety of circumstances where the facts involve a failure of consideration despite the possibility of literal performance.[196] While the approach is thus similar, it appears that American jurists generally have gone somewhat further than their English colleagues in realistic analysis of the function of the court in frustration cases.[197]

[192] Cf Gow *op cit* 315.

[193] In *British Movietonews Ltd v London and District Cinemas Ltd*, 1952 AC 166, at 184, the court said: "If a condition of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be found in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation." See also SCRUTTON 16th 111—121.

[194] PARRY, *The Sanctity of Contracts in English Law*, The Hamlyn Lectures 10th Series, London 1959 p 49—50. For a review of the British doctrine of frustration as applied to maritime charters, see GRIGGS, *Frustration in Relation to Contracts of Affreightment*, in 1959 Gothenburg School of Economics Publications No 3 (Skrifter utgivna i samverkan med Sjörättsföreningen i Göteborg No 17).

[195] VON MEHREN, *The Civil Law System*, 704—705.

[196] Restatement of Contracts sec 288; 6 WILLISTON 2d 5477—5481 § 1954; as applied to maritime charters, see GILMORE & BLACK, *The Law of Admiralty*, Brooklyn 1957 p 197—203.

[197] Of the vast literature with a comparative outlook only a few examples can be mentioned: CORBIN, *Frustration of Contract in the United States, of America*, 1947 29 JCLIL 3rd Part III p 1—8; SMIT, *Frustration of Contract: A Comparative Attempt at Consolidation*, 1958 58 Col LRev 287—315; also WADE, *The Principle of Impossibility of Contract*, 1940 56 LQR 519 and GUTTERIDGE, 1935 51 LQR 108—112. See also CONSTANTINESCO *op cit* 251—265 nris 148—158. — A broad comparative discussion is found in GOTTSCHALK, *Impossibility of Performance in Contract*, 1938, and VON MEHREN, *The Civil Law System* 1957 p 755—760. Cf FULLER, *Basic Contract Law* 1947 p 666—670. For references to selected European materials, see RODHE, 1959 3 Scandinavian Studies in Law 153—197.

SECTION 4. DAMAGES

## § 1. *Compensation to the terminating party*

Damage payments and doctrinal construction of termination — case of implied terms — *lex commissoria* — *clausula rebus* — general doctrines and fault — termination *ex tunc* and logic — American and German law — French, Scandinavian and English law — consequences of undeveloped conditions — implied terms and extraneous rules — damages excessive remedy —

The fact that the contract is terminated may or may not involve the payment of damages. Which of the two alternatives will prevail depends mainly on matters of doctrinal construction. It may be convenient to start with the case of the implied term. This case was met both as *lex commissoria* and as *clausula rebus sic stantibus*. As to *lex commissoria* the result is rather clear. The clause itself provided for its consequences, and these did not include damages. When French courts nevertheless awarded damages when dissolving contracts pursuant to article 1184, this was taken as a sign that they in fact did not rely on any implied *lex commissoria*.[198] Other terms are not so clear. *Clausula rebus sic stantibus* says nothing about consequences but one may, of course, infer that the contract should come to an end. Now, anything that is *pars contractus* is entitled to the same sanction as the rest of the contract. Theoretically, the *clausula rebus* being part of the contract in its capacity of an implied condition, there is nothing to bar damage claims side by side with termination.[199] But the natural view of the *clausula rebus*, of course, is that it says, in the event of a certain contingency, our relations are ended. This leaves no room for damages payable to either party.

Turning from the implied term to termination resulting from the application of general doctrines relating to a binding obligation, no one of the theories of cause, consideration, or impossibility, by itself excludes damages. Other rules, however, may

[198] See CAPITANT, *De la cause des obligations* 323—328 secs 151—152.

[199] The following example may illustrate the controversy: A manufacturer undertook to deliver certain textiles successively to a wholesale dealer. Previously the manufacturer had not sold direct to retailers. However, he now began to sell to them also. Is the wholesale dealer's tacit assumption that the manufacturer would continue his previous practice relevant, and, if so, can the dealer exact damages for the change of practice? — I leave aside the distinctions between "terme" and "condition" (Code Civil art 1185) and between warranty and condition in English law (CHESHIRE & FIFOOT, *The Law of Contract*, 5th London 1960 p 120 sq; cf CONSTANTINESCO *op cit* 185—188 nris 95—97).

restrict the award of damages to cases where the defendant was at fault.[200]

However, if you terminate the contract *ex tunc,* logic would seem to dictate that violations of the contract rules are as extinct as is the contract itself. This logic, however, seems to have impressed only a few legal systems. The German[201] and American[202] law treats rescission and damages as elective remedies. If you rescind the contract, you cannot sue upon it. In the other legal systems, however, notably English,[203] French[204] and Scandinavian[205] law, these remedies are cumulative, not elective.

In relation to the doctrines of underlying assumptions, termination, of course, was the natural remedy. Whether damages could be awarded or not became a controversial issue. If termination of the contract was brought about pursuant to a condition which the court found implied in the contract itself, there was nothing upsetting in the idea that the same condition might be sanctioned by damages as well.[206] But when the rule which terminated the contract was extraneous matter, hesitation arose. It appeared to be a sufficiently violent consequence to the occurrence of an event for which the parties had created no rule to free them from the ties of the contract. To compel the payment of damages as well was likely to appear excessive even in countries where legal scholarship encouraged courts to adjust contracts to new events.[207] The English law of frustration was particularly rigid on this point. Until 1943 it refused to accord greater effects to the frustrating event than to consider the contract discharged as from the moment of the occurrence.[208] In Germany, the background of the elective nature of *Rücktritt* and damages worked against the idea of awarding damages in any case of

[200] Cf SZLADITS, 1953 2 AmJCompL 341, 347.
[201] BGB § 325; COHN, 1 *Manual of German Law* 77 no 225-c; ESSER, *Schuldrecht* 2d 351 § 81-1.
[202] BLACK-LEE, 2 *On Rescission and Cancellation* 2d 1929 p 1381 § 562; 12 American Jurisprudence sec 455.
[203] CHESHIRE & FIFOOT, *The Law of Contracts* 5th 495.
[204] RIPERT & BOULANGER, 2 *Traité de droit civil d'après le traité de Planiol,* Paris 1958 p 207 no 539; cf PLANIOL, 2 *Droit civil* 8th 436 no 1317.
[205] In Scandinavian law the principle became well settled by its adoption in the pan-Scandinavian Sales Act. See 1 ALMÉN 4th 244.
[206] Cf *supra* page 441.
[207] See *e. g.* KARLGREN, *Avtalsrättsliga spörsmål* 2d 138.
[208] See generally VON MEHREN *op cit* 756—757. As to American positions, FULLER *op cit* 704—705; for a recent survey, see WEISS; *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution,* 1959—60 69 Yale LJ 1054—1089.

termination.[209] In Scandinavian law, the aversion was not equally outspoken. However, a few Swedish cases indicate a disinclination to award damages at the same time as the contract is terminated because of changed conditions.[211]

## § 2. *Compensation as the price of termination*

Repudiation of contract — problem of contract sanction — to compel performance *in natura* — effect as to delay — pecuniary damages — repudiation means end to contract — repudiation means notice of delay only — practical reflection of debtor destroying contract — When is rule of damage mitigation effective? — day when creditor can compel performance — day when performance is due

Will payment of damages for breach entitle the payor to terminate the contract at will? In other words, will wrongful repudiation of the contract by one party carry no further consequences than liability for damages for the breach?

This issue centers upon the problem of the contract sanction. Reliance on pecuniary damages means that wrongful repudiation of the contract when performance is due, will always bring the contract to an end under the definition of "termination of contract" here adopted. Wrongful repudiation of performance then will give the other party nothing but a right to receive damages,[212] and furthermore, the value of the latter's performance, where it has not yet been rendered, will be deducted from these damages. Under the systems which allow the compulsion of direct performance, repudiation involves nothing but a notice that the repudiating party intends to delay performance. The innocent party can expect to receive special damages for the delay and as long as he holds on to the contract, he can compel performance.[213]

[209] For other aspects, see *e. g.* discussion in VON MEHREN *op cit* 758—760.
[211] See KARLGREN *op cit* 140.
[212] Note however BLACK, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments*, Kansas City 1916 p 10 § 6: "the party abandoning [the contract] . . . cannot complain if the other party retains whatever he may have received or acquired under it" because "this is not properly a rescission of the contract." Cf CHITTY, 1 *On Contracts* 21st London 1955 p 259 no 466.
[213] For a comparative discussion of the principal courses of action open to an aggrieved party to a contract, see VON MEHREN *op cit* 501—513 and 773. See also the subchapter on delay and non-performance *supra* pages 399—414. PATTERSON, *Constructive Conditions in Contracts*, 1942 42 Col LRev 903, at 924, submits that, in the event of wrongful repudiation, the creditor "may go ahead with performance of his primary duty and seek to compel performance of B's [the debtor's] primary duty", but adds immediately that "the choice is greatly restricted by the rule against enhancing damages." Cf 5 WILLISTON 2d 3691—3704 §§ 1296—1305, CHESHIRE &

In actual practice, the question whether the debtor can destroy the contract by the repudiation will appear to the creditor in the form of another question: How long may the creditor act in reliance on the contract? The answer to this question is important since it determines when the creditor is put under a duty to mitigate the damages which the other party must compensate. It is a generally accepted rule that a person entitled to receive compensation for damages may not increase these payments by behaving in such a way that his damages increase. On the contrary, he must, as far as possible, diminish the damage (*e.g.* take new employment).[214] When does this rule of damage mitigation become effective as to the creditor? The Continental view on the whole would seem to involve that, a creditor refusing to rescind the contract, may act upon it as long as he can compel performance. The ultimate day would be the day of the court decree in the matter.[216] Anglosaxon law is basically hostile to such an approach. The Anglosaxon rule is that the creditor cannot act in reliance on the contract beyond the day when the performance was due.[217] In the case of an anticipatory repudiation this day may be even further advanced, but it appears that the creditor, by refusing to accept the repudiation, can postpone the day to the time when the performance would have been due.[218]

FIFOOT, *The Law of Contract* 5th 491, 511—512. — From a more theoretical aspect the remarks of VOLD, *The Tort Aspect of Repudiation of Contracts*, 1927—28 41 Harv LRev 340—376, seem worthy of attention, in particular those at 353: "It is common knowledge that the business value of a going concern far exceeds the value of the plant and stock in trade articles of merchandise. The difference lies in established business relations, among which current contracts pending performance form a large part. . . . A repudiated contract, no matter how binding in law, cannot effectively serve the promisee as the substantial foundation for business credit, . . ."

[214] BGB § 254. Code Civil contains no pertinent provision, nor is there any general statute provision in Scandinavian Law. As to Anglosaxon law, see *Clark v Marsiglia*, 1 Denio 317, 43 Am Dec 670. For a short comparative survey, see VON MEHREN *op cit* 511—512.

[216] The problem does not seem to have been much considered. LJUNGMAN, *Om prestation in natura*, Uppsala 1948 p 36, observes that, under certain conditions, the creditor can speculate at the expense of the debtor when making the choice between damages and specific performance. See also USSING, *Dom til opfyldelse in natura af kontrakt*, 1949 UfR 227—232. Note *Engström v Banco*, 1922 NJA 205, *supra* page 407.

[217] Note that at Common Law, a party injured by an anticipatory breach may sue in equity for a decree of specific performance before the term has expired, but the decree will not order performance before the stipulated date. Restatement of Contracts sec 352 comment q. Cf GERTLER, *Anticipatory Breach in Louisiana*, 1932—33 7 Tulane LRev 586—597, at 589.

[218] See SCRUTTON 16th 443—444. Restatement of Contracts sec 336. Cf SIMPSON *on Contracts* 538 sq sec 152. — Note, however, that the problem generally is approached from the opposite side, *i. e.* the anticipatory repudiation is considered in relation to insurance policies, repudiated by the insurer, when the plaintiff cannot await

## § 3. *Advance settlement of damages*

*Stipulatio poenalis — clause pénale* — unassailable by courts — German penalty clauce — penalty is alternative to performance *in natura* — penalty can be reduced by court — Scandinavian law — penalty replaces damages but rule not mandatory — penalty can be reduced by court — Anglo-saxon rule against penalty clauses — clause struck out — liquidated damages

Many transactions under Roman law were not enforceable *in iure civilii.* In order to secure the execution of the principal promises in such transactions the Roman lawyers resorted to the practice of the so-called *stipulatio poenalis (stipulatio poenae)* an example of which would be: "si ita factum non erit, tum poenae nomine decem aureos dare spondes?"[219] The validity of such penal stipulations was generally recognized.[220] In the form of *clause pénale* the same device was accepted in the Code Civil; the Roman origin is reflected in the formula that the clause "sert à assurer l'exécution d'une convention."[221] The *clause pénale* can appear in several forms; it can serve to *replace* damages *(dommages-intérêts)* or it can operate *à forfait.* In the former case, the benefit of the clause is dependent upon the debtor being liable in damages (art. 1280) that is to say that fault must be imputable to him, and that the creditor does not demand direct performance (unless the clause has been drafted to cover delay in performance) (art. 1228, art. 1229, para. 2). In the latter case, payment under the clause is due upon the occurrence of the contingency covered by the clause. Generally, the courts can not interfere with the amounts due under any one of these clauses (arts. 1152, 1231).[222]

Similarly,[223] in Germany, agreements providing that the debtor must pay a penalty in case of non-performance are permitted.[224] When a penalty is promised for non-performance, the creditor

the time when the performance should be due, perhaps his own death.

[219] Inst 3. 15. 7. see also 2. 3. 4.

[220] PLANIOL 2 *Droit civil* 8th 91 nris 253—254. But see SCHULZ *op cit* 109 no 185. WINDSCHEID, *Lehrbuch des Pandektenrechts* 9th 1906 § 285 note 16.

[221] Code Civil art 1226. Cf POTHIER, *Traité des Obligations* 156—159 secs 338—342.

[222] POTHIER permitted the creditor to recover supplementing damage payments when his actual damage exceeded that provided for by the clause. See *Obligations* 158 no 342. Cf PLANIOL 2 *Droit civil* 8th 92 no 256. The pre-Napoleonic law permitted the courts to reduce a penalty which they found excessive, but, apart from the case of part performance, modern French law will permit no such reduction. *Delacour v Buffet,* Civ 23 May 1940, 1940 Dalloz Hebdomadaire 161, 1940 Sirey I p 80.

[223] For a short comparative discussion of the French and German law in point, see VON MEHREN, *op cit* 513.

[224] COHN, 1 *Manual of German Law* 73 no 217.

can only claim *either* penalty *or* performance *in natura*. If he obtains the right to claim damages in lieu of performance he may claim the penalty as the minimum amount of damages (BGB § 340) and proof of further damages is admissible. If a forfeited penalty, however, is disproportionately high, it may be reduced to a reasonable amount by court decree (BGB § 343).[225]

In Scandinavian law the contract penalty is called *vite* (Swedish), or *Konventionalbod* (Danish). The general rule appears to be that the penalty and damages cannot be cumulated but this rule will not be enforced against a contrary provision in the contract.[226] As a result, there is no settled rule that the penalty is the maximum amount of damages that can be recovered. By the pan-Scandinavian Contracts Act, the courts were given general authority to reduce payments due under a penalty clause to such amount as was considered reasonable (§ 35).

Anglosaxon law does not recognize a set penalty for a breach or as a consequence of some particular action by one of the parties. This rule is believed to be the remaining result of an Act of 1697 "for the better preventing frivolous and vexatious suits."[227] The penalty clause will be struck out of the contract and allowed no effect.[228] While uncompromising as to the set penalty, Anglosaxon law, however, is willing to accept that the parties agree on an amount which is supposed to represent the measure of damage suffered by the party to whom the amount is to be paid, known as the case of liquidated damages.[229] The distinction between a set penalty and liquidated damages thus is most important, yet it is apparent that changing conditions can greatly affect the relationship between anticipated compensation and damages actually suffered.

[225] Cf ENNECCERUS-LEHMANN, *Recht der Schuldverhältnisse*, in ENNECCERUS-KIPP-WOLFF, 2 *Lehrbuch des Bürgerlichen Rechts* 15th Tübingen 1958 p 163—164 § 37.

[226] RODHE *op cit* 520 § 47 and literature cited in note 26.

[227] 8 & 9 Will III c XI sec 8. Validity of Act confirmed in 1852 and 1894, see SCHIRRMEISTER-PROCHOWNICK, 1 *Das bürgerliche Recht Englands — Allgemeiner Teil* (codification by JENKS, LEE, HOLDSWORTH and MILES), 1910 p 616 sq § 117. Rule applied to penalty clauses, see *Harrison v Wright*, 1811, 13 East 343, 104 ER 402. See also SCRUTTON 16th 437.

[228] ANSON *on Contracts* 21st 475.

[229] CHESHIRE & FIFOOT, *The Law of Contracts* 5th 512—515; 3 WILLISTON 2d 2183—2186 §§ 776—777. Also BRIGHTMAN, *Liquidated Damages*, 1925 25 Col LRev 299; MCCORMICK, *Liquidated Damages*, 1931 17 Va LRev 103; THAYER, *Penal Clauses in Contracts*, 1934—35 9 Tulane LRev 191; MARSH, *Penal Clauses in Contracts: A Comparative Study*, 1950 32 JCLIL 3rd, part III p 66—73.

SUB-CHAPTER 3

# DEVIATING DOCTRINES IN THE LAW OF CARRIAGE

## SECTION 1. MODIFICATION OF AFFREIGHTMENT CONTRACTS

Comparison of maritime law and general law — the obstructed voyage — maritime law reflected in Continental Codes — permissible delay — *pro rata itineris* freight — substitute transportation — subcontract or new contract between new parties *negotiorum gestio* — Anglosaxon law — *Jane v Paradine* — freight money and full performance — Admiralty practice

It has already been indicated that shipping was a practical means of commercial transportation in mediaeval times when political and technical conditions permitted no general system of land transportation. These factual conditions may also account for the fact that maritime solutions existed to questions which were barely conceived of in general law practice. On the other hand, once the general law had developed notions and solutions, the solutions of the maritime law came to appear peculiar if not antiquated.

To maritime lawyers it was a commonplace that voyages were interrupted by the perils of the sea. Accordingly, they were generally prone to take a liberal view of the shipowner's undertaking.[231] The principal cases of obstructed voyages were those in which the ship was forced to put into some intermediary port of refuge, leaving the master to consider whether or not to abandon the voyage. This raised the point of the shipper's right to withdraw from the agreement and of the shipowner's right to freight.

The general maritime law, as reflected in the Continental Codes,[232] afforded the shipowner, where his ship had met with an impediment of this kind, a reasonable additional period of time with which to earn his freight by overcoming these difficulties. The shipper must wait for the repair of the ship and abide generally until the supervening events changed so as to permit

[231] Note the submission by FLETCHER, *The Carrier's Liability* 69, that under the Law Merchant bad weather could successfully be pleaded in defence by the shipowner.

[232] Christian V Danish Code of 1683, 4-3-21 & 22 continuing the regulation in Fredrik II Maritime Code of 1561; Swedish Maritime Code of 1667, Skipslegobalk Cap. 11; Ordonnance de la Marine of 1681 3-3-11; Code de Commerce of 1807 art 296; ADHGB arts 631—632, 640; Norwegian Maritime Code of 1860 § 66; Swedish Maritime Code of 1864 § 114; pan-Scandinavian Maritime Code § 160, as revised § 129; HGB §§ 638, 640, 630.

the vessel to proceed on her voyage. In certain circumstances, however, the shipper was free to terminate the contract. Rules were laid down as to what freight he then had to pay. Equitable considerations here apparently had a wide play. Since the shipowner, prevented from completing the voyage although he had performed so much labour, had probably conferred benefit upon the shipper, the basic rule was that the shipper should pay *pro rata itineris* freight.

While the Continental Codes thus united in awarding the shipowner *pro rata itineris* freight, they differed as to what to do about the cargo. When the shipper had his representative on board, the *super cargo*, it was up to him to take care of the goods.[233] When this was not the case, a problem arose. Was the master under a duty to find substitute transportation or could he merely abandon the enterprise? Furthermore, if he found substitute transportation, was the shipper entitled to full freight or was the shipper absolved from his duty under the original contract and party to a new contract with a new carrier? The French law placed a duty upon the shipowner to find substitute transportation and entitled him to the full freight once the substitute transportation was performed, unless it was more expensive than the original freight. In that event the shipper had to make good the difference.[234] The other Codes absolved the shipowner from his contract and only placed a duty upon him to arrange a contract between a substitute carrier and the shipper. Certain safeguards were added to secure the receipt of the *pro rata* freight by the shipowner before he parted with his lien on the goods.[235]

The authority of *Jane v. Paradine*[236] led the Common Law courts to take the view that the affreightment contract "was deemed entire and indivisible, and the right to any freight depended upon full performance of the contract" and the Anglosaxon rule is generally asserted to be that no freight is due unless the cargo was carried to its destination.[237] On the other hand, the shipowner

[233] Cf GRAM, *Den private Søret efter Dansk Lovgivning*, Copenhagen 1851 p 209.
[234] DE VALROGER, 2 *Droit maritime — Commentaire théorique et pratique du Livre II du Code de Commerce*, Paris 1883 no 897. But see DESJARDINS, 3 *Traité de droit commercial maritime*, Paris 1882 no 795 sq.
[235] ADHGB art 634; Norwegian Maritime Code of 1860 § 66; Swedish Maritime Code of 1867 § 114; pan-Scandinavian Maritime Code §§ 161, 57 (as amended these provisions are deleted but same principles may be deduced from § 53, see AFZELIUS & WIKANDER, *Sjölagen* 15th 86); HGB § 632.
[236] KB 1647, Aleyn 26. See *supra* page 435.
[237] BORCHARD, *The Earning of Freight on Uncompleted Voyages*, 1920—21 30 Yale

was entitled to tranship the cargo to some other vessel and was then entitled to full freight upon the completion of the voyage. However, it appears that the British Admiralty courts were less strictly bound by the technical rules of the common law and allowed equitable considerations to dictate greater liberality to the shipowner. Borchard submits that "The influence of these courts induced a modification in all courts of the strict formula by ascribing to certain operative facts legal effects which changed the position of the parties, either by excusing full performance without penalty of loss of freight, or by inferring a new contract for partial freight."[238]

## SECTION 2. THE FAUTE FREIGHT RULE[239]

Feature of standardized penalties — joint venture aspect — *faute freight rule* as a compromise — Swedish Maritime Code of 1667 — universal success of *faute freight rule* during 19th century — exception: Common Law — explanations of *faute freight rule* — exclusion of *faute freight rule* by charterparty clauses — Scandinavian law reform in the 1930s — charterer partly more strongly bound than under general law principles

As the maritime law developed particular rules for modifying the contract of affreightment in emergency cases it also developed particular rules within the area of termination of affreightment contracts. From the knowledge of Antique shipping which Rhodian Law has conveyed to us, it appears that the parties to an affreightment contract used to safeguard the performance under the affreightment by penalty clauses. However, the Law added, "If they do not write in penalties, and there is a breach, either by the captain or the hirer — if the hirer provides the goods ... let him give half the freight to the captain. If the captain commits a breach, let him give half freight to the merchant. If the merchant wishes to take out the cargo, he will give the whole freight to the captain."[241] This feature of standardized

LJ 362—383, at 363; MACLACHLAN 5th 548 sq; SCRUTTON 16th 305 note e, p 309; ROBINSON, *On Admiralty* 588 § 82.

[238] BORCHARD *op cit* 363. He adds *ibidem* "To assume, therefore, that whenever a voyage is not completed no freight has been earned would be to court error."

[239] The English term for this rule is normally the "dead freight" rule. "Dead freight", however, has a somewhat different meaning as well, see, *e. g.*, in American maritime law, (GILMORE & BLACK *op cit* 190), and the term is therefore here avoided in favour of the original Continental term.

[241] Chapter 20 of Part III, see ASHBURNER, *The Rhodian Sea-Law*, Oxford University Press 1909. For general information about Antique shipping, see DAUVILLIER, *Le contrat d'affrètement dans le Droit de l'Antiquité*, in 2 *Mélanges offerts a Jacques Maury*, Paris (1960 ?) p 97—110.

penalties for breach, ranging between half and whole freight, was a recurrent feature in many mediaeval codes.[242] It corresponded to the general mediaeval idea of the voyage as a joint venture of seamen and merchants which manifested itself *inter alia* in the doctrine of the personality of the ship, which involved *e.g.* that the ship was bound by its contracts and was responsible for its torts;[243] in the system of liens, *i.e.*, liens on the ship held by the cargo owners, liens on the cargo held by the ship owners;[246] and, in the most celebrated manifestation of all, the contribution system of general average involving the proportioning of losses according to the size of contribution.[246]

In this setting, there developed the so-called *faute freight rule*.[247] According to this rule the charterer, before loading the cargo, was entitled to withdraw from the agreement against payment of half of the freight money. Perhaps this rule may be explained as a widely accepted compromise between the rather strict law and the practical necessities. Before the loading of the cargo there was no security for the master's claim, and a master eager to employ his vessel in transportation rather than litigation might easily take a favourable view of the compromise, perhaps im-

[242] See further GRÖNFORS, *Befraktarens hävningsrätt och sjöfraktavtalets konstruktion*, in 1959 Gothenburg School of Economics Publications No 2 (Skrifter utgivna i samverkan med Sjörättsföreningen i Göteborg No 16) p 10—19, and literature there cited. In more modern times, the practice appears to have been continued by resort to penalty clauses to the same effect. MALYNES, *Consuetudo, vel Lex Mercatoria or, the Ancient Law Merchant* 3rd London 1686 p 100 indicated that it was normal that the parties to a charterparty were "binding themselves each to the other for the performance thereof in a sum of Money *Nomine Poenae* . . ." During the 19th century, the clause commonly relied upon for this purpose (Penalty Clause) made the penalty commensurate to the freight: "Penalty for non-performance estimated amount of freight." See *Udkast til Sølov*, Kristiania 1890, Motiver p 140 note.

[243] 3 *Black Book of the Admiralty* (edited by TWISS 1874) p 103, 243, 345. See further HERBERT, *The Origin and Nature of Maritime Liens*, 1929—30 4 Tulane LRev 381—408, at 382. — Note that the doctrine of the personality of the ship as established by the United States Supreme Court still prevails in the United States. See *The China*, 1868, 7 Wall 53, where a vessel was held liable in damages for a collision occasioned by the fault of a compulsory pilot since the vessel was considered as the primary offender.

[245] CLEIRAC's statement: "Le batel est obligé à la marchandise et la marchandise au batel" (*Us & Coutumes de la Mer*, Bordeaux 1661 p 72; quoted as in ABBOTT 11th 237) recurred in modified form in Ordonnance de la Marine 3-1-11 and Code de Commerce art 280. "Chacune des parties donne un gage à l'autre, et le navire contient et porte ces gages respectifs": FOURNEL, *Code de Commerce accompagné de notes et observations*, Paris 1807 p 212. — As to Anglosaxon law, see HERBERT *op cit* 381—408.

[246] 2 RIPERT 4th 522 no 1627.

[247] Cf *supra* note 239. The name has been explained as referring to *faux fret* or as to *faute de frêt*.

pressed by the argument that, after all, the joint venture could hardly be said to have begun.

This *faute* freight rule appeared in the Ordonnance de la Marine of 1681 although its application there was limited to certain classes of affreightments.[248] Some contemporary enactments, such as the Swedish Maritime Code of 1667, did not carry the rule at all.[249] In 1807, however, the rule appeared in a more general form in the Code de Commerce[251] and during the 19th century it became almost universally accepted. It was adopted in the Norwegian Maritime Code of 1860 (§§ 46—50), in the Swedish Maritime Code of 1864 (§ 87), in the ADHGB (§§ 581 sq.), and in others. But the rule did not enter the Common Law despite the fact that the English courts had successfully digested considerable parts of the Law Merchant during the 18th century.

During the 19th century, the charterer's right to shed his obligation under the charterparty on terms more generous than these offered in the general law, was frequently explained in terms of business expediency. Gram, in 1851, pointed out that the merchant might have good reasons for his withdrawal from the contract, but that it was not feasible to require him to disclose

[248] Ordonnance de la Marine 3-3-6: "Si le vaisseau est chargé à cueillette, ou au quintal ou tonneau, le marchand qui voudra retirer ses marchandises avant le départ du vaisseau, pourra le faire décharger à ses frais, en payant la moitié du fret." — "L'affrètement à cueillette" meant that the master received separate packages to one certain destination, but if he did not get a complete shipload the scheme was called off and the packages returned to the consignors. "L'affrètement au tonneau" meant that the merchandise to be loaded was determined by its weight and volume. "L'affrètement au quintal" meant that the merchandise to be loaded was determined by its weight. See 2 RIPERT 4th 282 no 1371.

[249] See generally GRÖNFORS, *Befraktarens hävningsrätt* 10—13. Note, however, that the rule appeared in Christian V Danish Code of 1683, 4-2-4 *in fine*. — Note further that the affreightment by the tun (affrètement au tonneau) which is envisaged both by the Swedish Maritime Code of 1667 and by the Digests themselves (see Skipslegobalk 5 Cap pr, and Dig 14.2.10.2, respectively) would seem to have offered rather favourable terms to the careful merchant. MALYNES *op cit* 100, states: "If the ship of 200 tons be freighted by the tun, and full laden, according to their charterparty: Then freight is to be paid for every tun, otherwise but for so many tun as the lading in the same was."

[251] Art 288-3: "Si cependant l'affréteur, sans avoir rien chargé, rompt le voyage avant le départ, il paiera en indemnité, au capitaine, la moitié du fret convenu par la charte-partie pour la totalité du chargement qu'il devait faire." — Information as to why the drafters of the Code de Commerce changed the *faute freight rule* so considerably is not easy to find. According to DESJARDINS, *Introduction historique à l'étude du droit commercial maritime*, Paris 1890 p 247 only the comments offered by the French courts to the projected code contain any information on the legislative intent generally, ("c'est à peu près la seule partie des travaux préparatoires où l'on ait à puiser, quant au droit maritime, des renseignments utiles.") and, as summarized by Desjardins, they do not touch the *faute freight rule*.

these reasons since such publicity might adversely affect his business.[252] Others argued that merchants were so dependent upon business conditions that they must have the opportunity to terminate the affreightment contract at will if not gratuitously.[253] Still others indicated how practical it was to have a fixed rule for dissolution, one which could be followed without legal dispute and resort to litigation and which could also bestow the general benefits of a simple scheme.[254]

In the end, however, it appears that charterparty clauses came to exclude the application of the *faute* freight rule, specifically the provision that the freight was earned upon signing the charterparty, and that cancellation by the charterer was possible only against payment of the full freight.[255] The decline of the *faute* freight rule, thus evidenced, coincides conspicuously with an overall improvement in the general security of the business transactions affected.

The *faute* freight rule came up for consideration when the Scandinavian Maritime Codes reform was under way during the nineteenthirties. It was then stated that the charterer's traditional right to countermand the shipowner's performance should be retained, but as adjusted to the general regulation of the contract for work. Thus, the charterer was to pay full compensation.[256] In the resulting legislation, however, the charterer was in certain instances bound even more strongly to the contract than under a contract for work. In the case of the vessel's delayed arrival at the port of loading, the charterer could not even terminate the contract as of right on the occasion of the delay. Instead, his right was dependent upon whether the shipowner's delay was negligent in certain respects.[257]

[252] *Den private Søret* 157.
[253] HAMBRO, *Den privata sjörätten* 2d 1881 p 138.
[254] *Udkast til Sølov* 1890 — *Motiver* p 140. Also CAPELLE, *Frachtcharter* 563. Further in GRÖNFORS, *Befraktarens hävningsrätt* 14.
[255] Cf RIPERT, *Précis* 1952 p 209 no 324.
[256] WIKANDER, *1936 års sjölagsändringar*, Stockholm 1937 p 185.
[257] § 126 of the Swedish version of the Scandinavian Maritime Codes, as amended, reads as follows: "provided that the shipowner when contracting, has in fact understood or ought to have understood that the purpose of the carriage would be essentially frustrated because of such delay."

SECTION 3. THE TICKET REFUND RULE

## § 1. *Passenger carriage*

Land carriage and general law — passenger carriage — passenger's broad rights to terminate contract commonly accepted — application of general principles — inability to pay not impossibility — carrier's damages when under duty to operate irrespective of payload

The unusual features of the right to terminate the contract in the trade of carrying goods by sea had no such equivalents in the law of land carriage. This latter body of law developed in close conformity with the principles of general law.[258] The reason for this was probably due more to the development of the system of land carriage at the same time as the general law of termination than to any important differences in the carrier's position in the two trades.[259]

With passenger carriage, however, the case differed. The passengers represented a considerable public interest, and there was little difference to be seen in that respect between land and sea carriage. Indeed, having regard to the passenger's right to terminate his passage contract it is remarkable and most peculiar to see the broad rights of termination which have been extended to the passenger in all kinds of transportation.

Under the general law, a passenger having contracted for his carriage was bound by the contract. In so far as his essential obligation was to pay the fare, he could not release himself on any grounds of impossibility. Inability to pay was never impossibility, and furthermore, almost invariably, the passage contracts came to be established by the sale of tickets for cash. In actual practice, therefore, the passenger could not even repudiate performance and thus destroy the contract. Should he rescind the contract under the doctrine pertaining to the contract for work, he must pay full compensation to the carrier. But carriers, as societal conditions developed, were generally subject to a duty

[258] At times, however, public law intervened. Public law provided the bases for the passenger transportation system which was organized in the Swedish realm from mediaeval times until 1933 (KF 7 Apr 1933 om upphävande av stadgan om skjutsväsendet). The law meant *i. a.* that the passenger enjoyed certain cancellation rights coupled with a duty to compensate the waggoner or cart owner pursuant to a tariff scaled in such a way that compensation money decreased as the notice time relating to cancellation increased.

[259] LEHMANN, *Handelsrecht* 915 § 212, submits, however, that such differences existed. As to shipping, contrasted with land carriage, he indicated: "Die Grösse und die Gefahren des Unternehmens, die häufig weite Entfernung des Reisezieles vom Abgangshafen, die Möglichkeit zahlreicher Zufälle und Unberechenbarkeiten bürden ihm ganz andere Opfer auf als dem Landfrachtführer."

to carry and to fulfil their transportation services irrespective of payload; full compensation as a principle then had little meaning unless it meant payment of the whole fare. And yet, passengers who fell sick or died or underwent other frustrations were generally given a right to terminate their contracts and receive their money back, wholly or partly; and in the end, a passenger in the organized transportation systems could claim a refund of most of his fare whatever his reasons for not using his ticket.

## § 2. *Maritime law*

Development started in the 19th century — previous absence of legislative interest explained — carrier's powers of military command — litigation on treatment and delayed departures — emigration brings change — upsurge in emigration traffic — the sick emigrant and his passage money — British Passenger Act of 1855 — passage contract developed in Continental and Scandinavian enactments — principle of cancellation for good reason without damage payments — reactions on general passenger carriage statutes — no French enactments — cargo principles applied by analogy — ADHGB develops *faute* freight principles — termination *ex justa causa* and *sine causa* — Scandinavian law adaption of *faute* freight principle — *laga förfall* — pan-Scandinavian Maritime Codes of 1890s — 1930 reform

Maritime passenger law was almost completely a development of the 19th and 20th centuries. Prior to the 19th century there was a notable absence of statutory rules.[261] Explanations for this lack of interest by the legislature have been offered. Josserand submitted that the opinion of the earlier centuries had held property to be more valuable than human life.[262] Another explanation may be found in the unruly conditions of the time. The passenger and carrier often had to fight their way to their destination. The important consideration was to what extent the passenger was placed under the para-military command of the carrier rather than what compensation he should receive if injured.[263] Litigation generally concerned treatment on board or delayed departures.[264] The latter situations sometimes led to

[261] Among the few which existed were, the Prussian Allgemeines Landrecht II-8 §§ 1750—1752; and, further back in time, the Consolato del mare, which contained *i. a.* one of the first definitions of a passenger.

[262] JOSSERAND, *Les Transports* 2d 820 no 792.

[263] The direction of the legislator's interest is evidenced by Charles XII's of Sweden Letter of Protection which made it a special offence to assault passengers riding in the King's mail coaches. The Letter was signed 24 Jun 1704, like many contemporary Swedish enactments, in the King's headquarters, then in Muttelin, Poland.

[264] See *e. g.* cases collected in ABBOTT 11th 185—190, and GRAM, *Den private Soret* 253—256.

disputes about the termination of the contract, but there was little else of legal interest in the dissolution of the passage contract, or in a right of compensation in the case of passenger injury.[265]

The force of emigration drastically altered the legal picture.

In 1848, gold was found in California. During the period 1848 to 1854, somewhere between 250,000 and 400,000 people were carried by ship from Europe to the United States every year. Under such circumstances, transatlantic passenger carriage could be organized on an industrialized basis, and a number of the present great shipping lines were set up in these years with emigrant transportation on their programmes.[266]

As a measure of self-preservation, masters of emigrant ships could not permit emigrants with supposed contagious or deadly diseases to embark on their ships. Such emigrants were promptly relanded, and it appears that the masters often kept the fares paid by these emigrants. The British Passenger Act of 1855 then provided summary procedures for the recovery of the passage money in such cases.[267] Provisions of a similar nature appeared in contemporary Continental and Scandinavian enactments, but these enactments rather nourished the idea that the emigrant was an independent party to a passage contract. As translated into more abstract legal terms, the principle was that the passenger could cancel the contract prior to departure because of his serious illness. Later, in certain systems, this principle was expanded so that the emigrant passenger could cancel for any good reason.[268]

[265] Cf PARDESSUS, *Cours de droit commercial* 5th Paris 1840, as cited by T GIANNINI, 1949 12 RGA 340.

[266] Hamburg Amerika Line was founded in 1847, Cunard Line in 1848, Norddeutscher Lloyd in 1857. Germany provided probably the largest national contingent of the emigrants (36 %). The British 60 % include the Irish.

[267] 18 & 19 Vict c 119, art XLVI; in ABBOTT 11th cclv-cclvi.

[268] In the French Act of 18 Jul 1860, 1860 Sirey — Lois annotées p 60, Bull off 823 no 7898, art 6 it was provided: "Tout émigrant empêché de partir pour cause de maladie grave ou contagieuse, régulièrement constatée, a droit à la restitution du prix payé pour son passage. Le prix du passage est également restitué aux membres de sa famille qui restent à terre avec lui." Cf decree 15 Jan 1855 and decree 9 Mar 1861. Similar provisions appear in most equivalent regulations of other nationalities. For instance: KM:ts förordning om hwad med afseende på utwandrares fortskaffande till främmande werldsdelar iakttagas bör, 6 Aug 1864, § 34: "Utwandrare, som, till följd av behörigen intygad sjukdom af sådan beskaffenhet att han icke utan fara för eget lif eller allmänna helsotillståndet ombord kan företaga resan, warder hindrad att med fartyget afgå, må, äfwensom de medlemmar af sådan utwandrares familj, hvilka skolat fartyget åtfölja, men nu wilja jemte honom qwarblifwa, ega att, efter afdrag af så stort belopp, som kan anses motswara åtnjutet

The idea that the passenger could cancel for any good reason — *i.e.*, any obstacle to the passenger's personal participation in the voyage which had arisen without his fault — appears to have had an impact upon the normal passenger carriage which developed more modestly in the general coastal trade. France was left behind in this area. The Code de Commerce — until an Amendment of art. 433 in 1897 — did not carry a rule directly made for passenger carriage. French law relied on application by analogy of the rules for cargo carriage.[269] By contrast, the German ADHGB brought forth principles which benefited the sea passenger along the lines of the *faute* freight rule. The passenger enjoyed an unconditional right prior to departure to terminate the passage contract by notice against payment of half the fare (ADHGB § 668). *Ex justa causa* the passenger could even terminate the contract in this way and receive a total refund of the fare (ADHGB § 670), but the notion of *justa causa* was here rather restricted and did not involve the illness of the passenger. Mere failure to show up for the departure because of disease was equal to termination by notice without reason given.[271] These principles were carried over to the imperial federal HGB without change (HGB §§ 667, 669), and still remain in force.

Scandinavian law, however, was less generous to the passenger. The first piece of legislation to carry principles for the dissolution of the passage contract was the Swedish Maritime Code of 1864 (§ 122). Its asserted purpose was to assimilate the new contract to the principles of the affreightment of goods.[272] However, while the statute granted the passenger a right to terminate the passage contract upon payment of half the fare, this grant was considerably limited by the requirement of lawful

herberge och underhåll under tiden, återbekomma erlagd afgift för resan." Cf Överståthållare Ämbetets provisoriska kungörelse 8 Jul 1864; in HULTIN 120—121; also KF 5 Feb 1869, KF 16 Mar 1877, KF 4 Jun 1884. — Gesetz 9 Jun 1897 über das Auswanderungswesen, nr 2393, § 29: "Die Rückerstattung des Ueberfahrtsgeldes kann auch dann verlangt werden, wenn der Auswanderer oder einer der ihn begleitenden Familienangehörigen vor Antritt der Seereise stirbt oder nachweislich durch Krankheit oder durch sonstige ausser seiner Macht liegende Zwischenfälle am Antritte der Seereise verhindert wird . . ." § 31: "Vereinbarungen, welche den Bestimmungen der §§ 27 bis 30 zuwiderlaufen, haben keine rechtliche Wirkungen."

[269] See 2 RIPERT 4th 855 no 1964 and literature there cited; JOSSERAND, *Les Transports* 2d 842 no 817.

[271] LEHMANN, *Handelsrecht* 1908 p 932 § 216; WÜSTENDÖRFER, *Neuzeitliches Seehandelsrecht* 2d 369.

[272] RABENIUS, *Handledning vid föreläsningar i sjörätten*, Uppsala 1869 p 58.

excuse, *laga förfall;* a *terminus technicus* which expressed the idea that the passenger's participation must be barred by some obstacle having arisen without his fault. Examples of this would be the passenger's illness, arrest, or, subject to certain reservations, military service.[273] The Swedish rule was later inserted in the pan-Scandinavian Maritime Codes of the 1890's[274] and it remained in force until the 1936 revision when it was altogether suppressed.

## § 3. *Railway law*

Principles of contract for work applied to Continental railway passenger transportation — rule of non-returnable ticket fare — reliance on ticket system — case of the lost ticket — dispute about refund on refound ticket — Eisenbahns-Verkehrsordnung of 1899 — Eisenbahns-Verkehrs-Ordnung of 1938 — force of change in the interval: CIV — refund rule in CIV — non-discriminatory tariff principle — sales policy ideas — reflections of CIV principles — maritime passage contract — Anglosaxon law — cancellation rights viewed as redemption of ticket — American statutory interventions

At an early stage, the passenger received worse treatment on land than at sea. The basis for all observation of the land passenger contract under Continental law was that it was a variety of the *entreprise, Werkvertrag.* Accordingly, the passenger had a general right to cancel upon full compensation.[275] Full compensation, as already indicated,[276] meant the full fare remaining with the carrier, at least if line carriage — where the duty to operate irrespective of payload prevented any rule of avoidable damages from developing — was involved. It was therefore in full conformity with the general law that the early railways developed the rule of the non-returnable ticket fare.

Reliance on the ticket was an early characteristic of railway law. The ticket served as a receipt for the fare and as an indication to the company's personnel of the passenger's rightful destina-

[273] See HASSELROT, 8 *Skrifter* 102. A right to terminate so conditioned had existed in the 1734 Code relative to a tenant renting a yard or house in town (JB 16: 11) but there, termination was effective without any penalty being due. — It is noteworthy that no unconditional right to terminate equal to the rule of ADHGB was given to the sea passenger.

[274] AUBERT, in 1905, while declining to use by analogy the *faute freight rule* in § 169 to the case of a land passenger having fallen sick before departure, nevertheless sought to annul his obligation under the contract by assimilating the illness to impossibility. The case "burde afgjöres paa samme Maade som den rent objektive Ulykke." *Den Norske Obligationsrets spec. Del,* Kristiania 1905 p 11.

[275] LEHMANN, *Handelsrecht* 1908 p 928 § 216.

[276] *Supra* pages 453—454.

tion. A basic rule of the system was that each passenger must show his ticket whenever duly required to do so. If he could not, he must immediately buy a new ticket at a specified rate. A common case came to be the passenger who lost his ticket in the course of travel and later found it again. Having paid the fare twice or more, could he recover the value of the first "unused" ticket? For a long while Continental case law said that he could not.[277] However, certain legal writers pleaded the opposite rule.[278] It was therefore fairly natural that § 19 of the German Eisenbahn-Verkehrsordnung of 1899 did not allow the passenger to recover either the paid fare or any damages, if he missed the train's departure time. Of course, he had to put up with his misfortune if he had no other excuse for not taking advantage of his contract of carriage. But by 1938 the rule had been reversed and the passenger was thereafter always entitled to a refund of the fare merely by establishing the fact that he had not used his ticket.[279]

This change was a reflection of a development which had taken place during the interval in European international railway law. In 1924, the first European multilateral railway treaty (C.I.V.) relative to passenger carriage was signed.[281] Article 26 § 1 of the CIV treaty provided, "Lorsqu'un billet n'est pas utilisé, la restitution du prix payé peut être demandée . . ." with the addition, however, of certain reservations relating to taxes and a minor fee.[282] The innovation was the realization of the idea of the non-

[277] See *Beschorner, Das deutsche Eisenbahnrecht*, 1858 p 241 citing decisions by the Leipzig Appellationsgericht from 1843. The Court of Cassation in France developed similar rules, see *Chemin de fer Paris-Lyon-Méditerranée v Gravier*, Cass 12 Dec 1911, 1912 Sirey 1 p 227, 1913 Dalloz Périodique 1 p 12.

[278] BESCHORNER *op cit* 242; JOSSERAND, *Les Transports* 2d 851 no 824-3°; ROGER, 2 *Manuel* 1st 16—26 no 432—432 bis.

[279] Eisenbahns-Verkehrs-Ordnung of 1938, § 24—1. — Note that as early as in 1915, RUNDNAGEL, *Beförderungsgeschäfte*, Leipzig 1915, (separate reprint from 5 *Handbuch des gesamten Handelsrechts* (published by Victor Ehrenberg) Part II) p 506—507, submitted that the Allgemeine Ausführungsbestimmungen to the Railway Ordinance were considerably more favourable to the passengers than the Eisenbahnsverkehrsordnung. The conditions were said to entail that "Hiernach 'können' derartige Fahrkarten 'nach Ermessen der Eisenbahn' in Fällen eines Irrtums, einer Erkrankung oder aus sonstigen Billigkeitsgründen vor oder unmittelbar nach Abgang des Zugs an der Fahrkartenausgabestelle zurückgenommen werden . . . Auf der anderen Seite besteht aber auch ein Rechtsanspruch auf Zurücknahme der Karte nicht."

[281] Convention Internationale concernant le transport des Voyageurs et des Bagages par Chemins de fer, 1928 SÖF no 36 (hereinafter CIV).

[282] The provision recurs in the subsequent Conventions. See art 26-1 CIV signed in Rome 23 Nov 1933; art 26-1 CIV signed in Berne 25 Oct 1952.

discriminatory tariff. The tariff set a price for the transportation over every stretch of railroad affected. If the actual price paid was higher than the tariff rate, the difference should be returned to the passenger whatever the prescription in his contract with the railway. If the contract price was less than the tariff rate, the railway company could exact the difference from the passenger whatever the contract. But, then, if the passenger did not use the transportation at all, he was not carried and the tariff rate was zero. The passenger could have the fare refunded as a matter of right "fondé sur l'indue réception par le voiturier d'une prestation dont il n'a pas fourni l'équivalent" and the reason why the passenger had not travelled on his ticket mattered little so long as it was conclusively established that he had not in fact travelled on it.[283]

It seems reasonable to suggest that at the time a general sales policy of encouraging travel may have facilitated the switch to the new principle. The thinking was probably that the passenger might be more inclined to buy a ticket if he was sure that he did not risk losing all his money in the event of his being unable to use it. Once he had the ticket in his pocketbook, however, he would be inclined to travel rather than to seek a refund.

The development in international railway law towards a general refund rule, in the sense of an unrestricted right of cancellation without the penalty of damages, was reflected, not only in the German domestic railway law, but in the domestic railway law of other countries [284] and in other means of transportation

[283] BRUNET, DURAND & DE FOURCAULD, *Les transports internationaux par voie ferrée*, Paris 1927 p 431 no 628 and note 9.

[284] In Sweden the rule was adopted by Kgl. Järnvägsstyrelsen enacting Additional Regulations to Järnvägstrafikstadgan of 12 Jun 1925, see §§ 22 mom 2, and 4. In FLODIN-WIKANDER, *Järnvägstrafikstadgan m. m.* 314. — It is not absolutely clear whether the rule is followed in domestic French railway carriage. French railway tickets appear to be valid only a limited time. "Les billets non utilisés dans le délai qui leur est imparti n'ont plus aucune valeur et leur prix reste acquis au chemin de fer," see SNCF Tarifs Généraux applicables aux voyageurs, bagages et chiens accompagnés, feuille rectificative 6 Jan 1958, no 14, Art 5-C. — At times, the French discussion has indicated that the passage contract was a "contrat réel" not binding until the passenger had embarked upon the train, see JOSSERAND's review of this discussion in *Les Transports* 2d 822 no 794. — In reference to *Francillon v Chemin de Fer de Paris-Lyon-Méditerranée*, Cour de justice civile de Genève, 11 Nov 1893, 1895 Sirey 4 p 23, concerning a special ticket valid only a limited time which the passenger could not use within the time limit due to illness, FIATTE, *Les effets de la force majeure dans les contrats* 16—17, submits that the case was decided on the principle that the passenger by purchasing the ticket subject to the time condition had waived his right to invoke the illness as *cas fortuit* and therefore could not claim a refund.

as well. Wüstendörfer, *e.g.*, submits that "In der Praxis vergütet die Reederei bei Kündigung des Reisenden vor Reiseantritt häufig 90 % des Fahrpreises zurück."[285]

Anglosaxon law, for natural reasons, knew nothing about a right to cancel, much less cancellation without the carrier being entitled to full compensation. Apparently, the approach was that there was not so much a contract for the carriage, as the sale of the ticket. At common law, a carrier was under no obligation to redeem an unused ticket.[286] In a number of American jurisdictions, however, statutes intervened and created a refund rule in favour of the passenger holding an unused ticket.[287] The effect of these statutes, however, came to be sharply curtailed in so far as they related to contracts for interstate transportation, by the adoption of the Federal Transportation Act, 1920.[288] This Act *i.a.* set up a tariff filing system as to rules and regulations which determined the rates. As construed by the Court of Civil Appeals in Texas in 1923,[289] Congress by this Act had "undertaken to appropriate the field ... The occupation of the field excludes State action ... Because of this conflict the State statute must yield in so far as it pertains to charges for interstate transportation." The State statutes thus were pre-empted and unless

[285] *Neuzeitliches Seehandelsrecht* 2d 369.

[286] See *Salomon v NY Central*, 150 NYS 282, 165 App Div 35. Per Hotchkiss J (at 283): "When a railroad has sold a ticket, it has, in the absence of a statute, the right to treat the purchase price as having been irrevocably paid to it for its own uses, and, so long as it stands ready to perform its contract, it cannot at common law be deprived of the consideration money." See also *Neubert v Chicago, Rock Island & Gulf Railway*, 248 SW 141 (further *infra* in note 289).

[287] *E. g.* New York Penal Law sec 1562 (see 150 NYS 284); Texas Penal Code, as approved 31 Mar 1911, art's 1527, 1528 and 1529, requiring railroads to redeem unused passenger tickets (see 248 SW 141).

[288] 41 Stat 456.

[289] *Neubert v Chicago, Rock Island & Gulf Railway Co*, 1923, 248 SW 141, at 142.— See further 13 CJS 1166 § 614. — A number of American cases have held that the carrier, before ejecting the passenger from the train for misconduct or similar reasons, was under a duty to tender to the passenger any fare received by the carrier in excess of that required to pay for the passenger's transportation to the point of ejection. See HUTCHINSON, 2 *A Treatise on the Law of Carriers as Administered in the Courts of the United States, Canada and England* 3rd Chicago 1906 p 1266 sec 1086; DOBIE, *Handbook on the Law of Bailments and Carriers*, St Paul — West 1914 p 558. English law would seem to have provided for the same contingency only by penalties against the passenger to be prescribed in the railway company's bye-laws. See MACNAMARA, *on The Law of Carriers By Land* 3rd 524. It is beyond the scope of this review to analyse carefully the American cases. Several constructions of the duty to tender are possible. It may be noted that in American Admiralty law the passenger has been told that claims by passengers for a refund of prepaid passage money are equitable in nature: *Acker v Hanioti*, 1950 AMC 283, cf GILMORE & BLACK 521 note 116. Whatever the construction, however, the railway cases contribute to the prevalence of a general rule for refund on the unused ticket.

the tariffs on file provided for some right of redemption no such right obtained.

## § 4. *The IATA ticket law*

Airlines as public carriers — slight government interest in conditions of carriage — business considerations lead to a policy of refund on unused tickets — airlines and railways, bookings and extra cars — Vienna meeting in 1927 adopts refund principles — weather conditions and breakdowns — system — sliding scale success of Vienna principles — Antwerp agreements — United States — tariff system under Civil Aeronautics Act of 1938 — voluntary and involuntary refund — full or proportionate refund — "no shows" and service charges — disappearence of service charges — European and American systems meet in post-war IATA — double system in Bermuda conditions — unity on full refund if medical reasons — Honolulu abandonment

In Chapter Two, the development of airlines was reviewed in relation to the requirement of franchise. It will be recalled that in the early days such a requirement was a common, but not a universal feature. Furthermore, before the second World War, governments generally cared little about airline rates except in so far as the affected subsidies. As a result, airlines could draft their tariffs and conditions of carriage almost undisturbed by governmental interference. Also, they were undisturbed by any interferences of a rates tariff system with their right to draft cancellation conditions at will. Yet, business considerations led airlines to a policy on cancellation which in the end was not dissimilar to that of the railroads.

Technical conditions were definitely responsible for the early unwillingness of the airlines in the 1920's to adopt an equivalent to the CIV refund rule. In the case of an excess of traffic, the railroad could adapt its capacity to the demand by adding extra cars to the train. The airline could rarely do anything like this, even though extra section flights were sometimes arranged. The airlines thus felt obliged to rely on a system of bookings and the measurement of demand well in advance. But this system interfered strongly with the airline policy on ticket cancellations.

The matter of the unused ticket was brought before the IATA airlines at their Vienna meeting on February 18th, 1927. At that meeting, the principle of fare refund in case of the failure to fly or an incomplete flight, was adopted without much discussion. Whatever discussion there was, concerned the amount of refund in the case where the unperformed flying related to several airlines, computing charges at different per kilometre

rates.[291] The ease with which the refund principle made its way into the conditions of carriage should be seen in the context of the frequent occurrence of abandonment by the carrier of scheduled voyages due to adverse weather conditions or aircraft breakdowns. Such occurrences had to be in some way off-set in the public's appreciation of air transport. The airline policy, therefore, went further than offering a refund in the case of carrier's non-performance. Passengers were given the right to cancel without the duty to compensate the carrier, whatever their reasons for cancellation. But these rights were not formulated as simply as the CIV rules. Due to the booking system, there were further complications.

A late cancellation invoked the general rule that the airline should keep the fare as damage payment "unless the reservation has been resold."[292] Early cancellations were given preferential treatment, varying with the value of the ticket. A cancellation charge of 10 % of the fare was always kept by the airline plus the cost of telegrams and telephone calls in connection with the cancellation. Tickets priced at 100 gold francs or less, could be cancelled with the right to full, so qualified, refund before 24 hours prior to departure time. For tickets priced at more than 100 gold francs, this time limit was 48 hours.[293] A corollary to these rules, of course, was that the late passenger could not claim any repayment on his unused ticket.

The Vienna principles were followed, in the main, in the Antwerp conditions although the price limit was raised to 500 gold francs. However, the cancellation rules did not appear in the general conditions, (the so-called, Antwerp conditions), but were inserted into a separate side agreement between the carriers.[294] This side agreement added, that for inter-continental carriage each company should be entitled to make its own conditions concerning refunds.[295]

In the United States, the successful development of air carriage into a great nationwide transportation system[296] wrought cancella-

[291] 7 IATA Inf Bull 14.
[292] Vienna GCP no 5.
[293] Vienna GCP no 5.
[294] Agreement Concerning the Contract of Carriage by Air Made Between the Air Navigation Companies, Members of the International Air Traffic Association (I. A. T. A.). See point no 4. In 14 IATA Inf Bull 32.
[295] *Ibidem.* See also 14 IATA Inf Bull 36.
[296] As to cancellation principles during the thirties, see HAUPT, *Die gewerbmässige Luftbeförderung von Personen in den Vereinigten Staaten von Amerika*, 1938 8 AfL 1—68, at 56.

tion principles which were closer to those of railway transportation than the IATA rules. The backbone of the regulation was introduced by the tariff system provided for by the Civil Aeronautics Act, 1938. The tariffs were soon concentrated into certain basic consolidated rules tariffs.[297] Perhaps the most important of these tariffs was the Redfern Passenger Rules Tariff.[298] The system which developed in American domestic flying employed a somewhat unique terminology. Refunds were termed either "voluntary" or "involuntary".[299] Involuntary refund included the following instances, both based on non-performance on the part of the airline: flight cancellation due to schedule failure by the airline, or the airline's refusal to the carry passenger because of his conduct, etc. Whether the passenger presented a wholly unused ticket (virgin ticket) or discontinued the trip while under way because of such non-performance, he should receive a refund of the fare, wholly or *pro rata itineris*. The voluntary refund similarly included both virgin ticket refund and partly used ticket refunds. The reason for refund demand by the passenger was irrelevant, but the last minute cancellation in the form of "no show" — *i.e.* where reservation was made and was not cancelled but the passenger failed to show up for departure in time —, was originally penalized by a so-called service charge. At one time this service charge was in the amount of 25 % of the fare.[300] The affinity between this service charge and the rule for full damages, of course, is apparent. Later, however, the service charge was generally left out of the tariffs.[301]

The European IATA and the American domestic systems met in the IATA post-war efforts to establish world-wide conditions of carriage. In the beginning these efforts were not successful in relation to cancellation. In the Bermuda conditions, the failure was evidenced by the principles being split between the American

[297] See *supra* pages 227 sq.

[298] Merrill E Redfern, agent, Local and Joint Passenger Rules Tariff No PR-1, CAB no 4; cf GROSSMAN, *Air Passenger Traffic* 64.

[299] The refund was voluntary or involuntary on the side of the passenger. The voluntary refund of course includes the so-called no-show problem.

[300] GROSSMAN *op cit* 183.

[301] See J B Walker, agent, Local and Joint Passenger Rules Tariff No PR-4, CAB no 43, rule 78. — CAB has indicated its interest in the matter by a prescription as to the tickets used by the large irregulars (see *supra* page 123 and note 343): "On or after the date of flight, tickets shall be validated by the carrier in some appropriate manner on the face thereof to indicate that either the transportation service covered thereby has been rendered or appropriate refund has been made where no service or only a part of the air transportation service has been rendered." See Part 291.24 as effective 10 Dec 1949.

and the European Areas. Tickets for carriage wholly within the former were to be refunded after deduction of a service charge not less than 25 % of the fare or US $100, whichever was smaller, provided, however that the pertinent reservation had not been cancelled prior to departure time. Tickets for carriage wholly in the European Area, on the other hand, followed the Vienna principles as to refunds, with only slight modifications. Where the seat had been resold or where the flight was not fully sold at the time of cancellation, no damages — now named service charge — were exacted from the passenger. If the normal adult one-way fare was less than £25 Sterling or its equivalent, full refund was granted if the reservation was cancelled 48 hours prior to departure. Where the fare was more than that amount, the cancellation time limit was raised to 72 hours. Cancellation earlier than 72 hours entitled the passenger to receive full refund. Cancellation made later than this meant that a service charge was deducted from the refund in the amount of 25 % of the fare or £25 Sterling whichever was greater.[302] Both set of rules, however, granted full refund if the passenger was unable to occupy his seat for "medical reasons to the satisfaction of carrier" — a rule reminiscent of the old emigrant cancellation provisions.[303] If no service charge was assessed, the carrier could require payment of a sum to cover the communications costs of making and cancelling the reservation.[304]

In the subsequent Honolulu conditions of 1953, which never entered into force because of lack of government approval, the attempts to bring together the American and European law were abandoned and the matter was left to be ruled by the regulations of each carrier.[305] The present state of the clausal law in point thus means that price of termination by the passenger *sine causa* is left for determination by each airline.[306] As far as practice is concerned, it appears that airlines in the United States generally, impressed by the costs of accounting involved in a system of cancellation fees (service charges), have preferred to delete such systems.

[302] Bermuda GCP art 7 § 7. The geographical requirements for application have been simplified in the text.
[303] Bermuda GCP art 7 § 7-d-7.
[304] Bermuda GCP art 7 § 8.
[305] Honolulu GCP art 11-1. This provision recurs without change in the conditions of carriage published by many operators.

SUB-CHAPTER 4

# AIR CHARTER CONTRACTS

## SECTION 1. PATTERN OF CLAUSES

Diversity of general law, unity of the clausal law of air chartering — attraction on clausal law exercised by special law principles — affinity of ticket and charter cancellation principles — arrangement of clausal law of air chartering — separation of cancellation and non-performance — differentiation between termination after notice and upon the happening of some event — differentiation between payment and flying — carrier's cancellation and non-performance — interesting features of the clausal law for the unperformed air charter

One old complaint sometimes aired is that the general and special law of contract termination fails to satisfy sufficiently the needs of the business community. The general law is too vague, and flexible, the special law is too casuistic.[307]

The general law of contract termination, as has been demonstrated, varies considerably from one place to another. By contrast, certain uniform features have developed in the species of stereotyped aircraft charter agreement forms. Some of these features will be reviewed in the present sub-chapter. It is well to

[306] See on this point SCHWEICKHARDT, *Die neuen Beförderungsbedingungen* 136—137. — Note, however, that some basic principles in the cancellation scheme have been detached from the conditions of carriage and drafted as two separate IATA Resolutions, 278 and 285. This separation was motivated by the desire to arrive at binding principles. In so far as refunds affected the economic relationships between the airlines, binding status was not conferred by the Bermuda conditions which were mere Recommended Practices. Resolution 285 on Refunds was originally prepared for the Honolulu Conferences in 1953, but the adoption was delayed until the Venice Conferences in 1954. Resolution 278 on Involuntary Change of Routing, containing the basic principles for the notion of "voluntary refund", was adopted at the Cannes Conferences in 1956.

[307] PAPPENHEIM, 3 *Handbuch* 561 note 4: "Die Unterscheidung solcher Fälle, in denen der Vertrag durch das zufällig Dazwischentreten von Erfüllungshindernissen von selbst sein Ende nimmt, und solcher in denen es hierzu der Willensbetätigung einer Partei bedarf, ist alt und sehr verbreitet. Indessen wird die Abgrenzung beider Gruppen von Fällen gegen einander duch das kasuistische Verfahren der älteren Quellen und ihre oft nicht scharfe Ausdrucksweise sehr erschwert. Die neuere Gesetzgebung hat auf diesem Gebiete . . . nicht genug getan. . . . Auf die Gestaltung der seerechtlichen Vorschriften hat der Umstand einen sehr ungünstigen Einfluss ausgeübt, dass ihren Hintergrund die wechselnden und grossenteils noch jetzt ungeklärten, allgemein privatrechtlichen Bestimmungen und Anschauungen über die Bedeutung nachträglicher Erfüllungshindernisse agbeben . . ."

remember, however, that this review of the formulary law is restricted to sources, *i.e.* the charter forms which have in common the fact that the charterer is not the operator in the sense of operational standard.[308]

The more special rules for contract termination which were surveyed in sub-chapter 3, exhibit a less striking contrast when compared with the clausal law of air chartering. Their solutions have much more in common than might have been anticipated in view of the doctrinal diversity in the general law. The special ticket law on refunds appears indeed to possess a considerable attraction for air chartering. This is particularly true of the charter tariffs, and, as already indicated, there are true hybrids between charterparties and tickets or waybills under the tariff system.[309]

The clausal law of air chartering is arranged according to practical requirements rather than dictated by Code systems or doctrinal arguments. The business community requires a clear-cut distinction between those cases where the contract can be dissolved only after notice, and those cases where termination occurs through the happening of some other event. The stereotyped air charter contract maintains this distinction by assembling the former rules in a cancellation clause and the latter rules in a non-performance clause. By having separate cancellation and non-performance clauses, however, drafters also maintain the difference between the two types of performances which are involved in the air charter contract, *i.e.* payment and flying. This differentiation between the charterer's payment and the operator's flying obligation cannot be upheld, however, unless the operator's right to cancel by notice is kept separate from the general cancellation clause. But the separation is not maintained solely for this reason. As will be shown *infra*, practical arguments support it as well. It is furthermore facilitated by the fact that the operator's right to cancel can easily be assimilated within the non-performance clauses.

There are several features which make the clausal law interesting as related to the unperformed air charter contract. As the clausal law and the general law are distributed in different but

[308] See *supra* page 60.
[309] *Supra* page 217.

overlapping patterns, a number of complications arise. These are particularly noticeable as to cancellation clauses because of the absence in some legal systems of a general law remedy leading to termination. The picture is further complicated by the rules against setting a fixed price for termination. The difficulties are less in the case of non-performance clauses and very often the termination of the contract would have followed even in the absence of the clause. The legal interest in the clausal law on this point therefore has less to do with contrary principles of general law than with an original and specialized pattern being set for the behaviour of the operator.

## SECTION 2. CANCELLATION CLAUSES

### § 1. *Business needs*

The inclusive tour charterer—time discrepancies in middleman's contracting — reaction of feature on other charterers — advance contracting and cancellation

The position of the charterer in the inclusive tour business is rather risky. His agreement with the carrier is concluded many months ahead of the scheduled departure. His contracts with the prospective passengers are entered into much later and sometimes only on a tentative basis, perhaps not to be settled until some weeks prior to departure. As the inclusive tour business forced charter fixtures[311] further and further in advance of departures[312] all charterers found themselves forced to follow suit and contract for their charter flights at an earlier stage.[313] This increase in advance contracting, however, has made the contracts increasingly vulnerable. Should the inclusive tour charterer's acquisition programme fail for one reason or another, he must have the possibility of terminating his commitment with the

[311] As to the meaning of the term "fixture" see note 469 *supra* page 231.
[312] Compare *supra* note 157 at page 37.
[313] Mr LEVI-TILLEY advises me (by letter 5 Apr 1961) that "It is not only Inclusive Air Tour Operators who are most likely to have to cancel charter agreements but for instance, shipowners who contract to fly a new crew for a ship under completion or maintenance and who suddenly find that, through some mishap, the ship will not be ready on time and the seamen will not be required for another few weeks or months."

airline as well as of cancelling the contracts with the ready-to-go passengers, or he will be out of business. Other charterers are no less vulnerable to changes occurring in the interval between fixture and departure. There has arisen a corresponding need for a reasonable opportunity for charterers to withdraw from the contract. The widespread business necessity of limiting the charterer's risk resulting from advance contracting seems to have been responsible for the creation of the cancellation clause.

The need for cancellation clauses, however, has its limits. On some occasions, for instance when the charterer charters the aircraft one way only, while another charterer charters the aircraft in the other direction, the airline usually protects itself in the contract so that neither charterer can cancel, or, if one cancels, he must pay the full amount of the charter rate agreed so that the airline will be able to carry on with the two way movement for the benefit of the second charterer.[314]

### § 2. *Contrast between general and clausal law*

Right to cancel under Anglosaxon law — right to cancel under Continental law — doctrinal considerations necessitating the reservation of a charterer's right to cancel — third party contract — undisclosed principal — wrongful repudiation and cancellation clause — weight of cancellation clause lies on the side of damages

Under the law of contract, in several countries, the right to terminate the contract is definitely not open to the charterer unless specifically provided for in the agreement. This is true, for instance, in Anglosaxon law where it is part of the binding quality of the contract itself. It is less true of Continental and Scandinadian law because of the right to countermand which belongs to any contract for work. However, disputes about the legal construction of the air charter contract may nullify the right to countermand unless safeguarded by a contract clause, and in any event the right involves, in principle, a liability to pay full compensation.

Among the legal constructions, often relied upon in the drafting of air charter forms, which would suppress the right of termination unless expressly reserved to the charterer, the doctrines of third party beneficiaries and undisclosed principals deserve mention. Under the French doctrine of *stipulation pour autrui*

[314] Information supplied by LEVI-TILLEY (letter 5 Apr 1961).

acceptance or ratification by the passenger/shipper of the charter-party would have the effect that it makes the passenger/shipper's right to carriage secure against revocation.[315] Similarly under German law any revocation of the third party's right can take effect only if a power of revocation has been reserved in the making of the contract.[316]

The same disadvantages are present in Anglosaxon law when the parties attempt to construe their contract on the pattern of undisclosed agency. "Before the third party has notice of the principal, the agent has power to vary the terms of the contract, and the principal is bound by the variation . . . But notice of the principal operates to fix the contract of the agent and the third party, so that the agent and third party cannot, by agreeing together, alter or rescind the contract which sprang from their previous agreement . . ."[317] Should the parties try to arrive at a third party contract by use of the trust notion, the same difficulties are encountered. "[O]nce the promisee is considered to hold the benefit of the contractual promise in trust for the third party, the promisor and the promisee cannot cancel the contract, however desirable it may be for them to do so."[318]

These doctrinal considerations, however, do not permit a full appreciation of the function of the cancellation clause. There is always the possibility of wrongful repudiation by the charterer of the contract. When such repudiation occurs, the airline can recover only damages[319] and furthermore will be faced with a

[315] According to the express provision of Code Civil (art 1121 *i. f.*) the right given to the third party may be revoked by the stipulator at any time before the third party "has declared his intention of taking advantage of the benefit." See 2 RIPERT & BOULANGER 4th 231 no 654. Also LEYSER, *Third-Party Contracts in English and Continental Law*, 1954 3 Annual LRev (Univ of Western Australia) 39—51, at 47.

[316] BGB § 328. See ENNECCERUS-LEHMANN, *Recht der Schuldverhältnisse* 15th Tübingen 1958 p 147 § 34-IV-2-c, compared with p 154 § 35-IV-1. Also LEYSER *op cit* 50. — Note that Scandinavian doctrine is opposed to irrevocable third party rights: see *e. g.* USSING *Aftaler* 1st 374 § 36-IV-B-1; ARNHOLM, *Sammensatte Aftaler*, Oslo 1952 p 128, 133.

[317] GOODHART & HAMSON, *Undisclosed Principals in Contract*, 1930 4 Cambridge LJ 323 with supporting reference to *Dyster v Randall*, 1926 Ch 932.

[318] LEYSER *op cit* 43.

[319] It is hard to imagine any case in which the airline's interest in direct performance on the part of the charterer would be such as to persuade the court in a jurisdiction offering compulsion of performance as a normal remedy to grant a decree for such compulsion. The considerations expounded *supra* at page 413 certainly do not apply. As to the maritime discussion whether the charterer's principal undertaking is to deliver the cargo or pay the freight, see GRÖNFORS, *Befraktarens hävningsrätt* 18 note 3 with abundant references; and BLACK-LEE, 2 *On Rescission and Cancellation* 2d 1929 p 896 § 334.

duty to mitigate these damages. As far as termination is concerned this would seem to be exactly the same result as that conferred by the cancellation clause. The weight of the clause, accordingly, is not on termination as such, but rather on the side of damages as the price for termination. It is upon the issue of what price the charterer must pay for his right of cancellation that the clausal law begins considerably to differ from the general law. For the latter law is based on damages actually suffered, but the clausal law generally works with set cancellation fees.

## § 3. *The clausal law*

Pattern of clauses on charterer's right to terminate *sine causa* — sliding scale and Vienna ticket law principles — cancellation free of charge and tariff principles — sliding scale pattern — KLM type framework clause — figures as custom of the trade? — diversity of figures in complete sliding scale cancellation clauses — cancellation rights free of charge but with provision for reimbursement of costs — United Airlines' tariff — fixed cancellation fees — forms lacking cancellation clauses — lack of clause and period when form adopted

The cancellation clauses of the various stereotyped air charter forms arrange themselves, in relation to their provisions for the charterer's right to terminate *sine causa* into four different categories. The main category follows the pattern of a sliding scale for calculating the cancellation fee by referring to the time at which the airline was notified of the cancellation. A second category represents those forms which exact a pre-fixed penalty from the charterer, *e.g.* forfeiture of down payments. The forms belonging to the third category permit cancellation free of charge with the proviso that the charterer must reimburse the airline for the costs which it had incurred. Those forms which leave to the parties the task of separately negotiating cancellation terms, constitute the final category.

It may be noted that the sliding scale corresponds to the pattern found in the Vienna ticket principles while the free cancellation resembles the refund principles of the American passenger tariffs (*supra* pages 463 sq). It is a conspicuous fact that the former scheme is mainly represented in the European charter-party forms and the latter scheme in the American charter tariffs.

The sliding scale is strongly in evidence in the European

forms. Some of these forms suppress the figures for fees and notice time, leaving these figures to be negotiated separately by the parties, but offer the framework for a sliding scale based on a notice time and a percentage of the full charter price. This feature characterizes particularly the KLM group of forms.[321] A clause of this type has also for a long time been recommended by IABA.[322] This type of clause would appear to introduce a certain flexibility. Yet it was said at the IABA meeting in Amsterdam in 1954: "In practice, these percentages in aviation are fairly well established, and are really a custom of the trade."[323] This statement may have merit in relation to broker's practices, but it can hardly be said to be substantiated by those forms which fix the notice time and fee percentage figures in advance. Indeed, these forms display amazing differences as to the price of termination when dealing with different airlines. Considering the fees which are exacted for a last day cancellation, figures range from 10 % of the charter price in an Air France form;[324] to 50 % in the forms of UAT, BEA, BOAC and TCA;[325] to 66,6 % in Transair Sweden's form;[326] to 75 % in TAI's form [327] and to 100 % in Scanair's form.[328] Cancellation less than a week in advance will entail cancellation fees of 5 % under the Air France form; 10 % under the forms of UAT, BEA, BOAC and TCA; 33,3 % under the Transair Sweden form; 50 % under the Kar Air form;[329] 75 % under the TAI form and 100 % under the Scanair form.[331]

[321] KLM ACA (HAG/LEG/164 5 Jul 1951) art 1-k and art 15; provisions recur in later forms (note the addition in 1953 of a duty on the charterer to indemnify KLM in case the cancellation would not be valid against the passenger/shipper as third party beneficiary). Swissair ACA, same provisions. Lufthansa FCV (VK 88—55) Art 7—2, (XL 4—56) same, (XP 46—61) Art 3. IATA Model Air CA (1954) clauses 10—vi and 19; (1957) clause 23. Lately BOAC CC clause 14. Also Eagle ACA (1958) clause k;

[322] IABA Standard Cancellation Clause, adopted at the meeting in Amsterdam in 1954.

[323] By GARRETT, the IABA lawyer for the United Kingdom, see IABA Minutes of Amsterdam Meeting 1954, Documentary Committee Agenda Item no 9.

[324] Air France Contrat type provisoire passagers & bagages art VII-1°-b. To this fee, however, will be added also "majorée des frais qui auraient déjà pu être engagés par AIR FRANCE."

[325] UAT CdA art V; BEA SFOA (T 176 1st) clause 7-iii. BOAC SFOA (Form No 6108) clause 7-ii; TCA CA (1958) 11th paragraph of conditions.

[326] Transair Sweden Charterkontrakt (1960) § 10.

[327] TAI CdA (1958) clause 12.

[328] Scanair ACA art 9-b.

[329] Kar Air CA *Cancellation and delays*-clause.

[331] Form cited in notes 324—328 *supra*.

In American air chartering the feature of cancellation rights almost free of charge is encountered. Under the United Airlines Passenger Charter Tariff,[332] the cancellation provisions are dealt with under the heading of "Voluntary Refund" and the tariff provides that "upon request and surrender of the charter ticket at the General Offices of UA" the airline will "make immediate refund" of "an amount equal to the charter rates and charges specified on the charter ticket . . . less any ferry, lay-over or other charges incurred up to the date of such voluntary refund, and such other charges as will be incurred by UA in order to return the charter plane to the point specified in the charter ticket." Similar provisions were adopted in the Airfreight tariff relied upon by a number of the large irregular air carriers participating in the ACTA Air Charter Traffic Exchange.[333]

The standard non-scheduled American charter form originally only provided for reimbursement of the airline's costs in the case of charterer's cancellation *sine causa*[334] but more recently a pattern of fixed cancellation fees has been introduced.[335] In Europe, on the other hand, fixed standard penalties of this type may have been practised before the war[336] and in the immediate post-war period[337] but they appear not to play any rôle today.

[332] United Airlines, Inc. Passenger Charter Tariff No 4, CAB No 19, rule 13-B-a (issue 16 May 1956).

[333] J. A Forsyth, Agent, Local Airfreight Tariff No 1, CAB No 4, rule No (N) 73 (issue 24 Aug 1955): "REFUNDS . . . (B) VOLUNTARY . . . (a) *To the Charterer:* Refund on an incompleted charter flight, due to cancellation by the Charterer, will be an amount equal to the Charter Rate paid less; 1. The Charter Rate Per Mile applicable to the Charter Miles used and, 2. The Ferry Rate applicable from the point of cancellation to the point where the Charter Flight originated or carriers base of operations in the Continental United States, whichever results in a lesser charge to the Charterer . ." — Note however that there is no equivalent in the United Airlines Cargo Charter Tariff No 7, CAB No 21.

[334] Air Charter Traffic Exchange Form A art 1-c.

[335] Air Charter Exchange ACA clause 11: "In the event charterer desires to cancel flight prior to the date of initial depatture, the Exchange shall be entitled to retain for its own use and account such monies as have been paid to it unless it is able to effect a resale of the flight at the same revenue rate. If a resale of the flight at the same revenue rate is made, the Exchange will retain $500.00 and will refund to the charterer such sums in excess of $500.00 that have been received by the Exchange as deposit or advance payment on this charter. If resale of the flight at a lesser rate is effected, the Exchange will retain $500.00 plus the difference between the price of the cancelled flight and the resold flight."

[336] *E. g.* KLM-VanLearBlack Agreement 11 Jul 1927 clause 11 (£ 1000); KLM-Raymond Whitcomb Inc Agreement 15 Mar 1934 paragraph 14 (Dutch florins 5000).

[337] Charte-partie aérienne dite Transair paragraphe B-a & b; Sabena Contrat (1947?) front page 4th paragraph, Contrat (passagers) (1954?) art 8, Contrat (marchandises) (1954?) art 8.

Concerning the number of forms which lack cancellation provisions, it does not necessarily follow that in practice they are not combined with cancellation clauses. Some reserve space for a cancellation clause to be negotiated separately between the parties.[338] Others deny on their face any need for cancellation terms. Most of the forms which belong to this latter group date back to the early post-war period, *e. g.* the Pan American Charter Contract,[339] the BIATA form[341] and the Baltic Exchange documents.[342] Since these forms, and their followers in other countries, represent the state of the industry as unaffected by the inclusive tour boom[343] it appears plausible that currently they are combined with some sort of cancellation clause, *e.g.* the common though not printed one which reads: "Charterers have cancellation rights free of charge latest on the . . ."

## § 4. *Effect of cancellation clause*

Plan — cancellation rights free of charge — damages recoverable or not? — problem of drafters' intent — intent deduced from intent underlying cancellation fee — cancellation rights with fee — uncertainty under Anglo-saxon law — difficulty of appreciating airline's loss — general effect: low fees — high fees explained under German and Scandinavian doctrine allowing court to reduce fees — cancellation fees and termination *ex justa causa* — frustration — effect of events only affecting charterer — passenger illness: charter and ticket principles — implied and express terms — cancellation fees and denial of landing rights — American doctrine

It is difficult to predict with any certainty the effect which the cancellation clauses will be given in a court for no instances of court decrees on these air charter clauses are known. The present discussion must therefore be limited to the theoretical aspects of some of the principal cases arising in air chartering. The problem will be surveyed from three angles: Firstly, the case of the reservation of cancelling rights without provision for a cancellation fee will be considered. Secondly, the case of the charterer terminating *sine causa* when the contract provides for a fixed cancellation fee will be discussed. Thirdly, the case of the charterer terminating *ex justa causa* when the contract provides for a cancellation fee will be considered.

[338] Silver City ACA clause m (an adaptation of the BIATA form).
[339] This form has retained its general structure at least since 1948.
[341] First adopted in December 1946.
[342] Adopted during the period 1949—1952.
[343] For an example of how the inclusive tour business influences drafters of cancellation clauses, see the extensive and complicated formulas in Scanair ACA art 9.

Cancellation clauses of the type reading: "Charterers have cancellation rights *free of charge* latest on the . . ." (italics mine) may raise the issue whether the carrier would have any right of damages against the charterer if the latter exercises his right of cancellation. The carrier will probably not be so entitled in Germany and the United States where the contract must be upheld as a prerequisite to the right to sue for damages upon it. Under French, Scandinavian and English law, he may be entitled to damages, but since the law is not mandatory in these systems, the solution must be found by interpretation of the intention of the contract drafters.[344] It is submitted that "charge" as used by the drafters in this context means the same thing as in those clauses by which a "charge", *i.e.* a cancellation fee, is agreed upon. The cancellation fee system is fairly uniform in its basic features throughout the forms. The intent of the drafters when using the term may therefore safely be taken to be the same in whichever charter document it appears. In some documents the intent of the drafters is clearly reflected by the statement added to the clause that the payment of the fee shall be a final discharge.[345] This statement conveys the same idea as does the very correspondence of the differentiation of the size of the cancellation fee to what an airline normally may be expected to lose by the customer cancelling a contract in view of the limited time open to the airline to make new arrangements. On the other hand, it is evident that the cancellation system generally is invented to relax the bonds of contract, not to strengthen them. On the basis of these circumstances it is submitted that the fee system reflects the standardization of damages. It follows that the cancellation fee is intended to replace damages and that accordingly "free of charge" clauses exclude damage claims.

The next case to be considered is the not unusual instance where the charterer cancels without giving any reason for his action. Can the airline recover the cancellation fee provided for in the charterparty? The problem is an important one under Anglosaxon law. Any system of pre-fixed cancellation fees replac-

[344] For a Scottish maritime case in which *charterers* recovered damages in the amount of the excess freight they had to pay for substitute carriage after having cancelled the charter under a cancellation clause, see *R Nelson v Dundee East Coast SS Co*, 1907 Sess Cas 927.

[345] The IATA Model Air CA (1954) art 19 provided expressly: "The payment of such cancellation fee shall be a final discharge."

ing court determined damages will always teeter on the borderline between liquidated damages and penalties, a line which, it is to be recalled, is the borderline between validity and unenforceability. The issue of whether the fee agreed upon is on one or the other side of this line is commonly considered in relation to the measure of damages in an action against the charterer for failure to load the cargo. Theoretically, this measure would be the same as in shipping, *i.e.* the amount of freight which would have been earned under the charter less the expense of earning it and the net profits of any substitute voyage. However, in aviation, — in marked contrast to shipping —, the evidence of the type of loss which the airline would suffer from cancellation is often subject to dispute. As indicated in Chapter One, (pages 46—48 *supra* the basis of estimates are highly controversial as far as charter operations by scheduled air carriers are concerned. On the practical level, these indications are supplemented by those American charter tariffs which allow cancellation merely on the condition of reimbursement of costs and thus suggest very low damage figures. As far as legal opinion is concerned, the indications are that few of the cancellation clauses used in air charterparties are considered to meet the requirements in English law for classification as liquidated damages.[346]

While the English law thus would appear to restrain the airlines' desire to arrive at high cancellation fee figures, the Scandinavian and German law is believed to work the other way. This belief is at least not contradicted by the comparison between clauses of different nationality made in the preceding sub-section. German and Scandinavian law will permit the court to reduce an excessive cancellation fee. The hardboiled approach of airline contract drafters then, of course, would include an at-

[346] By a courtesy extended to me, I have been given the opportunity to consider an anonymous "Legal Opinion On the Validity of Cancellation Clauses", which reads, in part, as follows: "In general . . . we are of the opinion that in the case of Air Charter parties provisions stipulating for payments to be made on cancellation would normally be likely to be upheld by the Courts of this country if: — (i) an express right to cancel was given (ii) no use was made of the word "penalty"; and (iii) the sums stipulated for were not so large as to [be] palpably greater than the maximum loss which the owner of the aircraft could suffer by the cancellation. In the light of the above opinion, our legal advisers, consider that of all cancellation clauses now incorporated in existing Charter Agreements, only the one used by B. O. A. C. meets on the whole the requirements of (i), (ii) and (iii), referred to at the conclusion of the above quotation. For your guidance, the B. O. A. C. cancellation clause which we have in mind reads as follows:

tempt at a high figure. The clause might possibly not be challenged and, if it were challenged in court, the extent of the airline's risk would only be that the court would rewrite the clause to limit but not to exclude the airline's recovery.

In French law the cancellation fee agreed upon appears unassailable. It appears curious that this should result in such a wide span in pre-fixed fees as that stretching between 5 and 75 %.

Attention will now be devoted to the fate of the cancellation fee when the charterer cancels *ex justa causa*. To be sure, many charter forms provide, expressly or impliedly, that the cancellation fee scheme shall not apply to this case of cancellation.[347] However, this is not always the rule and the question of the effect of the fee provision would seem to merit a discussion although it cannot it here be carried much further than a posing of the problems in their proper legal contexts. This question has two aspects. Firstly, if the occurrence on which the charterer relies to excuse his cancellation brings into play a general legal doctrine, will this doctrine supersede the contract cancellation clause effecting the contrary result? Secondly, if the charterer cancels the contract at a time when he had no reason to believe that the airline would not be able to perform, yet when the time for departure comes the airline cannot perform, is the cancellation fee due?

As to the first question, the problem may be illustrated by an example. When the Plague has broken out in Mecca, may the agency which charters for flights with Hajees to Jeddah cancel without paying the fee?[348] Cases of this kind where the frustrating event affects only the charterer, involve a number of issues of which only two will be indicated here. Firstly, there is doubt whether an event, however extraneous, which affects only the charterer can amount to frustration under any variant of the

> "The Charterer may cancel any charter flight contemplated in this Contract:-
> — (i) If more than . . . days before the time scheduled for the commencement of the flight, on paying B. O. A. C. 10 % of the charter price for that flight.
> — (ii) If within . . . days of the time scheduled for the flight departure, on paying to B. O. A. C. 50 % of the charter price for that flight."

The clause referred to in the Opinion is BOAC SFOA clause 7.

[347] TAI CdA 1947 clause 17°; Charte-partie aérienne dite Transair paragraphe IX-3; TAI CdA (1958) clause 13; Airnautic CdA clause 13; UAT CdA art IV-5.

[348] In July 1952 newspapers reported such events. 1952 AviC MarkRep (May 23) 221.

[349] Cf PAGE, *The Development of the Doctrine of Impossibility of Performance*, 1920 18 Mich LRev 589—614, at 591 sq: "for few contracts there are in which it can be

doctrine in the systems here dealt with.[349] In ticket law, it is true, passenger illness is generally accepted as a liberating cause. Whether this will be accepted under a charter is certainly doubtful; but the closer the charter contract is placed to the ticket contract in the system, the more tempting must such an interpretation be. Secondly, if we accept that a case of frustration is established, can it oust the contract provision for the cancellation fee? It is not very clear how frustration stands in relation to an express contract clause.[351] The German variant of this doctrine, at one time, was held to be an independent doctrine which could not be excluded by contract clauses.[352] But, whenever frustation doctrines are construed as based on implied terms, interpreters will inevitably be faced with the question why an implied term should oust an express one.

The second question arises when, under the contract, as is normal, the denial of landing rights automatically terminates the contract. What should happen if landing rights are denied, but the denial is not known at the time the charterer cancels the charter? At first sight, one may be tempted to rely directly on chronology. Whichever terminating occurrence — denial or cancellation — first took place it would prevent the other from becoming relevant. Probably, however, the matter is not so simple. On the practical level, there is the problem of communication. It may frequently happen that the denial is known to someone in the airline staff, but not communicated to the charterer when he cancels and perhaps not even to the employees receiving the cancellation. The temptation never to communicate the denial must be considerable. On the level of scholarly discussion, the indications are that at least in American jurisdictions the solution takes into account factors other than merely chronology. The case has been discussed in reference to a wrongful repudiation, and the result arrived at was that only the frustrating event was relevant. Patterson explains the result as follows: "To excuse a shameless repudiator because of a lucky accident seems moral-

said that the object of one of the parties in receiving the benefit of the contract, is frustrated if the adversary party can be compelled to pay."

[351] The House of Lords in *Bank Line Ltd v Capel*, 1919 AC 435 decided that the doctrine of frustration was not rendered inapplicable by the express terms of a charterparty and that the contract was discharged notwithstanding that the parties had provided generally what was to happen on the occurrence of the contemplated event.

[352] Cf COHN, 1946 28 JCLIL 23.

ly indefensible; yet the hardboiled view is that the repudiatee has sustained no damage in being deprived of a bargain which he could not have performed. Impossibility does not excuse substantial non performance of a constructive condition, and from this point of view the promisor's repudiation appears to be a harmless indiscretion."[353] If this is the law in relation to a wrongful repudiator, it certainly must be concluded that a charterer with contractual cancellation rights cannot be placed in a worse situation. Accordingly, even the late denial would prevent the airline from recovering the cancellation fee.

## SECTION 3. NON-PERFORMANCE CLAUSES

### § 1. *Business needs*

Suez crisis — American oil strike — distinction between airline's and charterer's performance — effect of supervening events on respective performance — Why not bilateral cancellation clauses? — airline's economic considerations — charterer's economic considerations — impact of American common carriage doctrine — restraints go with risks — character of non-performance clauses — restricted meaning of the "Non-Performance Clause"

The Suez crisis in 1956 greatly affected shipping. This is a well-known fact. However, the crisis affected aviation as well. A line was drawn roughly from El Adem to Istambul east of which civil aircraft were not permitted to fly. Airlines had to find alternative routes for those which were closed, and much time was spent in the last week of October 1956 in diverting the already chartered aircraft. The alternatives were either to route via Ankara and skirt widely round most of the Arab territories to the Persian Gulf, or else to divert on the southerly route through Khartoum and Aden to Karachi. Both alternatives presented certain problems for those types of aircraft which had to reduce their payloads slightly below contractual obligation in order to operate over the longer stages.[354] Most scheduled and independent airlines continued to use the northern route through Turkey, but shortage of aviation fuel resulted in some refuelling difficulties. Furthermore, owing to the terrain over which aircraft had to fly, operators of non-pressurized aircraft had to abstain from business on this route because of their statutory

[353] PATTERSON, *Constructive Conditions in Contracts*, 1942 42 Col LRev 903 sq, ta 924.
[354] 1956 AC Bull (Nov 2) 40.

obligation not to fly above 10,000 feet except when passengers were equipped with oxygen apparatus.[355]

But supervening events need not be of this magnitude in order greatly to affect operations. During the spring of 1952 an oil strike occurred in the United States. Its effects hit Europe as well. Thus, later in May 1952, the French authorities suddenly imposed a ban on the supply of fuel for flying. Many British aircraft on non-scheduled flights were stranded abroad. At the same time, international regular airlines cancelled in some cases up to 50 % of their services on trunk routes.[356]

From the contract point of view supervening events bring to light an important difference between the positions of the parties to the contract when the charterer is not operator. The charterer's obligation is most simple. He must pay the charter price.[357] Nothing but a general moratorium can normally relieve him from this obligation. Thus, supervening events are of slight interest. As to the airline it is otherwise. The essential obligation of the airline under the contract is a most complicated performance. Supervening events interfere very seriously with its execution. The obligation to fly from point to point on schedule suddenly becomes extremely difficult to fulfill. To bring passengers and cargo to the destination on time may cause extra expenditure and extra exposure to risks. On the other hand, failure to fulfill this obligation, will under the general law, subject the airline to the contract sanctions, *i.e.* damages. These damages are not limited at law. Facing such consequences, airlines have been prone to frame their contracts so as to offer only those conditions under which they could profitably operate.

One might suspect that airlines would rely on a means of termination by notice parallel to the charterer's cancellation clauses in order to achieve the minimum requirement of adjustment to new conditions. Indeed, there are some forms which introduce cancellation clauses in favour of the airline as well.[358]

[355] 1956 AC Bull (Nov 16) 42.

[356] 1952 AviC MarkRep (May 23) 221

[357] For the discussion whether the charterer's principal obligation possibly would be to deliver the cargo, see *supra* note 319.

[358] Such clauses appear in the forms referred to in the next note, and furthermore in Lufthansa FCV (XP 46—61) Art 3, and prior forms; Eagle ACA (1958) clause 20—B; also older editions of some American forms: TWA Charter Passenger Flight Agreement (Form T1191 (3—47)) art 3-b, but deleted in same form (4—58); ONA ACA (Ca) clause 14-m, but deleted in ONA ACA (Md). Cf IATA Model Air CA (1957) art 24.

The parallelism, however, is limited inasmuch as bilateral cancellation fee systems are generally avoided.[359] The leading consideration against having a fee system *vis-à-vis* the carrier is believed to be that charterers often will have great difficulty in establishing the amount of damages which are due to carrier's cancellation. The charterers' organization, particularly in the case of passenger groups, is generally very unsatisfactory and not likely to produce any reliable damage figures. In actual practice, therefore, the carrier's damage payments would tend to be smaller than under a system of fixed fees. On the whole, however, it is unusual for airlines to have the right to terminate the contract except *ex justa causa* (charterer's breach, bankruptcy etc.).[361] At times this phenomenon can be explained in terms of business expediency. It would be natural for an inclusive tour operator to insist that the airline should forego any claim to be entitled to cancel the programme of flights at its discretion, before the tour operator will feel prepared to spend the considerable amounts of money involved in promoting an inclusive tour programme.[362] In the United States, the absence of cancellation clauses reserving to the airlines a right to terminate *sine causa* may be explained under the common carrier doctrine. In fact, at one time such clauses were frequent.[363] However, their validity was dependent upon the airline being qualified as a private carrier. Once the development towards viewing air charters as contracts in common carriage was under way[364] these clauses were stripped of their effect because they contained the means by which a common carrier could avoid his duty to contract with

[359] A bilateral cancellation fee system, however, appears in KLM ACA (HAG/LEG/N/36/56) art 15-1, and prior forms; Swissair ACA art 15-1; BEA SFOA (T. 176 4th) clause 19; but not in (T. 176 1st). UAT CdA art V; Fred Olsen ACA clause 12; LTU FCV art 16; IATA Model Air CA (1954) art 19 and 10-vi.

[361] In submitting the text statement I am supported by LEVI-TILLEY (letter 5 Apr 1961).

[362] For this indication I am indebted to LEVI-TILLEY (letter 5 Apr 1961).

[363] HAUPT, *Die gewerbmässige Luftbeförderung von Personen in den Vereinigten Staaten von Amerika*, 1938 8 AfL 1—68, at 58, reproduces the following ticket clause from the thirties: "The company may cancel the trip or any part thereof and land and discharge the holder whenever and/or wherever it deems fit, in which event the only responsibility of the company shall be to refund that part of the fare equal to the unused portion of this ticket." Haupt submits that this clause appeared in the model ticket adopted by the American Air Transport Association in 1930. For similar clauses, see ticket forms in 1928 USAvR 609 clause 1; 1929 USAvR 347 clause 5.

[364] See *supra* pages 208 sq.

the first comer.[365] Consequently, such clauses do not nowadays normally appear in the stereotyped air charter forms.[366]

A means of adjustment to new conditions, of course, can be arranged by limiting the contract penalties to an insignificant amount. With the airline's risks thus limited, so may be its restraints. The airline may not even find it worth while to make efforts to draft any other clauses for its protection against possible claims by the charterer. Of course, such an attitude on the part of the airline may open the whole discussion about negligence clauses.[367] Apart from this, however, the attitude appears to be commercially infeasible in air chartering. As a result, the contracts which airlines offer to prospective charterers commonly involve a number of provisions which, on the one hand, make reservations for a possible abandonment of the flying venture and seek to establish a certain flexibility in the operational undertaking and, on the other hand, aim at improving the financial position of the operator by saving him as much as possible of the freight and by limiting his risk to pay damages because of failure of performance.

All of these clauses provide for the situation of non-performance. The term "Non-Performance Clause", however, has a more restricted meaning and relates to one particular type of abandonment and flexibility provisions. This clause will be further dealt with *infra*.

[365]The underlying idea may have been that since the airline could cancel at will, it had shown its intention to reserve to its discretion whether or not to contract with the first comer and thus could not be classified as a common carrier who by definition was willing to contract with the first comer. Compare *supra* pages 169—170. HAUPT *op cit* 57, submits: "Probably, the overly broad right to withdraw has been introduced into the ticket because of quite another aspect [than that of business necessity], namely in order to support the fiction that the air transport companies were private carriers. . . . When the pressure of the Courts had forced a retreat from the Private Carrier Clause, the cancellation clause, unassailed until now [1938], was left in the process as a mere residuum deprived of its foundation by the refusal to recognize the air carrier as being a private carrier." (Original text in German, translation mine.)

[366] Note the development of the TWA and ONA forms indicated in note 358 *supra* page 479.

[367] Cf note 76 *supra* page 260, compared with pages 168—169.

## § 2. *The clausal law*

Principal aspects — relevant situations: — laconic clauses and elaborate clauses — BEA clause — *force majeure*, labour disputes and aircraft damage — *force majeure* clause largely redundant — labour dispute clauses and business necessity — aircraft damage and legal character of airline's undertaking — the undetermined aircraft — type clauses — substitution clauses — *genera non pereunt* — American Restatement — only post-identification damage relevant — German discussion about moment of switch from generic to specific — clauses to neutralize effects of *genera non pereunt* rule — risk increase clauses — changes in original undertaking: — charter price refunded if contract repudiated before departure — explicit clauses and flat clauses — explicit clauses: — flexibility by broad airline discretion — Standard Non-Performance Clause — extent of charterer's risk under clause — attaches — good-will — reorganization of voyage clauses — IATA Resolution 045b — delay clauses — termination clauses — flat clauses: — airline's decision — What considerations influence decision? — freight earning problem — non-returnable freight clauses — *pro rata itineris* freight clauses — impact on airline's decision — liability problem — penalty clauses — refund clauses — BIATA clause — KLM clause — single refund case — double refund case — IATA discussion — case of double refund — impact of refund clauses on airline's decision — costs of reorganization —repairs under way — substitution by subcontracting — impact of ferry mileage — airline's situation and charterer's situation — form drafters' reactions — CAB reactions

The need to find contract terms under which airlines can operate profitably even when supervening events obstruct the originally contemplated performance has two principal aspects. On the one hand, the time *when* the original undertaking may be changed must be indicated; on the other hand, *the changes* in the original undertaking which are permissible must be determined. Each of these, the relevant situation and the permissible effects, present separate groups of problems, yet it is the cumulative effect of the solutions to these problems which characterizes air chartering.

*The relevant situations* are variously described in the air charter forms. The BIATA forms laconically indicate them by the expression that the airline is "unable" to perform.[368] Other forms are satisfied to refer to "any cause beyond the control of the charterer or Company"[369] which entails that the "Charter flight cannot be commenced". The elaborate clauses, however, are more informative and offer themselves more readily to comment. The BEA clause may illustrate this group. It reads as follows:

[368] BIATA ACA clause 14. See also *e. g.* Eagle ACA (1958) clause 17; LTU FCV clause 13; Flying Enterprise ACA Paragraph 11 (*Sic!*)
[369] BEA SFOA (T 176 1st) clause 11, (T 176 4th) clause 17.

> "B.E.A. shall be exempt from liability due to any failure to perform its obligations under this contract arising from :— —.—.— (b) Labour disputes or strikes whether B.E.A.'s employees or of others on whom B.E.A. is depending to fulfil this contract. (c) Force majeure or any other cause beyond the control of B.E.A. including accidents to or failure of the aircraft or any part thereof or any machinery or apparatus used in connection therewith. —.—.—"

Although framed in various ways this clause recurs in many important forms.[370] Apparently, it deals with three principal cases and supplements these with catchwords to make them as broad and all-inclusive as possible. These cases, *i.e. force majeure,* labour disputes and aircraft accidents will be dealt with in turn.

The first case is the one indicated by the triumphant French term "force majeure". Its exact meaning in each legal system may be subject to dispute[371] but it seems clear that the kernel of the notion is a supervening extraneous event on an extensive scale and of rare occurrence which carries with it an insurmountable obstacle to the debtor's performance of his obligation.[372] There is little doubt, however, that cases of *force majeure* so defined could be classified as involving termination *ex justa causa* in most jurisdictions. This would seem to apply to Anglo-saxon jurisdictions as well since the common carrier may rely on the defence of Act of God. Accordingly, in so far as the clausal law refers to the *force majeure* case it seems largely redundant and thus of minor interest.

The second case to consider is the one of labour disputes. It is noteworthy that the clause does not assimilate this case to that of *force majeure* although courts at times have accepted such an assimilation.[373] The reason is that probably it cannot

[370] BOAC SFOA clause 9, CC clause 17; similarly, but with another wording, generally more enumerative: Air Charter Traffic Exchange Form A art 5-e; Air Charter Exchange ACA clause 12; Baltairvoy 1951 paragraph 10; Baltairpac paragraph 8; TAI CdA 1947 clause D-17°; charterpartie aérienne dite Transair § A—IX; TAI CdA clause 13; Air France Contrat type provisorie passagers & bagages art VI-2; UAT CdA art IV-5; Swedish *force majeure* clause invoked in *Jonker v Nordisk Transport & Spedition,* 1961 USAvR 230, 1 Ark f L 272; and in *AIK v Aero Nord,* 1 Ark f L 268.

[371] See *e. g.* GUTTERIDGE, 1935 51 LQR 112; RODHE, *Obligationsrätt* 544 § 48.

[372] Cf RODHE, *Adjustments of Contracts* 160.

[373] For French cases, see SMITH, 1935—36 45 Yale LJ 455; for English cases, see

easily be said that the obstruction to performance which is represented by the strike, is "insurmountable" since, apparently, it often is a mere economic concession on the part of the employer-airline that is needed to end the strike and make the airline ready to perform. However, there are good reasons why strikes should excuse performance. Not to let them do so would, indeed, be to invite strikes. Knowing that their employer would incur not only the immediate losses consequent upon cession of production having ceased but also losses in the form of damage claims for the absence of production during each day the strike lasted, employees would certainly feel encouraged to engage in labour warfare, In this connection, it is interesting to note that some of the older forms apparently consider strikes to be the trouble only of the charterer.[374] This feature does not occur in the modern forms.

The third case to be dealt with is the one of damage to the aircraft. The flying ability of the aircraft may appear as an indispensable prerequisite to the airline's performance: however, it is by no means certain that aircraft damage is always within the scope of the relevant situations. The reason for this uncertainty relates to the legal character of the airline's undertaking under the sterotyped air charter contracts.

Air charter contracts are often concluded so far in advance of departure dates that airlines find it inconvenient to assign one particular aircraft of their fleet to carry out the contracted operation. A profitable overall operation of the airline is greatly simplified if there is a certain flexibility as to equipment. As a result of considerations of this kind[375] the stereotyped air charter contracts seldom involve the airline in an absolute obligation as to one specific aircraft. Their obligation is generally qualified in either of two ways. Very often the forms specify which aircraft is affected by the contract only by the clause:

GUTTERIDGE *op cit* 112 note 45.

[374] S. Instone & Co Aircraft Charter Party clause 2, cf 11; Baltairvoy clause 10, cf 18; Baltaircon clause 11, cf 19.

[375] In my opinion this is a more important consideration than the following one advanced by AMBROSINI, *Fletamento y Transporte* 17 no 15-b: "Ce fait est sûrement dû à une raison technique. Une fois le prototype expérimenté, on construit en série des aéronefs et également c'est en série qu'on les met en service et qu'on les destine au transport. En général l'aéronef d'un type équivaut à un autre aéronef du même type." — When the French criticised the specific undertaking in Baltairvoy 1951 preferring a generic undertaking (preamble) they relied primarily on the text argument; SAINTON, *Note sur la Baltairvoy 1951*, dated 11 Apr 1952, 1°.

"The Company will provide one . . . type aircraft."[376] Other forms which are drafted to have both registration number and type of aircraft inserted into the document arrive at the same result by reserving to the airline a right to substitute aircraft.[377] In both cases the net result is to allow the airline to select the aircraft which will fit in with other commitments when the performance becomes due.

Under this type of clausal law the performance of the airline involves a number of alternatives and the airline itself has the privilege of making the choice between them. Such an obligation may be termed an undertaking for a *generic* performance; it is subject to special legal rules. They may be identified with the maxim: *genera non pereunt,*[378] which means, as transcribed by the American Restatement of Contracts[379] "Impossibility of performing one or more but less than all of a number af performances promised in the alternative in a contract discharges neither the duty of the promisor if by the terms of the contract he had the privilege of the choice . . . but merely destroys or limits the possibility of choice; except where a contrary intention is manifested . . ." If the debtor has promised to deliver one sample of a certain kind, the fact that one such sample is destroyed cannot discharge him from his obligation. This rule is understood to apply in most jurisdictions.[381] What then, considering the general doctrine of *genera non pereunt,* is the meaning of placing damage to "the aircraft" among the relevant situations?

The result which would seem to follow is that the expression "the aircraft" can have no meaning until the airline has presented an aircraft to the charterer for the departure. Damage to aircraft occurring prior to presentation thus cannot be relevant and failure to present the aircraft at the time of departure cannot be

[376] Pan American CC clause 1; KLM ACA art 1-a; Lufthansa ACA (XP 46—61) art 1—1; Air France Contrat type provisoire passagers & bagages art 1—1°; Cf BIATA ACA schedule a; Air Charter Traffic Exchange Form A front page; Air Charter Exchange ACA front page.

[377] Fred Olsen ACA clause 1; Eagle ACA (1958) clause 2. Cf BEA SFOA (T. 176 4th) front page clause 2, conditions clause 1; BOAC SFOA front page and clause 1.

[378] Cf PLANIOL 8th 199 no 621-2°.

[379] Sec 469. Cf GOTTSCHALK *op cit* 123.

[381] 2 PLANIOL 8th 199 no 621, p 337 no 1004; BGB § 279; pan-Scandinavian Sales Act § 24. The doctrine of frustration, as understood in English law, will not apply to a generic undertaking. Cf ATIYAH, *The Sale of Goods,* London 1957 p 114.

excused under the clause. Its effect is limited to damage occurring after the commencement of the voyage.

These results may be compared with those arrived at in German maritime law. It has there been considered that the character of the shipowner's undertaking may change from specific to generic by the introduction of substitution clauses ("Beförderung mit Dampfer FREIBURG ... oder einem anderen Schiff dieser Linie") or the suppression of the identity of the vessel ("steamer to be named hereafter", "affrètement par navire à désigner"). In view of this changed character, damage to the ship should not result in the termination etc. of the contract as envisaged by the HGB (§§ 628, 630, 641) but rather have the consequences previewed by the BGB § 279 for undertakings of generic performances, until such moment as the shipowner's undertaking assumes specific character. This latter switch from generic to specific should occur somewhat differently in tramping and in line carriage. While the naming of the vessel would be decisive in the former category, the moment in line carriage would arrive "erst mit der gattungsmässingen Durchführung der Beförderung bis zum Bestimmungshafen; ..."[382] The setting apart of line carriage is explained by the fact that the shipping line normally has vessels other than the one damaged, sailing the route at limited intervals, each of them being capable of completing the carriage performance.[383]

Considerations parallel to if not influenced by the German maritime discussion have impressed air chartering and in order to avoid adverse results as to the effects of *force majeure* clauses and the general *force majeure* doctrine, drafters of some forms have been careful expressly to reject any duty to substitute.[384] It seems certain that such rejection is sufficient to avoid these adverse results in so far as they are based on the substitution clause.[385]

[382] WÜSTENDÖRFER, *Neuzeitliches Seehandelsrecht* 2d Tübingen 1950 p 237.
[383] See generally WÜSTENDÖRFER, *Das Problem der hinkenden Spezieschuld*, 1926 88 ZfdgHR 241—268, in particular 249—250; CAPELLE, *Frachtcharter* 125—128 § 20-II.
[384] KLM ACA (HAG/LEG/164 5 Jul 1951) art 2—2, and subsequent forms; Swissair ACA art 2—2; BIATA ACA clause 15. In many forms a right of rejection would follow from the wording of the substitution clause in which only expressions conferring a right to substitute are used, *e. g.* UAT CdA art I-7 ("autorisée"), Eagle ACA (1958) clause 2 ("at its own discretion may substitute").
[385] See also AMBROSINI, *Fletamento y Transporte* 18 no 15-b.

As to the consequences which result from the suppression of the identity of the aircraft, however, the rejection clause is inoperative. Yet it is clear that where one aircraft of a whole fleet is made unserviceable, inevitably, the loss of the services of this aircraft must fall somewhere in the fleet utilization programme. A few forms contain clauses designed to meet this contingency. One American form contains a very explicit clauce in point: "Tigers may cancel this agreement where such cancellation is . . . due to inability to replace lost, damaged or destroyed aircraft previously committed to its charter operations, . . ."[386] Other forms may perhaps arrive at the same result by using merely loose language such as referring to damage to "un appareil"[387] or the case that "par suite de pannes mécaniques ou avaries, elle [la compagnie] était empêchée de procéder au transport".[388] Reliance on a flat *force majeure* clause conferring relevance to "other obstructions of a technical nature", however, will certainly not exonerate the airline for failure to present the aircraft promised due to disruption of its programmes because of the crash of one of its aircraft.[389]

Apart from the variants of the relevant cases covered by the BEA clause, at least one other situation deserves mention. Certain air charter forms open up an opportunity to the airline to allow relevance to supervening events which severely change its risk exposure. Here, considerations of underlying insurance policy conditions seem likely to have influenced the drafting. There are well known equivalents to this provision in maritime law.[391] The clause appears in some American forms. The one inserted in the Air Charter Exchange Air Charter Agreement may serve as an example: "In any situation . . . which in the judgment of the Exchange or the captain is likely to give rise to capture, seizure, detention, damages, delay, disadvantages, or loss of the aircraft, passengers or cargo, the aircraft may return or proceed to or stop at any place the captain

[386] Flying Tigers CTA paragraph 9.
[387] TAI CdA clause 13; Airnautic CdA clause 13.
[388] Air France Contrat type provisoire passagers & bagages art VI—2.
[389] Compare *AIK v Aero Nord*, 1 Ark f L 268, in which under such circumstances the airline was held not to be entitled to avail itself of this *force majeure* clause. The case is not fully in point, however, because the undertaking was specific, not generic, and the accidented aircraft was another one than the one promised in the charter contract.
[391] Pan-Scandinavian Maritime Code § 135.

may consider safe or advisable under the circumstances without any liability whatsoever."[392]

*The changes in the original undertaking* which are introduced as a consequence of the occurrence of the relevant situation, remain to be considered. The clausal law on this point is fairly diversified. It may therefore be proper to make a preliminary remark about one of the rules which appears to be almost uniformly adopted throughout the whole area here surveyed. If the charter contract is terminated by the airline before the departure of the aircraft, the charter price is not due and should be refunded if prepaid. Express variants of this rule appear in some forms.[393] In no form is it contradicted. However, the drafting of certain forms allows for an advance of the important moment from the departure to some prior time.[394]

The diversity of the clausal law governing the change of the original undertaking of the airline upon the occurrence of the relevant situation stems from the division of the clausal law into two main categories, *viz.* the explicit clauses and the flat clauses.

Some clauses are more explicit as to what is to happen. This group of clauses however, is heterogeneous. Some forms strive to introduce flexibility into the airline's undertaking by conferring broad powers of adjustment on the captain of the aircraft. In Europe, the prime representative of this type of clause is the so-called Standard Non-Performance Clause. This clause originated, it would seem, in the original Baltairvoy,[395] and received its first clear enunciation in Baltairvoy 1951 in which it read as follows:

> "The Captain shall have the right to land or deviate at any time or at any place whatsoever for any purpose which in his opinion is necessary for the safety of the Aircraft, crew or cargo or incidental to the performance of this Charter or for the purpose of attempting to save life or property. If the Captain after having taken all

[392] Clause 20. Similarly Transocean ACA clause 11; ONA (Ca) clause 16.

[393] KLM ACA (HAG/LEG/238 1 Aug 1953) art 8-1 and prior forms, rule deleted in later form; Swissair ACA art 8-1; Lufthansa Agreement (cargo) art 8; TAI CdA 1947 clause 17°; Eagle ACA (1958) clause 20-B. Rule implicit in chartepartie aérienne dite Transair paragraphe A-IX; TAI CdA (1958) clause 13; Airnautic CdA clause 13.

[394] See further *infra* page 493 sq.

[395] Baltairvoy clause 9. Compare S. Instone & Co Ltd Aircraft Charter Party clause 8.

> reasonable steps to resume the flight, finds that it will be impossible to do so within ... of any such landing he shall immediately inform Charterers or their Agents who shall forthwith give instructions to Owners for the disposal of the Cargo. When those have been carried out at Charterer's risk and expense the carriage shall be deemed completed and the freight earned."[396]

In the immediate post-war period the Pan American Charter Contract contained a clause which was much to the same effect although ostensibly it conferred fewer powers upon the captain as such and limited the discretion of the airline by the enumeration of excuses:

> "The Company shall have the right to select the route for the charter flight; provided however, that the shortest route which, in the opinion of the Company, is safe and feasible, will be followed. In case of mechanical difficulties, damage to the aircraft, adverse weather conditions or other circumstances which, in the opinion of the Company, require such action, the charter flight may be cancelled or delayed at the point of origin or at any other point, in which event the charter flight shall be that portion, if any, of the flight completed ..."[397]

From the charterer's point of view, clauses conferring such broad powers upon the captain are not altogether innocent. While it is true that the charterer's principal interest in the venture is to have the cargo or passengers carried to destination safely, undamaged and on time, his interests are not unaffected by how the carriage is carried out. A comparison with shipping may illustrate this point.

Airplanes go long distances over land and may pass through a great number of jurisdictions. Ships, contrariwise, go over the high seas outside all countries and states. Nevertheless, ships enjoy a number of settled exterritorial rights while aircraft — which apparently would have a greater need for them — have few equivalents. The aircraft cargo is always attachable by the local jurisdictions. At one time, goods being shipped to India would be confiscated if they fell in the hands of Pakistan. Every

[396] Clause 9. See also Baltairpac clause 7, and IABA Standard Non-Performance Clause.
[397] Clause 5 in form reproduced by HÜRZELER, *Probleme des Chartervertrags nach Luftrecht*, diss Zürich 1948, Anhang p II—III. In later forms (1070C, 1070D, 1495) the provision recurs as clause 6. Also IATA Model Air CA (1957) art 29.

government feels free to open an aircraft and take out the load. In the management of the airplane therefore, continuous control by the charterer may be desirable. Fuelling stops no less than weather conditions must be foreseen so that the crew will not stop the plane in an area where something will happen.

The interests of the charterer may be involved in other ways as well. In passenger carriage, diversions and delays mean inconveniences to passengers which may greatly affect the commercial good-will and value of the venture to charterers. The charterer, therefore, has an evident interest in qualifying the captain's or operator's discretion so that, *e.g.* a decision to land or deviate solely for the purpose of obtaining fuel at a cheaper rate or to allow the crew to have lunch at their favourite spot will not change the expected manner of the flight. However, it will always be difficult to control the captain's exercise of his judgment.[398]

Some forms contain principles for the reorganization of the voyage when the flight has met with an insurmountable obstacle. Reorganization in the form of transshipment, it will be recalled, is required under English maritime law if the carrier in such a case is to be entitled to his freight. The Air Charter Exchange form contains a proviso that the Exchange, in the event that any flight contemplated in the charter agreement is not performed or completed, "will use its best efforts to find alternate or equivalent transportation for the remainder of the journey, a reasonable time being allowed by the charterer for the Exchange to complete the journey with the original aircraft."[399] The Fred Olsen Air Charter Agreement provides for the same event, that the operators "will use their utmost endeavours to find alternative or equivalent transport for the whole or incompleted part of the journey or service. The cost of such alternative aircraft or transportation and expenses in connection therewith shall be borne by Operators except when the circumstances involved are beyond the control of Operators."[400]

[398] See *e. g, Romulus Films v William Dempster*, 1952 2 Lloyd's List LR 535, at 538, in which case it was disputed *i. a.* whether the 920 kilograms shut out of a promised cargo of 3,000 kilograms was due to the pilot's exercise of his discretion as to the aircraft's safety, or to the fact that the aircraft's all-up weight was only 2,000 kilograms.

[399] Air Charter Exchange ACA clause 12; Eagle ACA (1958) clause 17.

[400] Fred Olsen ACA clause 10, cf 11. Cf LTU FCV clause 13.

As far as the IATA airlines are concerned, it may be noted that their opportunities of reorganizing the voyage by absorbing the charter passenger load in the regular services, whether it be those of the airline itself or some other IATA carrier, are subject to the Resolution 045b. Reorganization under this Resolution is permissible only in the following circumstances: "(a) a Member for reasons beyond its control is unable to land at the destination provided in the charter agreement ... (b) a Member is unable to provide previously confirmed space due to operational limitations beyond its control, including but not limited to: — (i) weather conditions necessitating the off-loading of the passengers involved, or, (ii) mechanical failure en route which would result in a delay of at least 24 hours."[401]

It is then an interesting feature of some of these clauses that they will not permit the contract to be terminated unless it can be foreseen that the performance will be delayed beyond certain limits. As will be recalled, the Air Charter Exchange form reserved to the airline a "reasonable time" to overcome its difficulties, the Standard Non-Performance Clause left room for this time to be fixed by express agreement between the parties, and as to the IATA carriers it may perhaps be concluded from Resolution 045b that they will insist on 24 hours being allowed for repairs due to mechanical failure.

Some forms thus provide for the airline's performance in the relevant situations being adjusted by diversion or by delay. Other forms, however, only indicate that in the relevant situation the contract shall come to an end. The faculty in the TAI 1947 form is that "Le présent contrat pourra être annulé sans préavis ...";[402] its equivalent in the KLM form is that the "Agreement shall be terminated ..."[403]

The information thus conveyed by the forms about the rules which prevail when the contracts are explicit on the changes to be made in the original undertaking, should be kept in mind when the situation under the flat clauses is considered.

[401] IATA Resolution 045b, issue 1 Mar 1961, clause 1. This Resolution was first adopted at the Honolulu Conferences in 1959, effective 1 Apr 1960. — The Resolution expressly permits the airline to absorb the passenger expenses during the period of delay (*sic!*).

[402] TAI CdA 1947 clause 17⁰.

[403] KLM ACA art 8—1. See also Swedish *force majeure* clause invoked in *Jonker v Nordisk Transport & Spedition* and *AIK v Aero Nord*, *supra* in note 370.

The majority of air charter forms are only slightly informative on the point of the effects which should follow from the occurrence of one of the relevant situations. The favourite language of these forms is the short provision that the occurrence will mean no liability on the part of the airline: the airline "shall be exempt from liability",[404] "sera dégagée des obligations contractées par elle, et que sa responsabilité ne pourra être mise en cause",[405] this is a case "justifiant l'inexécution du présent contrat sans préavis ni indemnité",[406] the airline "shall be under no obligation or liability to the Charterer".[407] In actual practice, clauses of this type leave the matter in the hands of the airline. The airline's repudiation of the contract will be sufficient to put an end to it, and its decision to hold on to it will suffice to keep it alive. Whether the issue be delay or termination, it is entirely in the hands of the airline.[408] This is so because the sanction against the airline is absent in the case of termination as well as in the case of modification. The result coincides, as will be recalled, with the one arrived at when discussing the distinction between delay and non-performance under Article 19 of the Warsaw Convention.[409]

The flat clauses thus leave the powers to change the original undertaking in the hands of the airline. It may then be proper to examine what considerations influence its exercise of these powers. What principles will govern the choice between termination, deviation or delay, and substitution? The answer to this question presupposes a survey of some of the consequences to the airline of the various alternatives, *viz.* the freight earned and the liability incurred.

The stereotyped air charter contracts reveal a pattern of two

[404] BEA SFOA clause 17, BOAC CC clause 17. Cf UAT CdA art IV-5.
[405] Air France Contrat type provisoire passagers & bagages art VI-2.
[406] TAI CdA clause 13.
[407] BIATA ACA clause 14.
[408] Note in this connection the American case *Dant & Russel, Inc v Grays Harbour Exportation Co*, CCA 9, 1939, 106 Fed 2d 911, in which it was held that non-performance was excused under a contract clause which, after having set forth the relevant situation, continued: "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days". — In the United States it is commonly stated that a casualty clause, broadly the equivalent of a *force majeure* clause, permanently excuses performances interrupted by an intervening impossibility, unless the parties to the contract have expressly agreed on only temporary excuse. See 6 WILLISTON 2d 5524—5529 § 1968.
[409] See *supra* pages 413 sq.

main solutions to the freight problem. One is where the freight is forfeited to the carrier as soon as the voyage commences, or sometimes even at an earlier time; the other is where freight is made due on a *quantum meruit* basis.

The earning of the full freight by the very commencement of the charter voyage is a common solution in English as well as in French charter forms, In the English forms it has a very maritime flavour[411] and indeed can be traced back as far as to the S. Instone & Co., Ltd. Aircraft Charter Party of 1928 where it read as follow: "The freight to be paid in cash without discount on signing Consignment Notes, and to be non-returnable (aircraft lost or not lost)."[412] In the original Baltairvoy the provision took the following form: "The freight shall be considered earned on ... and shall be paid to ... at ... on ... in cash without discount and shall be non-returnable (Aircraft lost or not lost)."[413] In this form it recurs with slight modifications in the other Baltic documents.[414] — The French clause goes back to TAI 1947 which carried the following provision: "Si l'annulation d'un voyage est enregistrée après le départ de l'avion pour accomplir le service pour lequel il a éte affrété, le prix de l'affrètement est forfait à 100 %."[415]

Insurance of the charter price is the practical corollary to the solutions thus advanced.[416] The charterer can insure his freight

[411] English maritime law contains a customary rule that prepaid freight cannot be recovered, even in the event of the loss of the goods or non-completion of the voyage. See generally SCRUTTON 16th 382—386 art 140. Cf BORCHARD, 1920—21 30 Yale LJ 363—364. Brett, J., in *Allison v Bristol Marine Ins Co*, House of Lords, 1876 1 AC 209, at 226, explains the rule thus: "It arose in the case of the long Indian voyages. The length of voyage would keep the shipowner for too long a time out of money; and freight is much more difficult to pledge, as a security to third persons, than goods represented by bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and, for a consideration, took the risk in order to obviate a repayment, which disarranges business transactions." — Contrary to the English law, the American maritime law, and the maritime law of France and Germany as well as that of the Scandinavian countries make no exception from the normal rules for freight in the case of its being prepaid. See *e. g.* BORCHARD *op cit* 364, and HASSELROT, *Frakt och utrustning*, Stockholm 1929 p 18 with further references. In these jurisdictions commercial usage has often attached to the case of prepaid freight a bill of lading clause reading "Freight prepaid, and not to be returned, ship lost or not lost." See BORCHARD *loc cit.*

[412] Clause 7.

[413] Clause 16.

[414] Baltaircon clause 17; Baltairvoy 1951 clause 7; Baltairpac clause 6. Cf Eagle ACA 1958 clause 18: "Unless otherwise specified the whole Charter Price shall be deemed to be earned at the time of commencement of the Charter."

[415] Clause 18°. Similarly Chartepartie aérienne dite Transair paragraphe A-IX second paragraph; TAI CdA clause 13; Airnautic CdA clause 13.

[416] Cf CAPELLE, *Frachtcharter* 388 sq; 2 RIPERT 4th 539 no 1649. Note the American

or passage money and in the event of the aircraft being lost he may recoup himself under his cover insurance.

The *quantum meruit* solution elaborates the *pro rata itineris* freight principle. A clear enunciation thereof is found in the Pan American Charter Contract: "In case of a partially completed flight, the charter price (not including charges referred to in Paragraph 5 [= certain expenses such as taxes in connection with the flight]) shall be adjusted by a mileage pro-rate, that is to say, the total mileage which was to be flown on the charter flight will be divided into said portion of the charter price to ascertain a price per mile which will be applied to the mileage flown."[417]

When the earning of freight is considered under the aspect of the non-returnable freight, the result is that the airline's earning of freight is not even touched by its decision as to reorganize the voyage or to terminate the contract. Under the *pro-rata-itineris* freight system, however, the voyage is only profitable in so far as it proceeds and the decision to reorganize as contrasted to that to terminate will involve earning the remainder of the freight money originally contemplated.

The liability aspect remains to be considered. Limitation of liability in non-performance cases is generally established, either by a clause along the lines of the maritime penalty clause[418] or by a clause to the effect that refund of freight money is the ultimate limit of the airline's liability against the charterer.

The penalty clause was inserted in the S. Instone & Company Ltd Aircraft Charter Party form of 1928[419] and appeared in the first Baltic documents[421] but was later deleted.

Enunciations of refund principles are fairly common. An important instance is the BIATA form which provides: "If the car-

case, *The Schooner Constellation*, 1947 AMC 1266, in which it was held that freight prepaid under a clause equal to those discussed in the text was nevertheless returnable when the carrier had abandoned the voyage, discharged the cargo and returned it to the shipper.

[417] Paragraph 6. KLM ACA art 8-2: "If due to a cause as mentioned in paragraph 1 of this Article 8 [= with certain reservations, any cause beyond the control of Charterer] the Journey can be performed only partially by KLM within the Charter period, the Charter price shall be reduced proportionately on the basis of the Charter period consumed and the number of flight hours flown in the partial performance of the Journey."

[418] See note 227 *supra* page 446.

[419] Clause 14: "Penalty for non-performance of this agreement, proved damages, not exceeding the estimated amount of freight."

[421] Baltairvoy clause 21, Baltaircon clause 22.

rier is unable to perform or complete any flight, journey or service contemplated by this agreement, he shall be under no obligation or liability to the charterer beyond the refund of the sum paid for that part of the flight, journey or service concerned."[422] An equally important prototype of the clause is the KLM variant which recurs in the following way in Lufthansa's 1961 form: "Without prejudice to any other provisions of the Agreement, damages payable by Lufthansa in case of non-performance of this Agreement due to faults or omissions of Lufthansa, its employees or agents, shall in no event exceed an amount equal to the charter price and damages for partial performance shall not exceed a proportionate part of the charter price."[423]

The refund rule which, it is recalled, is irrelevant except when the airline's liability is established (*i.e.* outside the relevant situations dealt with *supra),* has two principal aspects. The rule may refer only to the earning of freight. In this case the liability is zero. This is the case of single refund. The rule may, on the other hand, establish an amount for the airline's liability which cannot be exceeded. In the latter case the charterer will receive back a proportion of the charter price equivalent to the unflown mileages as refund of freight, and furthermore may receive an equivalent amount as damages. This is the case of double refund. Whichever case occurs depends on the interpretation of each form separately.

The refund rule has been discussed[424] in its enunciation in the IATA conditions of carriage which read as follows: "without any liability except to refund ... the fare and baggage charges for any unused portion of the ticket."[425] As will be recalled the ticket refund rule established a right of proportionate refund of the fare in passenger carriage. The liability rule ties in with the freight rule, the airline's sole liability is to "refund ... the fare". The same conditions of carriage as to cargo followed the non-returnable freight system[426]. The corresponding liability

[422] BIATA ACA clause 14.
[423] Lufthansa ACA (XP 46—61) Art 8. The clause reproduces almost literally the KLM clause appearing in the company's form ACA (HAG/LEG/164 5 Jul 1951) art 12-5. In the prior form reproduced by AMBROSINI, *Fletamento y Transporte* 36—37 the article is less elaborate.
[424] See generally DRION, *Limitation of Liabilities* 73—74 no 66.
[425] See IATA Resolution 030 GCP art 10-2-b.
[426] See Bermuda conditions of carriage GCC art 4-5-b; Honolulu conditions of carriage (IATA Resolution 030) GCC art 4-7-b.

rule then was simply to exclude all liability.[427] Theoretically, the case of the passenger/shipper should be similar under both systems. The passenger should get the fare back from the airline and no more, the shipper should get the freight back from his insurance company, assuming that he had insured his freight as he was supposed to do, and nothing from the airline. These situations thus should correspond to the case of single refund expounded above, (the freight refund).

The second case under the refund rule, the double refund, would seem to arise as soon as the damage liability is expressed not in terms of refunding *the* freight but in terms of being liable in "an amount *equal to*" the freight to be refunded or a proportion of the charter price. If the freight is non-returnable, the result may then be that the airline will lose its freight earning as damage payments and the charterer will receive these payments in addition to what he may receive under his insurance policy, provided that he insured his freight and that his damages exceeded the proportion of the charter price. These damages, apparently, are reflected in what it would cost the airline to reorganize the voyage and may be considered in that context.

The net result of the refund rule as applied to the airline, whether in its single or its double form, thus will involve that the extent of its duties in non-performance cases will vary considerably depending on at what point the voyage was abandoned and the contract terminated. The closer this point is to the original destination, the less the liability of the airline. This sliding scale for damages (and refunds of freight) is likely to exercise a decisive influence on the airline when determining whether to reorganize the voyage or to terminate the contract.

The reorganization of the voyage, on the other hand, may be computed in pecuniary liability as well. The cost of reorganization, of course, may vary enormously and cannot be compressed into any all-inclusive principles. What is interesting here is that it can be expensive, even when completion of the flight is merely dependent upon repairs under way. In the *Westlund Case*[428] the Viking aircraft had suffered a breakdown of its tail wheel. It was explained in the proceedings that it had cost over 50.000

[427] *Ibidem* art 6-3-e.
[428] 1961 USAvR 218; 1 Ark f L 256.

Swedish Crowns to bring a new wheel and put the Viking in the air again.[429] Reorganization may furthermore take place by substitution of aircraft or carrier. Substitution here means the subcontracting of the transportation. A right to such subcontracting is reserved to the airline in a number of forms and can generally be exercised without further assent from the charterer.[431] As thus conceived, the substitution will involve that the airline will have to assume the costs of the substitute transportation, *i.e.* to pay the subcontractor's price, as well as to pay all costs incidental to the reorganization, such as housing and feeding the passengers during the delay before they can proceed on their voyage with the subcontractor. In case the breakdown takes place en route, it is almost inevitable that the cost of ferry mileage will enhance the subcontractor's price so that the costs, even after deducting therefrom the extra freight which the principal airline will earn because of the reorganization, will far exceed the amount of the proportionate refund, whether single or double. Single refund will be the measure of its costs for termination whenever the case is within the ambit of the relevant situations here discussed. As a result the airline will often find the price of subcontracting much higher than the cost of terminating and accordingly be tempted to let these economic considerations guide in its decision of how to change the original undertaking.

As seen from the charterer's point of view this situation may appear unsatisfactory. Theoretically, he should not be in a worse situation financially when the airline abandons the voyage halfway than when it completes the voyage, since an amount equivalent to the proportionate price for flying the remainder is paid to him, either as refund of freight or as insurance money. However, it is apparent that in practice he will face exactly the same difficulties which tempted the airline to prefer termination to substitution. The charterer's interest therefore will lie with the carrier not cancelling rather than the means by which the carrier

[429] In considerations of such risks some American charter forms are careful to indicate that "if said aircraft should be damaged to an extent that, in the opinion of ONA [the airline], the cost of necessary repairs is not warranted, ONA will have no obligation to make such repairs, and in such event this Charter shall terminate as of the date said damage occurred." ONA ACA (Ca) clause 15; Transocean ACA clause 10. Cf Pan American CC clause 6, under which the airline is entitled to cancel the charter flight in the mere case of a damage to the aircraft.

[431] As to the right to substitute carriers and aircraft, see *supra* pages 269 sq and pages 369 sq.

performs this undertaking. The situation has generated action in two directions. One is the introduction into the charter forms of clauses that the airline "will use its best endeavours to find alternative or equivalent transport for the remainder of the journey"[432] or even that the airline "will use their utmost endeavours" for the same purpose.[433] The other result has been continuous attacks on the rule that refund should be the ultimate liability limit.

Attacks on this limitation of liability rule are as old as the rule itself. The first charter case in which application of the rule was considered concerned an emergency transport of a passenger from St. Louis to New York during which the aircraft was forced down by a "low ceiling" near Pittsburgh.[434] The passenger was forced to secure the remaining transportation by train. The application was criticised as involving "exceedingly poor policy"[435] and further criticism followed.[436] The result was, it would seem, that TWA deleted the rule in the late thirties.[437] When IATA was reformed, however, it was brought back to reign and prevailed until, under the CAB pressure, it was deleted in 1957.[438] So far, however, this deletion has not reacted upon the charter forms.[439]

[432] Eagle ACA (1958) clause 17; Air Charter Exchange ACA clause 12.
[433] Fred Olsen ACA clause 10; LTU FCV clause 13 ("wird die Gesellschaft ihr Äusserstes tun").
[434] The report appears in a letter of 26 Feb 1930 from George B. LOGAN to Mr Howard Wikoff, reproduced in EDMUNDS, *Aircraft Passenger Ticket Contracts*, 1930 1 JAL 329—331 note 23, at 330—331.
[435] LOGAN *op cit* 331.
[436] See HAUPT, *Die gewerbmässige Luftbeförderung von Personen in den Vereinigten Staaten von Amerika*, 1938 8AfL 59 with further references.
[437] See HAUPT *op cit* 60.
[438] The rule appeared as part of clause 7 in the Rio ticket conditions of 1948 (IATA Resolution 248/275); in the Bermuda conditions of carriage, GCP art 8-2; in the Honolulu conditions of carriage GCP art 10-2-b; and in the conditions of contract, Resolution 275b, issue 1 Apr 1954, clause 7; but was deleted in issue 5 Mar 1957. The CAB criticism was formulated in E-8543 p 5—6, as follows: "A mere refund of unused fare will not make the passenger whole where his destination is overflown and he is subject to substantial expense in reaching it. At a minimum it would appear reasonable that the passenger receive sufficient refund to enable him to complete his journey to destination by reasonably comparable means of transportation."
[439] The introduction of IATA Resolution 045b (*supra* page 491) may however be a step in this direction.

*CHAPTER SIX*

# THE AIR CHARTER NOTION

## THE AIR CHARTER NOTION

International character of air charter notion — characteristics — autonomy — previous definitions — reflections of national law, of cartel policy and administrative policy — air charter defined by reference to document used — air charter notion, as defined, compared with other notions — usefulness of notion, as defined — separation of minor categories — guide in the constructing of legal concepts — standardized air charter forms — operator status — stereotyped air charter and inter-carrier air charter — categories not mutually exclusive — air transport undertaking

In many respects air charter is an international phenomenon. The very word "charter" has an international distribution. The many standardized air charter forms which may be found in the various countries have many features in common. The uniformity of these features is so fundamental that adaptations of British forms can be found in Germany, Denmark and Norway and it has already been shown how French forms have influenced the revision of British forms. In this sense the common features of these forms have an international character.

In the previous chapters some of the characteristics of this international phenomenon of air charter have been investigated. In particular the dependency of local law and local conceptualism has been dealt with. Inasmuch as this dependency has been clarified, light has also been shed on the autonomy of the air charter notion in relation to national law. At the same time the air charter notion set the pattern for the comparative law research which has been undertaken.

During the previous discussion of air charter a number of definitions of this notion have been put forth. At the inspiration of the work undertaken by certain international agencies (ICAO, IATA, Citeja) to create uniform definitions of important air law notions to be applied indiscriminately throughout the world, some of the definitions of air charter have assumed such a general character as to make it difficult to tell whether they are advanced for a similar indiscriminate application or merely to meet the needs of the national law.

All definitions of air charter have this much in common that air charter refers to the use of aircraft and does not transfer title. In other respects, however, different definitions set different limitations to the air charter notion. Some of the limitations may be explained as reflections of a national law conceptualism. In

particular the notions of *locatio rei* and bailment seem to produce such limitations. The bailment aspect thus would seem to explain the distinction which the editors of Shawcross and Beaumont seek to make between charter of the aircraft itself and charter of space therein.[1] Apparently this distinction reflects the distinction imposed by Anglosaxon law between contracts involving the bailment of the aircraft, and contracts involving the bailment of the cargo.

Other features of the definitions advanced cannot immediately be referred to national law concepts. In the absence of indication to the contrary they may therefore be considered as advanced for indiscriminate application. In particular the planeload principle has this character. This principle is made part of the definitions of air charter which have been advanced by Döring[2] in 1937, the editors of Shawcross and Beaumont[3] in 1951, Krüger[4] in 1954 and all the definitions called to life by the various ICAO committees.[5] It does not appear, however, in the definitions advanced by Chauveau[6] and Maniatopoulos.[7]

It was shown in the second chapter that the planeload principle is in no way characteristic of the air charter notion as such but is solely the product (and not even a completed product, see the fill up privilege development) of cartel thinking and considerations of administrative policy. In the third chapter it was shown how the equivalent of the planeload principle in maritime carriage depended for its formation during the 19th century upon the discussion of contract types then prevailing and upon considerations of possession ancillary thereto. Accordingly, the planeload principle cannot be accepted as part of an air charter definition except on the national, administrative level.

Thus, we arrive at the result that the limitations imported into the air charter notion must be stripped of their international character and should not be permitted to influence the framing of a definition. As a result only a purely formal determination of the notion of air charter appears safe. Air charter is to be defined

[1] SHAWCROSS & BEAUMOUNT 2d 470-471 no 513B.
[2] DÖRING, *Luftverkehrsgesetz und Verordnung über Luftverkehr*, München & Berlin 1937 p 342.
[3] SHAWCROSS & BEAUMONT 2d 470-471 no 513B.
[4] KRÜGER, *Der Begriff der "Charter" im Luftverkehr*, 1954 Flugwelt (Jan) 7.
[5] See *supra* page 212 note 381.
[6] CHAUVEAU, *Droit aérien*, Paris 1951 p 233 no 454.
[7] MANIATOPOULOS, 423 Citeja 6 art 2-2.

as relating to contracts which have been entered into by means of a special document, the charterparty, exactly in the same way as the maritime charter notion is believed once to have arisen (*carta partita*).

If air charter is so defined we will find an explanation not only of how the word "air charter" could arise spontaneously in separate legal systems but also of the widely differing results to which various authors have arrived when attempting to project the air charter notion into the classic conceptualistic system.

A formal, documentary notion of the kind now proposed cannot be hampered by borders between different legal systems so long as these systems have in common that they recognize the legal effect of the basic document. At the same time the notion remains essentially the same although differences in civil aviation economics or national law concepts impress it with different limitations in different countries.

A formal, documentary notion of this kind cannot immediately be compared with other legal notions unless they are constructed in a similar way. Accordingly, the air charter notion is directly contrasted only to the ticket and waybill notions, but not to the notions of the chattel lease or the contract for work. The formal, documentary notion cannot be determined as to its boundaries in any other way than by the effective use of the document. It is wholly in line with this character of the air charter notion that when it is abused and when the term "air charter" is used not to signify the contract but to signify the traffic in which the use of charterparties has been common, nothing will prevent the word being combined with its very opposite, the ticket or the waybill, so that hybrids arise like the American charter ticket or charter airbill.[8] At the same time, constructing the air charter notion in this formal way clearly explains why bare hull charter is at times considered to be covered by the notion and at other times is considered empty. Whether it is the one or the other depends on what type of legal notion the observer has in mind, formal ones or Continental contract types.

There are few useful legal functions which can be performed by such a loose notion as that of air charter as here defined. Perhaps it can meet some of the needs for a comprehensive designation of those contracts which are not formed by use of tickets and

[8] *Supra* page 217 and note 399.

air waybills. In this respect the air charter notion will become dependent upon the determination of the ticket and air waybill contract notions. These notions appear to have a considerable consistency. The ticket contract refers to a seat in a vehicle, it is formed in reference to special rates tariffs, the price is determined by live mileage only and is not affected by ferry flying. Allowing for the difference that at present no particular place in the aircraft is reserved for a shipment, the same applies *mutatis mutandis* to the waybill contract.

Within this rather formless air charter category, however, certain minor notions can be separated to some advantage. These minor notions have international character as well.

Faced with the problem of calling new contract categories to life, however, it is well first to establish what purpose these categories should serve. They should simplify! That is the service rendered by the Continental contract types. By drafting the contract to fit into the framework of the contract type one imports into that contract the complete regulation gathered around that contract type. A maximum of regulation with a minimum of effort. Simplification of this character may be considered a possible, immediate achievement in one sector of the air charter notion. Inasmuch as the standardized air charter forms conform to one and the same pattern as to their central, express terms, a corresponding international unity will be found in the regulation of the relationship between the parties to the air charter contract. If one furthermore adds that there is some likelihood that the same term will receive the same construction in the various countries (if not, the forms are likely to be amended on the point), the advantage of being able to refer to this complex of norms by one and the same notion seems clear.

When the diversity of regulations existent in the field concerned prohibits the creation of anything like the contract type, attempts must concentrate on the arrangement of categories within the framework of all the applicable legal rules. Of course, the systems of legal rules do not attach uniformly to the same contract features; the various connecting categories are many and overlapping even in the national system and this difficulty is naturally very much more felt when attempting to construct a category that will be acceptable internationally. Any constructive arrangement of a contract category therefore necessitates,

first, the weighing of the importance of each rule, and then the selection of those rules of greater importance. The ultimate result should be the creation of a category around which the most important rules are gathered and where the other rules not conforming to those categories form only exceptional crossrules of minor importance.

As far as air charter is concerned, there are at least five main groups of rules the effects of which contract drafters will have to consider. Those groups relate to third-party liability, liability as against the passenger/shipper, the hull risk, the insurance coverage and administrative operator status. It will be found that there is no uniform regulation outside the ambit of the standardized forms and that accordingly there is no hint of a stereotyped balance of interests. We do find, however, in relation to three of these groups of rules that the problems posed are posed in much the same way in so far as charter between air carriers is concerned. In all inter-carrier charters the problem of operator identity is always posed and reflects upon the solutions to problems of the third-party liability, the hull risk and the operator status under the administrative regulations.

With this in mind it is suggested that *stereotyped air charter* and *inter-carrier air charter* are separated from the general air charter notion and form special sub-categories. The former category is characterized by the use of more or less uniform charter-party documents, the latter by uniformity of principal problems. Since the bases of these two notions differ, it is not possible to draw a precise dividing line between them. Stereotyped air charter is a notion to be determined solely by the use which in practice is given to the document. The two categories are not exclusive but may be overlapping inasmuch as the parties may decide to use a form belonging to the stereotyped category for an inter-carrier charter. The boundaries of the inter-carrier charter notion are determined — apart from what is generally characteristic of air charter — by the status notion of "air carrier". When this status notion is considered more closely it may appear to the observer somewhat vague. In order to arrive at greater precision, I suggest that it be attached to the notion of air transport undertaking appearing in Article 1, paragraph 1, of the Warsaw Convention. From such an attachment it will follow that the carrier notion is not limited to undertakings under

a duty to carry (see Art. 33). Furthermore, it is clear that what is in issue is factual status, not registered status. Any undertaking which holds out itself to the public in such a way that it appears to the public as an undertaking that organizes and answers for the execution of transportation has status as an "air transport undertaking" in the sense of the Convention. Since the terms of the Convention should be construed uniformly by all states, no objection can be raised to attaching the category of inter-carrier charters to the same notion, thereby achieving international uniformity.

While the two categories now proposed are thus logically not mutually exclusive it is believed that in practice they will be mutually exclusive, simply because airlines find the forms drafted for dealing more or less directly with the general public to be inadequate for dealing with the problems of inter-carrier charters.

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# Annex

## SUNDBERG · AIR CHARTER

CONTENTS



NOTE

Effort has been devoted to make these reprints of the forms convey a reasonably accurate picture of the appearance of the original printed forms. However, technical reasons have at times necessitated slight changes as to the size of the form, the character of letters, and in one instance the disposition of the clauses has been changed. The original TAI form presented the clause (E) Assurances inclusive the paragraph reading "A défaut - - - d'un sinistre." on page 2.

# AIRCRAFT CHARTER PARTY

*LONDON* ..... 19.....

**S. INSTONE & CO.**
LTD.,
Ship, Insurance &
Aircraft Brokers,
52, LEADENHALL STREET,
LONDON, E.C.3.

**It is this day mutually agreed** between .....

Owners of the Flying Boat / Aeroplane / Seaplane ..... called the .....

registration marks ..... of ..... lbs. maximum permissible load.

or thereabouts now .....

and expected ready to load about .....

**and S. INSTONE & CO., LTD.,** as Agents for the Charterers.

1. THAT the said aeroplane, seaplane or flying boat being airworthy and licensed to carry goods for hire or reward and in every way fitted for the flight shall with all possible dispatch fly and proceed to .....

.....

and there load in the customary manner from the Charterers, at their risk and expense, at such licensed aerodrome or licensed airport as may be ordered by them a full and complete cargo of .....

.....

not exceeding ..... lbs. nor less than ..... lbs. and not exceeding what she is permitted to carry by her Certificate of Airworthiness or what according to wind and weather the pilot agrees can be carried and being so loaded shall therewith fly with all possible dispatch to .....

.....

or as near thereunto as she can safely get and there deliver her cargo upon any licensed aerodrome or licensed airport as ordered, where she can safely deliver, but if required to shift, the expense of so doing to be paid by the Consignees, and the time to count; on being paid Freight at the rate of .....

The Owners shall furnish, if required, a Statutory Declaration by the Pilot or other officers that all the cargo received on board has been delivered. The freight is in full of trimming and of all Aerodrome Charges, Pilotages and Consulages on the aircraft. All dues on the cargo to be paid by the Charterers.

2. The cargo to be loaded in ..... running hours. If detained longer Charterers shall pay demurrage at the rate of..... per running hour (or pro rata for part thereof). Loading hours not to commence before ..... and if aircraft be not ready at loading place before ..... the Charterers have the option of cancelling this Charter. Notice as to the time when the aircraft will be ready to receive cargo to be given during usual office hours.

Any time lost through riots, strikes, lock-outs or any dispute between pilots or other hands connected with the working or delivery of the cargo or by reason of accidents to aircraft, obstructions on the aerodrome or airport; or by reason of floods, fogs, frosts, storms, or any cause beyond the control of the Charterers not to be computed as part of the loading time (unless any cargo be actually loaded during such time).

3. Standard forms of Air Consignment Notes shall be duly prepared by the Charterers and shall be signed by the Pilot, Agent or Owners and by the Charterers or by there representative. The freight and all terms, conditions and exceptions as per this Charter shall be taken to be incorporated in the conditions of such Consignment Notes. Such Consignment Notes to be signed at the aerodrome or airport of departure before the commencement of the flight.

4. The Owners, their pilots and other employees and the undertakings and individuals which they employ in the performance of their obligations accept the cargo for carriage only at the risk of the Charterers.

The Owners accept no responsibility for loss, damage or delay caused directly or indirectly during the conveyance by aircraft or otherwise in connection with carriage by air. This refers to all obligations of the Owners either in respect of carriage, storage or any other operations in connection with the cargo. If the Charterers declare an insurance value in the Consignment Note it shall be taken as a request to the Owners by the Charterers that the Owners will, at the Charterers' expense and as agent for the Charterers, insure the cargo for the declared value. The Charterers, are offered facilities to insure against transport risks, including loading and unloading.

5. The aircraft shall have liberty to call at any aerodrome, airport or other intermediate point for fuel or other purposes or to make trial trips or adjust compasses, all as part of the contract flight.

6. The cargo to be discharged by Consignees at aerodrome of destination free of expense and risk to the aircraft at the average rate of 2 tons per hour ; if detained longer Consignees to pay aircraft demurrage at the rate of ..... per running hour (or pro rata for part thereof). Time to commence when aircraft is ready to unload and telephonic, telegraphic or written notice given. In case of strikes, lockouts, civil commotions or any other causes or accidents beyond the control of the Consignees which prevent or delay the discharging, such time not to count unless the aircraft is already on demurrage.

7. The freight to be paid in Cash without discount on signing Consignment Notes, and to be non-returnable (aircraft lost or not lost).

8. Should the aircraft land at any aerodrome or airport or elsewhere with damage the Pilot or Owners shall inform the Charterers thereof as soon as possible.

9. Dimensions of each separate package forming the cargo shall not exceed
3′ 4″ × 1′ 8″ × 1′ 8″ (100 × 50 × 50 cm.)
Cargo must conform to the Owners' general requirements as to fitness for transport.

The cargo shall not include :—

(a) Arms, ammunition, explosives, corrosives, or such objects as are liable to catch fire or otherwise endanger aircraft, cargo or crew ;

(b) Prohibited imports or things the transport of which is officially prohibited above any of the countries flown over.

The Charterers shall annex to the Consignment Note all such documents as are required to comply with all customs, fiscal or police regulations at intermediate aerodromes and airports and at aerodrome or airport of arrival. The Charterers shall indemnify the Owners against all consequences resulting from the absence of these documents or their being inaccurate or not complying with the regulations. It is not the duty of the Owners to examine the correctness or completeness of the documents.

10. The cargo is subject to a particular and general lien for all monies due in respect of the said cargo or on a general account with the Charterers or Consignees. If sums due to the Owners are not paid within 14 days after notice requiring payment is given to the party chargeable the cargo may be sold without further notice to Charterers or Consignees and the nett proceeds of the sale thereof retained in satisfaction or part satisfaction (as the case may be) of the debt in respect of which the Owners had a lien.

The cargo may be sold by auction or otherwise, in the discretion of the Owners.

11. The Act of God, the King's Enemies, Restraints of Princes and Rulers or Peoples, including interferences of Government authorities or their officials and perils of the Air, Land and Sea shall be mutually excepted.

The Owners in all matters arising under this contract shall also be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Article IV of the Schedule thereto in so far as applicable to aircraft and not over-ridden by legislation relating to aircraft.

12. Charterers have the right to transfer this Charter Party, but in such case the original Charterers shall remain responsible for the right and true fulfilment of same.

13. In the event of the aircraft nominated being unable to carry out the charter, the Owners shall have the option of providing other suitable aircraft to carry out the charter in substitution for the aircraft originally nominated.

14. Penalty for non-performance of this Agreement, proved damages, not exceeding the estimated amount of freight.

15. All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire, and the award of the said Arbitrators or Umpire shall be final and binding upon both parties hereto.

16. The Brokerage of Ten per Cent is due to S. INSTONE & CO. LTD. on signing the Consignment Notes.

The Original Charter in possession of

MEMBER OF

*No.*.....

*Date*.....

# AIRCRAFT CHARTER AGREEMENT

Between

NAME .....

ADDRESS .....

(*hereinafter, and in the Conditions hereafter referred to, described as "the Carrier"*)

and

NAME .....

ADDRESS .....

(*hereinafter, and in the said Conditions, described as "the Charterer."*)

---

The Carrier will charter to the Charterer and the Charterer will take on charter the aircraft described in the Schedule below (hereinafter, and in the said Conditions, described as "the aircraft") for the flight, journey, service or period and upon the terms specified in the said Schedule *subject to the Conditions set out on the back hereof*, which the Charterer hereby agrees and accepts.

AS WITNESS

## THE SCHEDULE ABOVE REFERRED TO

(*a*) Aircraft type..... Seating Accommodation.....

Maximum permissible pay load.....lbs.

(*b*) Journey from.....to.....via.....

or Period from .....to.....

Starting date..... Time .....

Single or return journey or circular tour.....

If not single journey, date and time of arrival home.....

Charter price or rate.....

Demurrage rate .....

# CONDITIONS.

1. The Carrier will provide the aircraft at the commencement of the charter properly manned, equipped and fuelled and will so maintain it during the period of the charter. The operating personnel are the servants or agents of the Carrier.

2. Deviation from any of the terms set out in the Schedule through the action or at the request of the Charterer may involve alteration in the charter price.

3. Unless otherwise agreed, the charter price does not include car or other transport to or from airports or landing grounds, but all expenses of operating the aircraft, including remuneration and expenses of operating personnel, running costs, maintenance and repair expenses, airport dues and hangarage charges, are included in the charter price. The Charterer shall not be entitled to pledge the aircraft or the credit of the Carrier for any purpose.

4. Traffic Regulations (if any) of the Carrier are applicable to all Passengers, Baggage and Freight carried in the aircraft. A copy of such Regulations (if any) may be inspected on demand at the office of the Carrier, and the Charterer shall be deemed to have notice of them, whether or not he shall have availed himself of his right to inspect them. The Captain of the aircraft shall have complete discretion concerning the load carried and its distribution, as to whether or not a flight should be undertaken, and as to where landings should be made, and the Charterer shall accept all such decisions of the Captain.

5. Carriage performed in pursuance of this Agreement shall be subject to the Conditions of Carriage contained in traffic documents of the Carrier.

6. For all carriage to which the Carriage by Air Act, 1932, is applicable, the Carrier and the Charterer will each use his best endeavours to ensure that all the provisions of the said Act and all the obligations of the Carrier thereunder are duly observed.

7. The Carrier, will, as far as possible, issue or arrange for the issue and completion of the traffic documents referred to in Clause 5 hereof and will supply the forms necessary for this purpose. The Charterer (especially in the case of time charters and when the obligation arises to issue fresh traffic documents during the currency of the charter) will use his best endeavours to ensure that the said documents duly completed as aforesaid, are always issued and supplied as provided in Clause 5 hereof, and for this purpose will afford to the servants and agents of the Carrier all reasonable information and assistance required.

8. Operating personnel are authorised to take orders only from the Carrier, unless specific agreement has been made between the parties whereby certain defined instructions may be accepted by operating personnel from the Charterer.

9. If any delay in the commencement or completion of the charter is caused by the Charterer or anyone acting on his behalf, demurrage shall run against the Charterer for such delay.

10. The Charterer is not entitled to assign this Agreement to any other party without the consent of the Carrier or to subcontract any part of the services contemplated hereunder.

11. The Charterer will comply, and cause all passengers and owners of freight carried to observe and comply, with all Customs, Police, Public Health and other Regulations which are applicable in States in which landings are made.

12. The Carrier is not a "Common carrier" and does not accept the obligations of a "Common carrier" nor is there implied in this Agreement any warranty concerning the aircraft or its fitness for any carriage.

13. This Agreement may be terminated and cancelled forthwith by the Carrier by notice to the Charterer.

(*a*) if the Charterer commits any breach of this Agreement

(*b*) if the Charterer goes bankrupt (or if a company goes into liquidation) or commits an act of bankruptcy or enters into an arrangement with his creditors.

14. If the Carrier is unable to perform or complete any flight, journey or service contemplated by this Agreement, he shall be under no obligation or liability to the Charterer beyond the refund of the sum paid for that part of the flight, journey or service concerned.

15. The Carrier shall be entitled (without giving a reason, or in the event of the scheduled aircraft becoming unserviceable), but shall not be obliged, to substitute another aircraft for the aircraft specified in the schedule hereto.

16. This Agreement is entered into by the Charterer both on his own behalf and as agent for all persons and the owners of all goods carried in the aircraft.

17. This Agreement shall be construed according to the law of England and any action arising therefrom shall be brought only in a Court of the United Kingdom.

COMPAGNIE DE TRANSPORTS AERIENS INTERCONTINENTAUX

**T. A. I.**

90, RUE DE MIROMESNIL — LABORDE 90—77

PARIS VIII E

# CONTRAT D'AFFRÊTEMENT

## CONDITIONS GÉNÉRALES

### (A) CLAUSES D'EXÉCUTION

1°) L'affréteur accepte et s'engage à respecter les conditions générales des transports aériens qui sont basées sur la Convention de Varsovie du 12 octobre 1929, les lois et règlementations françaises en vigueur ainsi que les règlements particuliers de la T. A. I.

2°) Le transporteur sera seul juge des conditions atmosphériques permettant l'envol ou s'y opposant, et conserve la direction technique des appareils dont la conduite et le service seront toujours exclusivement assurés par les soins de son personnel.

3°) L'avion affrété ne pourra être employé aux transports illégaux de passagers ou marchandises et en particulier des marchandises exclues de leur garantie par les Compagnies d'Assurances telles que: armes à feu, munitions, explosifs, combustibles, marchandises sujettes á la combustion spontanée, marchandises corrosives.

4°) Si la quantité effectivement chargée est inférieure au poids indiqué aux conditions particulières, le prix l'affrètement indiqué aux conditions particulières, restera dû intégralement.

5°) Si le nombre de passagers pris en charge est inférieur à celui autorisé par le certificat de navigabilité de l'appareil, le prix de l'affrètement restera dû intégralement.

6°) La marchandise doit être présentée à l'appareil avant l'heure fixée pour le départ dans un délai qui sera fixé aux conditions particulières.

7°) La cargaison sera chargée et arrimée dans l'avion par les soins de l'affréteur qui sera seul responsable des dommages causés aux marchandises par suite de leur arrimage insuffisant ou défectueux.

8°) Les passagers seront présents pour l'embarquement, toutes formalités douanières et policières accomplies, bagages enregistrés quinze minutes avant l'heure fixée pour le départ.

9°) Le déchargement à l'aérodrome d'arrivée aura lieu sous la responsabilité de l'affréteur et par les soins de son correspondant, il devra être terminé, après l'atterrissage de l'appareil, dans un délai qui sera fixé aux conditions particulières.

10°) La T.A.I. assume la seule responsabilité technique des vols, et entend limiter son rôle à celui de tractionnaire d'aérodrome à aérodrome pour le compte de l'affréteur dégageant toute responsabilité d'ordre commercial en ce qui concerne la nature et la qualification des chargements (passagers et fret).

11°) L'affréteur établira son propre règlement de transport définissant ses relations avec le public, ses propres tarifs de transport, ses billets de passage, ses lettres de transport aérien, dans la forme prévue par la législation en vigueur. L'affréteur conserve toute responsabilité vis-à-vis de ses clients, de la bonne organisation des voyages, des formalités qui y

sont liées et de l'application des lois et règlements. En cas de contravention, il supportera seul toute la responsabilité.

L'affréteur ne pourra transférer ce contrat à quiconque sans le consentement de la T.A.I.

## (B) CLAUSES FINANCIÉRES

12°) Le prix de l'affrètement, taxes et assurances passagers ou marchandises non comprises, couvre — le transport d'aéroport à aéroport, marchandises prises à bord (aérodrome de départ) et livrées à bord (aérodrome d'arrivée) — et les frais de vol de l'appareil (charges de l'équipage, combustibles, taxes d'atterrissage, etc . . .) à l'exclusion de tous autres frais se rapportant directement ou indirectement au chargement.

13°) L'affrètement doit être payé avant le départ.

14°) Un dépôt de garantie ou une caution bancaire agréée par la T.A.I. sera versé à la T.A.I. Les sommes versées ou garanties seront acquises à celle-ci en cas de résiliation anticipée du contrat. Il sera tenu compte de cette provision lors du règlement qui interviendra pour les derniers voyages prévus par le contrat.

## (C) SURESTARIES

15°) L'affréteur est responsable des immobilisations d'appareils qui pourraient se produire par suite de retard dans les opérations de chargement ou de déchargement. Chaque heure de retard donne lieu au versement d'une indemnité dont le montant est fixé dans les conditions particulières, toute heure commencée est due.

16°) L'affréteur est responsable des immobilisation d'appareils qui pourraient se produire du fait de son exploitation. Chaque jour d'immobilisation donne lieu au versement d'une indemnité journalière dont le montant est fixé dans les conditions particulières.

## (D) CLAUSES D'ANNULATION

17°) Le présent contrat pourra être annulé sans préavis par l'une ou l'autre des parties, en cas de guerre, conflit, soulèvement, émeute, grève, affrètement par un service public, accident grave survenant à un appareil, sans que cette annulation puisse donner lieu à dommages et intérêts au profit de l'une ou l'autre des parties. Le dépôt de garantie sera restitué à l'affréteur sous réserve des sommes qui seraient dues à la T.A.I. à raison des services fournis.

18°) Si l'annulation d'un voyage est enregistrée après le départ de l'avion pour accomplir le service pour lequel il a été affrété, le prix de l'affrètement est forfait à 100 %.

## (E) ASSURANCES

19°) L'affréteur devra faire connaître les conditions dans lesquelles doivent être assurés les passagers et le fret transportés. Ces conditions feront l'objet d'une clause spéciale des conditions particulières.

Au cas où l'affréteur désirerait utiliser les polices de la T.A.I., il en acceptera les conditions et limites ci-dessous résumées:

a) ***Marchandises.***

Par la Police n° 92 La Paternelle et avenants y annexés ou pour tout autre contrat la remplaçant et accordant une garantie de 12 millions au maximum par avion ou par chargement.

b) ***Passagers.***

Par les Polices La Paternelle individuelle Passagers et avenants y annexés ou par tout autre contrat ou police la remplaçant et garantissant aux victimes de l'accident les indemnités suivantes:

Cas de mort : un capital de 1 million de francs.

Cas d'incapacité permanente 100 % : 1 million de francs de capital.

La responsabilité civile de la T.A.I. est couverte jusqu'à concurrence de 2 millions par passager transporté.

En conséquence pour les marchandises l'affréteur déclarera à la T.A.I. la valeur des marchandises transportées d'après le montant des factures, augmenté de tous frais et débours y compris le fret et les primes d'assurances, le tout majoré de 20 % représentant le bénéfice espéré.

A défaut de facture, la valeur sera fixée soit d'après le cours des marchandises aux lieux et dates d'expéditions avec tolérance maximum de 20 % en plus, frais en sus, soit à dire d'expert. Cette valeur sera transmise au transporteur avant le départ. Le transporteur décline toute responsabilité en cas d'évaluation insuffisante, de déclaration erronée sur la nature de la marchandise pouvant entraîner l'application de la règle proportionnelle ou de la déchéance le jour du règlement d'un sinistre.

Pour les *Passagers*, l'affréteur délivrera à chaque passager un billet de passage dont un folio sera adressé à la T.A.I. pour la régularisation de l'assurance.

La T.A.I. s'engage à autoriser sa Compagnie d'Assurances à régler directement les sinistres avec l'affréteur. La responsabilité de la T.A.I. ne saurait être recherchée par l'affréteur dans le cas prévu par l'article 20 de la Convention de Varsovie.

Les taux d'assurances sont précisés dans les conditions particulières.

## (F) VARIATION DE PRIX

20°) Les prix indiqués dans le contrat correspondent aux indices économiques actuellement en vigueur. Ils sont fonction de la variation des indices soit en hausse, soit en baisse.

21°) Les modifications de prix seront calculées selon la formule de variations suivante :

$$(1) \quad \frac{1}{3} \times \frac{E}{Eo} + \frac{2}{3} \times \frac{S}{So} \text{ dans laquelle}$$

Eo = Moyenne des prix de l'essence 100 octanes à Paris à la date de la signature du présesent contrat suivant taxation officielle des prix indiqués.

E = Moyenne des prix de l'essence 100 octanes aux différentes escales empruntées pour l'exécution du contrat.

So = Salaire minimum du manœuvre de la métallurgie de la région parisienne à la date de la signature du contrat.

S = Salaire minimum du manœuvre de la métallurgie de la région parisienne pendant l'exploitation.

22°) La rèvision éventuelle des prix sera notifiée de l'une à l'autre des parties contractantes sous préavis de 4 jours à dater de la publication officielle des indices ci-dessus.

23°) La clause de révision de prix ne jouera qu'autant que la variation de prix obtenue par l'application de la formule (1) sera supérieure à 5 %.

## (G) ARBITRAGE

24°) En cas de contestation sur l'interprétation ou à l'occasion de l'exécution du présent contrat, chaque partie désignera un arbitre et ces arbitres règleront par commun accord ce différend.

Ils devront statuer dans un délai de deux mois à partir de leur désignation.

La partie poursuivante désignera par lettre recommandée l'arbitre de son choix à l'autre partie. Faute par cette dernière de faire connaître par lettre recommandée et dans un délai de quinze jours l'arbitre choisi par elle, la partie poursuivante pourra s'adresser au Président du Tribunal de Commerce de la Seine pour faire désigner cet arbitre.

En cas de désaccord entre les deux arbitres, ceux-ci désigneront dans les 15 jours suivant l'expiration du délai de deux mois, un troisième arbitre pour les départager ; à défaut d'entente ce tiers arbitre sera nommé par le Président du Tribunal de Commerce de la Seine à la requête de la partie la plus diligente.

Le ou les arbitres statueront dans un délai de deux mois souverainement et sans appel.

SIGNATURE DU CLIENT

*précédée de la mention "Lu et approuvé"*

APPROVED BY
THE AIR FREIGHT ADVISORY COMMITTEE.
LONDON
AND THE
BRITISH AIR CHARTER ASSOCIATION. LTD..
LONDON

# AIR VOYAGE CARGO CHARTER PARTY

**"BALTAIRVOY"**
TRADE MARK

LONDON.....19.....

**It is this day mutually Agreed** between Charterers, of and Owners of the Aircraft identified by registration marks of lbs. kgs. permissible load and cu. ft. cu. m. permissible capacity, or thereabouts, or such other Aircraft of similar loading capacity as

Time of loading

Owners may have available, expected ready to load Owners undertaking to keep Charterers or their Agents closely advised as to the actual readiness to load under this Charter Party.

1. THAT the said Aircraft, having a valid Certificate of Airworthiness and being airworthy and properly manned, equipped and fuelled for this

Place of loading

Charter, shall with all reasonable despatch proceed to Airfield where it can safely be loaded in the customary manner by Charterers, at their risk and expense, as may be ordered by them, subject to the Captain's discretion in respect to the stowage of the cargo in the Aircraft, a full and complete cargo of or other lawful merchandise, including Charterers' dunnage and separations if required, not exceeding lbs. kgs. nor less than lbs. kgs. which Charterers bind themselves to ship or pay deadfreight, and not exceeding what the Aircraft is permitted to carry by its Certificate of Airworthiness nor what according to wind and weather the Captain specifies can be carried. Charterers are to provide any special dunnage and any separations required, Owners allowing the use of any separations or dunnage already in the Aircraft.

Place of discharge

2. THE Aircraft being so loaded and upon signing Consignment Note(s) shall proceed with all reasonable despatch to Airfield , Owners being responsible for obtaining the necessary flights clearances and crew visas, and there deliver the cargo as ordered by Charterers, freight being paid as per Clause 16 at the rate of

On or prior to departure, Owners shall advise Charterers or their Agents of the estimated time of arrival at destination.

3. OWNERS shall be responsible for tallying the Cargo at loading and discharging Airfields, at their risk and expense.

Time allowed for loading

4. THE cargo shall be loaded and stowed as per Clause 1 by Charterers at their risk and expense in laytime of running hours, Sundays and holidays included. Loading hours not to commence before and if the Aircraft be not ready at the loading place before Charterers have the option of cancelling this Charter. Laytime shall count when the Aircraft has arrived at the loading place, is in all respects ready to receive cargo and notice of readiness has been given to Charterers or their Agents.

Time allowed for discharge

5. EXCEPT as specially provided in Clause 8 the cargo shall be discharged at the Airfield of destination by Charterers free of risk and expense to Owners in laytime of running hours, Sundays and ho idays included. Time to commence when the Aircraft has arrived at the Airfield of destination, is ready in all respects to unload and notice of readiness has been given Charterers or their Agents.

6. SHOULD neither Charterers nor their Agents be at the Airfield of loading or discharging when the Aircraft is ready to load or discharge the cargo, the Captain shall make all reasonable efforts to contact them. If unsuccessful, he shall then give written notice of readiness to the Airfield control and laytime shall thereupon commence. If, however, it be established that Owners or their Agents have failed to keep Charterers or their Agents advised of the estimated time of arrival of the Aircraft or any alterations thereto, then laytime shall not commence until Charterers or their Agents have had reasonable time to present themselves at the Airfield to accept notice of readiness.

7. SHOULD the cargo not be loaded or discharged within the above agreed laytime Charterers shall pay demurrage day by day at the rate of per running hour or *pro rata* for part of an hour.

After the Aircraft has been held on demurrage at the Airfield of loading for running hours from expiry of laytime, Owners shall have the option to cancel this Charter without prejudice to their rights thereunder.

Diversion

8. IN the event of the Captain diverting the Aircraft to the nearest safe Airfield because in his opinion the Airfield nominated in Clause 2 is unfit for landing at the material time, or if the Aircraft be diverted by a competent flight control authority, Charterers or their Agents are to be informed by Owners or their Agents as soon as possible.

On arrival of the Aircraft at the substituted Airfield, which must be in the same country as the Airfield nominated in Clause 2, Charterers must elect immediately either (*a*) to accept the cargo there, or (*b*) to hold the Aircraft for a waiting period of not exceeding running hours free of cost to themselves, on the expiration of which time the cargo shall be discharged as per Clause 5 and Owners shall be deemed to have fulfilled the terms and conditions of this Charter Party. Should the Airfield orginally nominated become safe and available at any time within this waiting period, the Aircraft shall at once proceed there and deliver her cargo unless delivery has already commenced at the substituted Airfield.

The exercise of option (*b*) as above by Charterers is however subject to the right of Owners at any time during the waiting period, to have the cargo discharged at the substituted Airfield, Owners binding themselves to forward the cargo with all reasonable despatch at Charterers choice either to the Airfield originally nominated or to such other destination as may be proposed by Charterers. If Owners deliver the cargo to the Airfield originally nominated they shall bear the full cost of such delivery. If however, the cargo is delivered at Charterers' request to some other destination, all additional costs of delivery in excess of those to the Airfield originally nominated shall be borne by Charterers.

Deviation and intermediate landings

9. THE Aircraft shall have liberty to land at any time for any purpose which, in the opinion of the Captain, is necessary for the safety of the Aircraft or cargo, or incidental to the performance of this Charter Party. Should the Aircraft from any cause or for any purpose land at any intermediate point and the Captain be of the opinion that he will be unable to resume the flight within a reasonable period, the Captain or Owners shall immediately inform Charterers or their Agents.

Strikes and lockouts

10. ANY time lost through strikes, lockouts, riots, civil commotions, breakdowns or accidents to Aircraft, floods, fogs, frosts, storms or any other cause whatsoever beyond the control of Charterers shall not count unless the Aircraft is already on demurrage.

If there is a strike or lockout affecting the loading of the cargo or any part of it when the Aircraft is ready to proceed to the Airfield (s) of loading, or after her arrival there, Owners may ask Charterers to declare that they agree to reckon the laytime as if there were no strike or lockout. Unless Charterers or their Agents give such declaration in writing immediately, Owners shall have the option of cancelling this Charter. If part cargo has already been loaded Owners have the option of either unloading the cargo already in the Aircraft at Charterers' risk and cancelling the Charter or proceeding with the cargo then on board (freight payable on loaded quantity only), and Owners are at liberty to complete with other cargo on the way for their own account and may make any reasonable deviation for this purpose.

If there is a strike or lockout affecting the discharge of the cargo on or after arrival of the Aircraft at Airfield of discharge, Charterers or their Agents may either (*a*) divert the Aircraft to the nearest safe Airfield in the same country not so affected and there discharge the cargo, or (*b*) detain the Aircraft pending the settlement of the strike or lockout. In the case of (*a*) any additional costs incurred shall be shared equally between Charterers and Owners, and on delivery of the cargo at such Airfield all conditions of this Charter Party and of the Consignment Note shall apply. In the case of (*b*) half demurrage shall be payable by Charterers day by day up to a period of running hours after which period the Aircraft may, on notice having been given to Charterers, be discharged by the crew and the cargo when unloaded shall be at the risk of Charterers.

11. AIR Consignment Notes for each consignment shall be duly prepared by Charterers and shall be signed by the Captain, Owners, or their Agents and by Charterers and/or Consignors or by their representatives at the Airfield of departure before the commencement of the flight and the signature of the Captain, Owners, or their Agents shall be deemed to be a good and proper receipt for the cargo. The freight, and terms, conditions and exceptions of this Charter shall be deemed to be incorporated in the conditions of such Consignment Note(s) and should any of the terms, conditions or exceptions of the said Consignment Note(s) differ from those of this Charter Party, the Charter Party shall be deemed to be paramount.

12. CHARTERERS shall attach to the Consignment Note(s) all such documents as are required to comply with customs, fiscal or police regulations at intermediate Airfields and at the Airfield of destination. Charterers shall indemnify Owners against all consequences resulting from the absence of these documents, or from their being inaccurate, incomplete or not complying with the regulations at the Airfield of loading or unloading. Owners shall take all reasonable precautions to ensure that the cargo is properly documented but they shall not be liable for any loss, damage or delay arising from faulty documentation by Charterers or their Agents.

Cargo insurance

13. OWNERS are not Common Carriers and do not accept the obligations of a "Common Carrier." The cargo is accepted and carried by Owners solely at the risk of Charterers.

14. THE cargo shall not include: —

(*a*) Any goods or objects which may endanger the safety of the Aircraft, cargo or crew;

(*b*) Goods or objects the importation, exportation or carriage of which is prohibited by laws or regulations of any Country or State the territory of which is to be crossed or entered.

(*c*)

15. ALL Airfield and other charges on or applicable to the Aircraft and crew shall be paid by Owners and all dues or charges on or applicable to the cargo shall be paid by Charterers.

Freight payment

16. THE freight shall be considered earned on and shall be paid to at on in cash without discount and shall be non-returnable (Aircraft lost or not lost).

17. THE Cargo is subject to a lien for all monies due from Charterers to Owners in respect of this Charter, and Owners shall be entitled to retain possession of the Cargo until all such monies shall have been paid. If payment of such monies is not made within after notice is given by Owners to Charterers requiring payment thereof, then Owners shall be entitled to sell the cargo by Auction or otherwise at their discretion and apply the nett proceeds of sale in satisfaction or part satisfaction (as the case may be) of all sums then due and owing by Charterers to Owners.

18. ACT of God, Restraints of Princes and Rulers of Peoples, including interferences of Goverment authorities and their officials, or perils of the air, land and sea are excepted, subject to the provisions of Clauses 8 and 9.

19. OWNERS in all matters arising under this Charter Party shall be entitled to the like privileges and rights and immunities as are contained in the Carriage by Air Act, 1932, and all the provisions thereof shall apply insofar as the same are applicable to this Charter and not over-ridden by legislation relating to Aircraft or the carriage of goods by air.

20. NOTWITHSTANDING anything expressed or implied elsewhere in this Charter, Owners and Captain of the Aircraft shall make every endeavour to implement the Charter.

21. PENALTY for non-performance of this Charter shal be proved damages not exceeding the estimated amount of freight payable.

22. ANY disputes arising out of this Charter shall, unless the parties agree forthwith on a single Arbitrator, be referred to two Arbitrators, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire, and the award of the said Arbitrators or Umpire shall be final and binding upon both parties hereto. The Arbitrators and Umpire shall be commercial men, at least one of them being a member of the Baltic Mercantile and Shipping Exchange, and the arbitration shall be held in London. For the purposes of enforcing any award this submission to arbitration may be made a Rule of Court.

23. THIS Charter may be cancelled forthwith by either Party on written notice being given if the other Party goes Bankrupt, goes into Liquidation or commits an act of Bankruptcy or enters into an arrangement with Creditors, but without prejudice to the rights of either Party under Clause 21.

24. BROKERAGE of on the freight, deadfreight and demurrage is due by Owners to on payment of freight. In the event of this Charter-Party being cancelled by mutual consent at least one half of the brokerage on the estimated freight shall be paid by Owners to the Brokers as above.

*Approved by*
**THE AIRBROKERS ASSOCIATION LONDON**
AND THE
**BRITISH AIR CHARTER ASSOCIATION LTD. LONDON**

# CONSECUTIVE VOYAGES AIR CARGO CHARTER PARTY

**"BALTAIRCON"**
TRADE MARK

LONDON.....19.....

**It is this day mutually Agreed** between Charterers, of and Owners of the Aircraft identified by registration marks of lbs. kgs. permissible load and cu. ft. cu. m. permissible capacity, or thereabouts, or such other Aircraft of similar loading capacity as Owners may have available, expected ready to load on her first flight under this charter Owners undertaking to keep Charterers or their Agents closely advised as to the actual readiness to load on each flight under this Charter Party.

1. THAT the said Aircraft, having a valid Certificate of Airworthiness and being Airworthy and properly manned, equipped and fuelled for this Charter, shall with all reasonable despatch proceed to Airfield where it can safely be loaded in the customary manner by Charterers, at their risk and expense, as may be ordered by them, subject to the Captain's discretion in respect to the stowage of the cargo in the Aircraft, with a full and complete cargo of or other lawful merchandise, including Charterers' dunnage and separations if required, not exceeding lbs. kgs. nor less than lbs. kgs. which Charterers bind themselves to ship or pay deadfreight, and not exceeding what the Aircraft is permitted to carry by its Certificate of Airworthiness nor what according to wind and weather the Captain specifies can be carried. Charterers shall provide any special dunnage and any separations required. Owners allowing the use of any separations or dunnage already in the Aircraft.

2. THE Aircraft being so loaded and upon signing Consignment Note(s) shall proceed with all reasonable despatch to Airfield , Owners being responsible for obtaining the necessary flight clearances and crew visas, and there deliver the cargo as ordered by Charterers, freight being paid as per Clause 17 at the rate of . On or prior to departure, Owners shall advise Charterers or their Agents of the estimated time of arrival at destination.

3. THIS Charter Party shall cover a minimum number of and a maximum number of flights as above during the period commencing and ending

Charterers shall have the option of extending this Charter by a further flights as above during the period commencing and ending

Each flight shall be performed as ordered by Charterers who shall give at least notice to Owners at of the required time of readiness to load, but Owners shall be given reasonable time to position the Aircraft for loading after completion of the preceding flight(s) under this Charter.

4. THE cargo shall be loaded and stowed as per Clause 1 by Charterers at their risk and expense in laytime on each flight of running hours, Sundays and holidays included. Laytime for each flight shall commence when the Aircraft has arrived at the loading place and is in all respects ready to receive cargo and notice of readiness has been given to Charterers or their Agents, but not before the time ordered by Charterers as per Clause 3. If the Aircraft be not ready at the loading place within hours thereof Charterers shall have the option of cancelling the particular flight.

5. EXCEPT as specially provided in Clause 9 the cargo shall be discharged at the Airfield of destination by Charterers free of risk and expense to Owners in laytime on each flight of running hours, Sundays and holidays included. Time to commence when the Aircraft has arrived at the Airfield of destination and is in all respects ready to unload and notice of readiness has been given to Charterers or their Agents.

6. IF on any flight neither Charterers nor their Agents are at the Airfield of loading or discharging when the Aircraft is ready to load or discharge the cargo, the Captain shall make all reasonable efforts to contact them. Should he be unsuccessful, he shall then give written notice of readiness to the Airfield Control and laytime shall thereupon commence, subject, to the provisions of Clauses 4 and 5. If, however, it be established that Owners or their Agents have failed to keep Charterers or their Agents advised of the estimated time of arrival of the Aircraft or any alterations thereto, then laytime shall not commence until Charterers or their Agents have had reasonable time to present themselves at the Airfield to accept notice of readiness.

7. SHOULD the cargo not be loaded or discharged on any flight within the above agreed laytime Charterers shall pay demurrage day by day at the rate of per running hour or *pro rata* for part of an hour.

After the Aircraft has been held on demurrage on any flight at the Airfield of loading for running hours from expiry of laytime, Owners shall have the option to cancel that flight without prejudice to their rights under this Charter.

8. OWNERS shall be responsible for tallying the Cargo at loading and discharging Airfields, at their risk and expense.

9. IN the event of the Captain diverting the Aircraft to the nearest safe Airfield because in his opinion the Airfield nominated in Clause 2 is unfit for loading at the material time, or if the Aircraft be diverted by a competent flight control authority, Charterers or their Agents are to be informed by Owners or their Agents as soon as possible.

On arrival of the Aircraft at the substituted Airfield, which must be in the same country as the Airfield nominated in Clause 2, Charterers must elect immediately either (*a*) to accept the cargo there, or (*b*) to hold the Aircraft for a waiting period of not exceeding running hours free of cost to themselves, on the expiration of which time the cargo shall be discharged as per Clause 5 and Owners shall be deemed to have fulfilled the terms and conditions of this Charter Party affecting that flight. Should the Airfield originally nominated become safe and available at any time within this waiting period, the Aircraft shall at once proceed there and deliver her cargo unless delivery has already commenced at the substituted Airfield.

The exercise of option (*b*) as above by Charterers is however subject to the right of Owners at any time during the waiting period, to have the cargo discharged at the substituted Airfield, Owners binding themselves to forward the cargo with all reasonable despatch at Charterers choice either to the Airfield originally nominated or to such other destination as may be proposed by Charterers. If Owners deliver the cargo to the Airfield originally nominated they shall bear the full cost or such delivery. If, however, the cargo is delivered at Charterers' request to some other destination, all additional costs of delivery in excess of those to the Airfield originally nominated shall be borne by Charterers.

10. THE Aircraft shall have liberty to land at any time for any purpose which, in the opinion of the Captain, is necessary for the safety of the Aircraft or cargo, or incidental to the performance of this Charter Party. Should the Aircraft from any cause or for any purpose land at any intermediate point and the Captain be of the opinion that he will be unable to resume the flight within a reasonable period, the Captain or Owners shall immediately inform Charterers or their Agents.

11. ANY time lost through strikes, lockouts, riots, civil commotions, breakdowns or accidents to Aircraft, floods, fogs, frosts, storms or any other cause whatsoever beyond the control of Charterers shall not count unless the Aircraft is already on demurrage.

If on any flight there is a strike or lockout affecting the loading of the cargo or any part of it when the Aircraft is ready to proceed to the Airfield(s) of loading, or after her arrival there, Owners may ask Charterers to declare that they agree to reckon the laytime on that flight as if there were no strike or lockout. Unless Charterers or their Agents give such declaration in writing immediately, Owners shall have the option of cancelling that flight. If part cargo has already been loaded Owners have the option of either unloading the cargo already in the Aircraft at Charterers' risk and cancelling that flight or proceeding with the cargo then on board (freight payable on loaded quantity only), and Owners shall be at liberty to complete with other cargo on the way for their own account and may make any reasonable deviation for this purpose.

If on any flight there is a strike or lockout affecting the discharge of the cargo on or after arrival of the Aircraft at Airfield of discharge, Charterers or their Agents may either (*a*) divert the Aircraft to the nearest safe Airfield in the same country not so affected and there discharge the cargo, or (*b*) detain the Aircraft pending the settlement of the strike or lockout. In the case of (*a*) any additional costs incurred shall be shared equally between Charterers and Owners and on delivery of the cargo at such Airfield, all conditions of this Charter Party and of the Consignment Note shall apply. In the case of (*b*) half demurrage shall be payable by Charterers day by day up to a period of running hours after which period the Aircraft may, on notice having been given to Charterers, be discharged by the crew, and the cargo when unloaded shall be at the risk of Charterers.

12. AIR Consignment Notes for each consignment shall be duly prepared by Charterers and shall be signed by the Captain, Owners, or their Agents and by Charterers and/or Consignors or by their representatives at the Airfield of departure before the commencement of each flight and the signature of the Captain, Owners, or their Agents shall be deemed to be a good and proper receipt for the cargo. The freight, and terms, conditions and exceptions of this Charter shall be deemed to be incorporated in the conditions or such Consignment Notes and should any of the terms, conditions or exceptions of the said Consignment Notes differ from those of this Charter Party, the Charter Party shall be deemed to be paramount.

13. CHARTERERS shall attach to the Consignment Notes all such documents as are required to comply with customs, fiscal or police regulations at intermediate Airfields and at the Airfield of destination. Charterers shall indemnify Owners against all consequences resulting from the absence of these documents, or from their being inaccurate, incomplete, or not complying with the regulations at the Airfield of loading or unloading. Owners shall take all reasonable precautions to ensure that the cargo is properly documented but they shall not be liable for any loss, damage or delay arising from faulty documentation by Charterers or their Agents.

14. OWNERS are not Common Carriers and do not accept the obligations of a "Common Carrier". The cargo is accepted and carried by Owners solely at the risk of Charterers.

15. THE cargo shall not include: —
(*a*) Any goods or objects which may endanger the safety of the Aircraft, cargo or crew;
(*b*) Goods or objects the importation, exportation or carriage of which is prohibited by laws or regulations of any Country or State, the territory of which is to be crossed or entered;
(*c*)

16. ALL Airfield and other charges on or applicable to the Aircraft and crew shall be paid by Owners and all dues or charges on or applicable to the cargo shall be paid by Charterers.

17. ON each flight the freight shall be considered earned on and shall be paid to at on in cash without discount and shall be non-returnable (Aircraft lost or not lost).

18. THE Cargo is subject to a lien for all monies due from Charterers to Owners in respect of this Charter, and Owners shall be entitled to retain possession of the Cargo until all such monies shall have been paid. If payment of such monies is not made within after notice is given by Owners to Charterers requiring payment thereof, then Owners shall be entitled to sell the cargo by Auction or otherwise at their discretion and apply the nett proceeds of sale in satisfaction or part satisfaction (as the case may be) of all sums then due and owing by Charterers to Owners.

19. ACT of God, Restraints of Princes and Rulers of Peoples, including interferences of Government authorities and their officials, or perils of the air, land and sea are excepted, subject to the provisions of Clauses 9 and 10.

20. OWNERS in all matters arising under this Charter Party shall be entitled to the like privileges and rights and immunities as are contained in the Carriage by Air Act, 1932, and all the provisions thereof shall apply insofar as the same are applicable to this Charter and not over-ridden by legisation relating to Aircraft or the carriage of goods by air.

21. NOTWITHSTANDING anything expressed or implied elsewhere in this Charter, Owners and Captain of the Aircraft shall make every endeavour to implement the Charter.

22. PENALTY for non-performance of this Charter shall be proved damages not exceeding the estimated amount of freight payable.

23. ANY disputes arising out of this Charter shall, unless the parties agree forthwith on a single Arbitrator, be referred to two Arbitrators, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire, and the award of the said Arbitrators or Umpire shall be final and binding upon both parties hereto. The Arbitrators and Umpire shall be commercial men, at least one of them being a member of the Baltic Mercantile and Shipping Exchange, and the arbitration shall be held in London. For the purposes of enforcing any award this submission to arbitration may be made a Rule of Court.

24. THIS Charter may be cancelled forthwith by either Party on written notice being given if the other Party goes Bankrupt, goes into Liquidation or commits an act of Bankruptcy or enters into an arrangement with Creditors, but without prejudice to the rights of either Party under Clause 22.

25. BROKERAGE of on the freight, deadfreight and demurrage is due by Owners to on payment of freight. In the event of this Charter Party or any part thereof being cancelled by mutual consent at least one half of the brokerage on the estimated freight shall be paid by Owners to the Brokers as above.

# T. A. I.


## Cie DE TRANSPORTS AÈRIENS INTERCONTINENTAUX

SOCIÉTÉ ANONYME A PARTICIPATION OUVRIÈRE AU CAPITAL DE 40.000.000 DE FRANCS
SIÈGE SOCIAL : 23, RUE DE L'AMIRAL D'ESTAING, PARIS, XVIe — R. C. SEINE 328. 163 B

Tél.: OPÉ. 53—62
Ad. Tél. Cotransavia-Paris

23, Rue de la Paix
Paris, 2e


## CHARTE-PARTIE AERIENNE —
## dite
## TRANSAIR

Entre:
d'une part, la Société

AFFRETEUR;

d'autre part, la COMPAGNIE DE TRANSPORTS
AERIENS INTERCONTINENTAUX
(T. A. I.)

TRANSPORTEUR.

IL A ETE CONVENU CE QUI SUIT:

### A. — *CONDITIONS GENERALES*

I. — La T. A. I s'engage à utiliser au profit de l'affrêteur:
— un appareil de type
sur la liaison de
à
via
Le départ étant fixé à heures et le trajet devant durer approximativement
heures, l'arrivée est prévue le à heures.

Ce délai de transport est donné à titre purement indicatif et ne constitue pas un délai de rigueur dont l'inobservation serait de nature à engager la responsabilité du Transporteur.

La charge utile de l'appareil est fixée à kgs, le nombre de sièges à

II. — La T. A. I. tractionnaire d'aérodrome à aérodrome pour le compte de l'affrêteur, conservera la direction technique de l'aéronef affrêté dont la conduite et le service technique seront toujours exclusivement assurés par les soins de son personnel; la Compagnie sera seule juge des conditions atmosphériques permettant l'envol ou s'y opposant, sauf recours éventuel de l'affrêteur pour le cas où cette décision présenterait un caractère arbitraire.

Tout changement d'itinéraire effectué à la demande de l'affrêteur, entraînera une modification correspondante du prix du transport, étant entendu que le prix de l'affrêtement fixé par la présente Charte-Partie ne pourra être réduit.

La T. A. I. se réserve le droit de modifier l'itinéraire fixé en fonction des circonstances météorologiques ou de considérations techniques.

Le Commandant de bord pourra faire en cours de voyage toutes escales, atterrissages fortuits ou réparations nécessités par la sécurité de l'avion mais, dans la mesure du possible, en informera l'affrêteur si le retard risque de dépasser heures.

III. — Les opérations d'embarquement et de débarquement des passagers, de chargement et d'arrimage des marchandises, seront effectuées par les soins et sous la responsabilité de l'affrêteur, sous le contrôle technique du Commandant de Bord et en conformité des indications portées au § Ier ci-dessus relativement à la charge utile.

Toutefois, en cas de conditions météorologiques défavorables, le transporteur se réserve le droit dde iminuer la charge utile autorisée afin de pouvoir emporter une quantité d'essence supérieure á celle prévue pour l'exécution du vol dans des conditions atmosphériques normales sans que ceci ait pour résultat d'entrainer une réduction du prix de l'affrêtement.

La T. A. I. n'encourra aucune responsabilité pour dommages causés par un arrimage insuffisant ou défectueux des marchandises.

IV. — L'appareil sera mis à la disposition de l'affrêteur
pour embarquement ou chargement
avant l'heure prévue pour le départ

Dès l'arrivée sur l'aérodrome de destination, l'aéronef sera mis à la disposition de l'affrêteur pour le débarquement ou le déchargement qui sera effectué par les soins et sous la responsabilité de celui-ci et devra être terminé dans les heures qui suivront.
raison de

Tout retard dans l'embarquement ou le débarquement, le chargement ou le déchargement, engagera la responsabilité de l'affrêteur à raison de par heure de retard.
par heure de retard.

En cas de retard dans le déchargement de marchandises, le Commandant de bord aura toujours la faculté de faire mettre d'office la cargaison sous douane aux frais de l'affrêteur.

V. — L'affrêteur s'interdit de charger:

— des passagers dont la condition mentale ou physique présente un danger pour les personnes ou pour l'appareil;

— des marchandises dangereuses;

— des passagers ou des marchandises ne satisfaisant pas aux lois des pays de départ, de destination ou de transit.

L'inobservation de cette régle engagerait la responsabilité de l'affrêteur pour le préjudice qui pourraît en résulter pour la T. A. I.

VI. — L'affrêteur remettra à la T. A. I. tous documents nécessaires pour l'accomplissement des formalités douanières, fiscales. administratives ou de transit aux aéroports de départ, de destination ou de transit.

Au cas où ces documents seraient présentés par T. A. I. aux Autorités compétentes, la Compagnie n'agirait qu'aux lieu et place de l'affrêteur pour son compte et sous sa responsabilité.

VII. — Dans tous les cas, la responsabilité du Transporteur est celle définie et limitée par la Convention de Varsovie du 1er Octobre 1949, même en l'absence de documents conformes aux exigences des articles 3 et 8 de ladite Convention.

VIII. — Le prix de l'affrêtement est fixé à

Il sera payé le

Il comprend le transport d'aérodrome à aérodrome des passagers, bagages ou marchandises pris à bord de l'appareil (aérodrome de départ) et livrés à bord (aérodrome de destination) à l'exclusion de tous autres frais et notamment de ceux se rapportant directement ou indirectement au chargement.

IX. — En cas d'interruption forcée et définitive du voyage, le prix de l'affrêtement fera l'objet d'une réduction proportionnelle à la distance non parcourue.

Si l'annulation d'un voyage est enregistrée après le départ de l'avion pour l'accomplissement du service pour lequel il a été affrêté, le prix de l'affrêtement sera acquis ou dû au transporteur.

Seront considérés comme évènements de force majeure justifiant l'inéxécution du présent contrat sans préavis ni indemnité:

— la guerre, les soulèvements, émeutes, conflits, grèves, épidémies, l' affrêtement par un service public, la survenance d'un accident grave à un appareil.

X. — Les conditions dans lesquelles devront être assurés les passagers et le frêt transporté, feront l'objet d'une stipulation spéciale dans les conditions particulières ci-après:

Les frais de ces assurances seront à la charge intégrale de l'affrêteur.

XI. — L'affrêteur ne pourra céder le droit au présent contrat sans l'accord écrit de T. A. I.

XII. — Toute contestation sur l'interprétation ou à l'occasion de l'exécution de la présente convention, sera réglée par la voie d'un arbitrage qui se déroulera à

La partie la plus diligente fere connaître par lettre recommandée adressée au domicile élu par l'autre partie au lieu de l'arbitrage, son désir de soumettre la contestation au règlement d'un arbitre.

Dans les quinze jours qui suivront la réception de cette lettre et si les Parties ne se sont pas mises d'accord sur le choix d'un arbitre commun, chacune désignera son propre arbitre.

Le ou les arbitres statueront dans un délai de deux mois à dater de leur nomination.

En cas de désaccord, les arbitres pourront nommer un surarbitre qui devra statuer également dans les deux mois de sa nomination.

Le ou les arbitres ainsi que le surarbitre sont formellement dispensés de suivre les régles de procédure de droit commun. Ils statueront souverainement et sans appel.

Chaque Partie supportera les frais de son arbitre et la moitié des frais de l'arbitre et du surarbitre communs.

*Election de domicile.* — En vue de l'exécution des présentes les Parties élisent domicile:

— la T. A. I. à

— la Société
à

## B. — CONDITIONS PARTICULIERES

a) Un dépôt de garantie de
sera versé à la T. A. I. le au plus tard. Il en sera tenu compte à l'affrêteur lors du règlement définitif de l'affrêtement.

b) en cas de résiliation anticipée du contrat par l'affrêteur, les sommes déposées resteront acquises à la T. A. I.

c) En cas d'inéxécution du présent contrat pour les motifs énoncés au § IX des Conditions Générales, le dépôt de garantie sera restitué à l'affrêteur sous réserve des sommes qui seraient dues à la T. A. I. à raison des services fournis.

Fait à le

en deux exemplaires.

Pour la Société

(Affrêteur)

Pour T. A. I.

(Transporteur)

*Published by*
THE AIRBROKERS ASSOCIATION
LONDON

# AIR VOYAGE CARGO CHARTER PARTY

"BALTAIRVOY 1951"
TRADE MARK

..... 19.....

IT IS THIS DAY MUTUALLY AGREED BETWEEN..... 1
..... of..... 2
..... (hereinafter called " Charterers ") and 3
..... of..... 4
.....Owners of the Aircraft registered as..... 5
of ..... $\frac{\text{c. ft.}}{\text{c. m.}}$ permissible capacity or thereabouts (hereinafter called "Owners" 6
THAT :— 7

1. The above Aircraft shall carry, subject to the Captain's absolute discretion, ..... 8
..... $\frac{\text{lbs.}}{\text{kgs.}}$ of..... 9
from.....to..... 10
via..... on the terms hereinafter set out, freight being 11
payable at the rate of ..... 12
..... 13

2. The Captain or Owners' Agents will give notice of readiness to load to Charterers or their 14
Agents at ..... 15
between ..... hours and ..... hours on the ..... 16
..... in default of which Charterers shall have the option of cancelling this 17
Charter. 18

3. Owners shall have the option of cancelling this Charter if loading has not commenced 19
within ..... hours of notice of readiness having been given. 20

4. Owners will give notice of readiness to discharge at the Airfield of destination to Charterers 21
or their Agents 22

5. Owners undertake :— 23

(i) that the Aircraft possesses a valid Certificate of Airworthiness; 24

(ii) that the Aircraft is airworthy, properly manned, equipped and fuelled for this 25
Charter and will be so maintained throughout; 26

(iii) that the Aircraft is clean, swept and in every way suitable for the cargo; 27

(iv) that after loading and signing Consignment Note(s) the Aircraft will proceed 28
with all reasonable despatch to the Airfield of destination; 29

(v) to be responsible for all necessary flight and Customs clearances, crew visas, formalities and regulations whatsoever and wheresoever, including all costs from Airfield of departure to Airfield of destination in respect of the Aircraft and crew and payment of all dues and charges in connection therewith;

(vi) to keep Charterers or their Agents adequately advised of the expected time of arrival at the Airfield of destination or any alteration thereto;

(vii) to tally the cargo both in and out of the Aircraft;

(viii) to provide any dunnage and separations required.

6. Charterers undertake:—

(i) to load (subject to the Captain's absolute discretion as to stowage) and discharge the cargo at their risk and expence;

(ii) to load and discharge in ..... and ..... running hours respectively: time to count immediately upon receipt of notice of readiness;

(iii) to pay demurrage if incurred at the rate of ..... ..... per running hour or *pro rata* for part of an hour;

(iv) to be responsible for all formalities and regulations whatsoever and wheresoever in respect of the cargo and the payment of all dues and chagers in connection therewith;

(v) to prepare Air Consignment Note(s) (Baltairnote; see specimen on page 4), supply Owners with all documents whatsoever and wheresoever required in respect of the cargo and indemnify Owners for any inaccuracy, omission, or non-completion;

(vi) not to load any cargo of a dangerous or hazardous nature or of which the importation, exportation or carriage is prohibited by any country or state which has to be crossed or entered;

(vii) not to assign or sublet this Charter without express consent in writing of Owners.

7. Freight shall be considered earned on .....
..... and shall be paid to .....
..... at .....
on ..... and shall be non-returnable, Aircraft lost or not lost. Unless freight be payable on a lumpsum basis, dead freight shall be paid on any cargo which Charterers fail to load.

8. Owners shall have an absolute lien on the cargo for all sums due under this Charter and shall be entitled, in default of payment within ..... days of notice in writing

f the sum due, to sell the cargo by auction or otherwise at their discretion and apply the nett roceeds thereof in whole or part satisfaction.

9. The Captain shall have the right to land or deviate at any time or at any place whatsoever or any purpose which in his opinion is necessary for the safety of the Aircraft, crew or cargo or ncidental to the performance of this Charter or for the purpose of attempting to save life or property. f the Captain after having taken all reasonable steps to resume the flight finds that it will be impossible o do so within ..... of any such landing he shall immediately inform harterers or their Agents who shall forthwith give instructions to Owners for the disposal of the argo. When these have been carried out at Charterers' risk and expense the carriage shall be deemed ompleted and the freight earned.

10. Neither Owners nor Charterers shall be responsible for delay in or prevention of the xecution of this Charter arising from any of the following unless the same could reasonably have een foreseen or avoided: riots, strikes, lock-outs, civil commotions, arrests or restraints of Princes, Rulers and Peoples, including interferences of Government Authorities or their officals purporting o act thereunder, King's Enemies, existence, apprehension or imminence of war between any nations, ivil war, sanctions (financial or otherwise), blockade, embargo, Act of God, fire, flood, fog, frost, e, storms, epidemics, quarantine, requisition of aircraft or cargo, breakdown or accident to aircraft not resulting from lack of due diligence) or any other cause whatsoever beyond their control; any ime so lost not to count unless the Aircraft is already on demurrage.

11. Owners are not Common Carriers and do not accept the obligations of a "Common Carrier."

12. In all matters arising out of this Charter, the carriage hereunder shall be subject to the Rules relating to liability established by the Convention for the Unification of Certain Rules relating o International Carriage by Air signed at Warsaw on 12th October, 1929, and all the provisions hereof shall apply to the Owners as Carriers whether the carriage is governed by the said Convention r not.

13. Any disputes arising out of this Charter shall, unless the parties agree forthwith on a single Arbitrator, be referred to two Arbitrators, one to be appointed by each of the parties, with power to uch Arbitrators to appoint an Umpire, and the award of the said Arbitrators or Umpire shall be inaland binding upon both parties hereto. The Arbitrators and Umpire shall be commercial men, t least one of them being a Member of the Baltic Mercantile and Shipping Exchange, and the Arbitra- ion shall be held in London. For the purpose of enforcing any award this submission to Arbitration nay be made a rule of court.

14. BROKERAGE of ..... on the freight, lead freight and demurrage is due by Owners to ..... ..... on payment of reight. In the event of this Charter being cancelled by mutual consent at least one half of the rokerage on the estimated freight shall be paid by Owners to the Brokers as above.

# AIR CONSIGNMENT NOTE

"BALTAIRNOTE"
TRADE MARK

No.: /

Name and Address of Carrier:

Issued by:

As Agents for the Carrier.

| | |
|---|---|
| Name and Address of Consignor: | Airport of Departure: |
| Name and Address of Consignee: | Airport of Destination: |

Agreed Stopping Places (if any):

| Marks and Numbers | No. of Pieces: Dimensions or Volume; and Method of Packing | Nature and Quantity of Goods / Country of Origin (if necessary) | Individual Weights | | Consignor's/ Shippers Declared Value for Customs |
|---|---|---|---|---|---|
| | | | Gross | Nett | |
| | | | | | |
| | | ← TOTALS → | | | |

CONDITIONS OF CARRIAGE: Carriage hereunder is subject to the Rules relating to liability established by **the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12th October 1929.** For other Conditions of Carriage, see Charter Party dated between Charterers and Owners, which Conditions the parties hereto agree shall govern the carriage and Contract of Carriage hereby contemplated.

Documents attached :

Special Conditions and Consignor's Instructions in case of refusal by Consignee :

**Payment of Freight** * By Consignor/Consignee Paid To
Amount (Words and figures).

*Signature of Carrier or Agents*

* Delete as necessary.

**Payment of Other Charges** * By Consignor/Consignee

_____ To On
_____ To On
_____ To On
_____ To On

* Delete as necessary.

Date and Place of completion of consignment note.

*Signature of Consignor or Agents.*

Certified that the abovementioned goods were received for despatch in APPARENT good order and condition except as noted hereon

At On *Signature of Carrier or Agents.*

Certified that the abovementioned goods were duly loaded and shipped in the APPARENT condition as stated above.

At On *Signature of Carrier or Agents*

Certified that the abovementioned goods were duly received in APPARENT good order and condition except as noted hereon

At On

*Signature of Consignee or Agents* *Counter Signature of Carrier or Agents*

**COPY No. 1 FOR THE CARRIER.**

*Published by*
THE AIRBROKERS ASSOCIATION
LONDON

# AIR PASSENGER CHARTER PARTY

"BALTAIRPAC"
TRADE MARK

..... 19.....

IT IS THIS DAY MUTUALLY AGREED BETWEEN .....
of..... (hereinafter called "Charterers") and
..... of .....
..... Owners of the Aircraft registered as .....
having a capacity of ..... seats (hereinafter called "Owners")

THAT :—

1. The above Aircraft shall carry, subject to the Captain's absolute discretion, a maximum of ..... passengers and their baggage but the total weight of both shall not exceed ..... $\frac{\text{lbs.}}{\text{kilos}}$ from .....
to ..... via .....
on the terms hereinafter set out, charter-price being payable at the rate of .....
.....

2. The Aircraft shall depart at ..... hours on .....
and shall in all respects be ready to embark passengers and load baggage at..... hours,
in default of which Charterers shall have the option of cancelling this Charter.

3. Charterers shall present passengers at Airfield of departure in all respects ready to commence embarkation formalities not later than ..... hours before the time of departure, failing which Owners shall have the option of cancelling this Charter or charging demurrage at the rate of ..... per running hour or *pro rata* for part of an hour. After the Aircraft has been ..... hours on demurrage Owners shall have the further option of cancelling this Charter without prejudice to their right to demurrage accrued.

4. Owners undertake :—

(i) that the Aircraft possesses a valid Certificate of Airworthiness ;

(ii) that the Aircraft is airworthy, properly manned, equipped and fuelled for this Charter and will be so maintained throughout ;

(iii) To cover by an effective insurance all risks of liability of Owners and Charterers towards passengers and their dependants in respect of the death, wounding or injury of passengers, and the destruction, loss of or damage to baggage, carried in pursuance of this Charter, up to the limits specified in Article 22 of the Warsaw Convention scheduled to the Carriage by Air Act 1932.

(iv) to issue passenger tickets and baggage checks (BALTICHECK);

(v) to embark passengers and to load baggage, including conveyance from Customs Area to Aircraft at their risk and expense;

(vi) that after embarkation the Aircraft will proceed with all reasonable despatch to the Airfield of destination;

(vii) to disembark passengers and unload baggage, including conveyance from Aircraft to Customs Area at their risk and expense at Airfield of destination;

(viii) to be responsible for victualling throughout and transporting and accommodating passengers at such stops as may occur;

(ix) to be responsible for all necessary flight and Customs clearances, crew visas, formalities and regulations whatsoever and wheresoever, including all costs from Airfield of departure to Airfield of destination in respect of the Aircraft and crew and payment of all dues and charges in connection therewith;

(x) to keep Charterers or their Agents adequately advised of the expected time of arrival at the Airfield of destination or any alteration thereto.

5. Charterers undertake:—

(i) to be responsible for handing passenger tickets and, if necessary, baggage checks to all passengers and for bringing the conditions of passenger tickets and baggage checks to the notice of each passenger and/or obtaining his signature hereto;

(ii) that each passenger is in normal health and capable of undertaking the flight contemplated;

(iii) that passengers' baggage will not contain anything of a dangerous, hazardous or offensive nature or of which the importation, exportation or carriage is prohibited by any country or state which has to be crossed or entered;

(iv) that no livestock, birds, pets or animal of any kind whatsoever will accompany passengers;

(v) to ensure that passengers are in possession of all documents enabling them to comply with all formalities and regulations whatsoever and wheresoever both in respect of themselves and their baggage and to be responsible for the payment of all dues and charges in connection therewith;

(vi) not to assign or sublet this Charter without the express consent in writing of Owners.

6. Charter-price shall be considered earned on ..... and shall be paid to ..... at ..... on ..... and shall be non-returnable, Aircraft lost or not lost, including payment in full for any passengers not presented.

7. The Captain shall have the right to land or deviate at any time or at any place whatsoever or any purpose which in his opinion is necessary for the safety of the Aircraft, crew or passengers or ncidental to the performance of this Charter or for the purpose of attempting to save life or property. f the Captain after having taken all reasonable steps to resume the flight finds that it will be npossible to do so within ..... of any such landing he shall immediately nform Charterers or their Agents, whereafter the carriage shall be deemed completed and the harter-price earned, but Owners shall, however, provide for the accommodation and victualling of he passengers until a reasonable time has elapsed for Charterers to make alternativ arrangements.

8. Neither Owners nor Charterers shall be responsible for delay in or prevention of the xecution of this Charter arising from any of the following unless the same could reasonably have een foreseen or avoided:— riots, strikes, lock-outs, civil commotions, arrests or restraints of Princes, Rulers and Peoples including interferences of Government Authorities or their officials purporting o act thereunder, King's Enemies, existence, apprehension or imminence of war between any nations, ivil war, sanctions (financial or otherwise), blockade, embargo, Act of God, fire, flood, fog, frost, ice, torms, epidemics, quarantine, requisition of Aircraft or cargo, breakdown or accident to Aircraft not resulting from lack of due diligence) or any other cause whatsoever beyond their control; any ime so lost not to count unless the Aircraft is already on demurrage.

9. Owners are not Common Carriers and do not accept the obligations of a "Common Carrier." Passengers and baggage are carried at the sole risk of Charterers who shall indemnify Owners against all claims, demands and liability arising from the carriage except to the extent that iability is covered by the insurance effected under the provisions of Paragraph 4 (iii).

10. The Rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on the 12th October 1929 and all he provisions thereof and all other compulsorily applicable laws, shall apply to the carriage hereunder nsofar as the same is governed thereby; in all other cases Owners accept no liability whatsoever for death, injury or delay of passengers or loss or damage to or delay of their baggage during the flight or any transport to or from or on Airfields of departure or destination or any intermediate Airfield or elsewhere.

11. Any disputes arising out of this Charter shall, unless the parties agree forthwith on a single Arbitrator, be referred to two Arbitrators, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire, and the award of the said Arbitrators or Umpire shall be final and binding upon both parties hereto. The Arbitrators and Umpire shall be commercial men, at least one of them being a Member of the Baltic Mercantile and Shipping Exchange, and the Arbitration shall be held in London. For the purpose of enforcing any award this submission to Arbitration may be made a rule of court.

12. BROKERAGE of ..... on the charter-price including sums due n accordance with Clause 6 for passengers not presented and demurrage is due by Owners to ..... on payment of the same.
In the event of this Charter being cancelled by mutual consent at least one half of the brokerage on the estimated charter-price shall be paid by Owners to the Brokers as above.

WORLD WIDE TRAVEL
AIR CHARTER EXCHANGE

District 7-2985
*Cable Address:* AIR CHARTER

# AIR CHARTER EXCHANGE

1411 K STREET, N. W., WASHINGTON 5, D. C.

Contract #ACE-F-_____

## AIR CHARTER AGREEMENT

THIS AGREEMENT IS MADE AND ENTERED IN_____ THIS_____ DAY OF _____196_____

BY AND BETWEEN_____HEREINAFTER CALLED THE "CHARTERER" AND _____

HEREINAFTER CALLED THE "CARRIER. BOTH PARTIES HEREBY AGREE TO ALL OF THE TERMS, PROVISIONS AND STATEMENTS HEREIN AND ON THE REVERSE SIDE HEREOF:

| Charterer | Name of Group Leader |
|---|---|
| Address | Address |
| City and Country | City and Country |

| Date of Departure | Time of Departure | Origination Airport | Destination Airport | No. of Pass. or Total lbs. Cr't'd | Type Aircraft | Max. Bagg. Allowance Per Pass. | Charter Price |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

| | | DATE OF PAYMENTS | AMOUNT |
|---|---|---|---|
| TOTAL CHARTER PRICE* | $_____ | _____ | $_____ |
| TRANSPORTATION TAX (If Applicable) | _____ | _____ | _____ |
| OTHER CHARGES— | _____ | _____ | _____ |
| | TOTAL $_____ | | TOTAL $_____ |

NATURE OF TRAFFIC TO BE CARRIED: _____

CANCELLATION: _____

SPECIAL CONDITIONS: _____

HAVING FIRST READ ALL OF THE TERMS, PROVISIONS AND STATEMENTS HEREON AND ON THE REVERSE SIDE HEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT ON THE DAY AND THE YEAR FIRST WRITTEN ABOVE.

WINNERS OF:


". . . In recognition of the Contribution of its members to Safe Air Transportation . . ."
NATIONAL SAFETY COUNCIL

| | (Exchange Aircarrier) | (Charterer) |
|---|---|---|
| FOR: | _____ | _____ |
| BY: | _____ | BY: _____ |
| TITLE: | _____ | TITLE: _____ |
| TRAVEL AGENT: (If Applicable) | _____ | BY: _____ |
| ADDRESS | | |

# CONTRACT TERMS AND CONDITIONS

1. Tigers will perform charter flights for Charterer under conditions and dates set forth on the reverse side of this agreement. The accommodations to be made available pursuant to this agreement are airport-to-airport only and Tigers assumes no responsibility for ground transportation, accommodations or service prior to scheduled departure by air or subsequent to arrival at ultimate destination of any flight.

2. All payments made by the Charterer as aforesaid shall constitute restricted deposits which shall be deposited by Tigers in a special depository account. In the case of a one-way trip charter, upon departure of the flight the entire deposit shall be withdrawn from such account as an unrestricted payment to Tigers. In the case of a round trip charter, upon the departure of the initiating flight of the round trip one-half of the charter price shall be withdrawn from such account as an unrestricted payment to Tigers; and upon departure of the return flight the remaining one-half of the charter price shall be withdrawn as an unrestricted payment to Tigers. In the event the charter flight(s) is (are) not performed pursuant hereto deposits made by the Charterer shall be refunded to Charterer less such sums as may be due hereunder as a cancellation fee pursuant to terms set forth on the reverse side of this agreement, which sum shall be withdrawn from such account and paid over to Tigers as an unrestricted payment for such purpose.

3. It is understood that this agreement shall at all times be construed and applied as an agreement for private or contract carriage of persons and property, and not as an agreement for common carriage or carriage for hire. Neither party shall do any act, or make any representation, or assert any right inconsistent with this paragraph.

4. Charterer agrees, represents and warrants that this agreement is made only on his own behalf or on behalf of a group whose principal aims, purposes and objectives are other than travel, which group had sufficient affinity existing prior to the application for charter transportation to set it apart and distinguish it from the general public and constitutes a "group" within the definition of Part 207 of the Economic Regulations of the Civil Aeronautics Board. Charterer further agrees that he will not permit the aircraft to be used by any person other than himself and members of such group.

5. Charterer agrees on behalf of himself and anyone deriving rights from him, that they will not sell directly or indirectly any chartered space, except for sale of space within a definitely defined and recognizable group as set forth in paragraph 4 supra.

6. Charterer agrees, represents and warrants that he has not already held out and will not hold out by advertisement, course of conduct or otherwise, individual passages to the public generally for transportation on the charter trip, it being understood that a reference in any public advertising or publicity to the amount being charged per person shall be deemed to be such a holding out.

7. The acceptance for carriage of any passenger or baggage shall be subject to the discretion of the Captain of the aircraft and Tigers shall have the right to examine all baggage offered for carriage. Stowage of baggage shall be subject to the Captain's discretion and each item or unit of baggage shall conform to Tigers' requirements as to weight, dimensions, and fitness for transportation, and if, in the opinion of the Captain of the aircraft, it is unsuitable for carriage it may be rejected and such a decision will be final. Any excess baggage over and above the maximum permissible as per terms set forth on the reverse side of this agreement will not be accepted by Tigers and Tigers has no responsibility for such excess baggage or baggage exceeding the dimensions established by the Tigers.

8. Charterer shall appoint a flight leader for each of his group(s) with whom Tigers may maintain constant contact during the 72 hours before scheduled departure. It shall be the responsibility of said flight leader to keep all members of the group informed concerning the date, time and place of departure or of any delays thereof due to weather conditions, mechanical difficulties or otherwise, both in this country and in Europe, so that there will be a minimum of delay in such departures. It shall further be the responsibility of said flight leader to see to it that all members of the group are on hand at the time and place of departure. If one or more members of the group fail to appear at the time and place scheduled for departure, Tigers will depart as scheduled and shall in no way be responsible for or to such individuals but shall be deemed to have completed its contractual obligation to Charterer. It shall be the responsibility of the Charterer to furnish Tigers with the name and address of each such flight leader. Any notice by letter or telegram sent by Tigers to such flight leader at such address shall be considered to have been received by such flight leader.

9. Tigers may cancel this agreement where such cancellation is necessitated by governmental seizure or diversion of Tigers' aircraft or due to inability to replace lost, damaged or destroyed aircraft previously committed to its charter operations, and in any such event the deposits therefor made by Charterer shall be refunded to Charterer from the special depository account; provided, however, that Tigers shall not be subjected to any penalty or damages for such cancellation.

10. Tigers will furnish airport ground services and provide passenger comforts equivalent to those generally provided in "coach" service of United States domestic scheduled air carriers, including meals en route and meals and sleeping accommodations at intermediate airports if made necessary by operational delay en route. If delays occur at the embarkation point, Tigers will assume no responsibility if the flight leader has been notified by letter or telegram at least twelve hours prior to the scheduled departure time of such delay and advised of the new scheduled departure time. If such notice is not given by Tigers to the flight leaer, Tigers' repsonsibility will be limited to reimbursement for the actual out-of-pocket cost to passengers for food, lodging and ground transportation; or in the alternative Tigers, at its option, may provide suitable meals, housing and ground transportation.

11. With respect to each flight provided for by this agreement, Tigers shall secure and maintain at its own expense passenger liability insurance of at least $50,000 per passenger and $2,500,000 per accident. The legal liability of Tigers for damage to baggage and property of passengers shall be limited to $100 per passenger.

12. Regardless of routes and destinations flown by aircraft under this agreement, no construction shall be drawn to deprive these air operations of their international character. Notwithstanding any other provisions contained in this agreement the transportation hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw October 12, 1929. (Warsaw Convention).

13. Charterer agrees to be exclusively responsible for assuring compliance on the part of the members of his group as aforesaid with all customs, immigration and quarantine laws and regulations, and with all passport, visa, vaccination certificates and other documentary requirements applicable to such members, provided that Charterer shall pay or indemnify Tigers for any fine, forfeiture or other losses or expenses incurred on account of any failure of compliance with any such regulations or requirements by any of the members as aforesaid.

14. Tigers shall have no responsibility or liability for any loss, damage or delay resulting from an Act of God; act of public enemy; arrest or restraint of princes, rulers of people; seizure under legal process, quarantine restrictions; riots or civil commotions, strikes, or labor stoppage (whether resulting from disputes between Tigers and its employees or between other parties, and whether or not the fault of Tigers); war, or hazards or dangers incident to a state of war; or any other acts, matters or things, whether or not of a similar nature, beyond the control of Tigers. Tigers shall have no responsibility or liability for any loss, damage or delay resulting from the acts of employees of, or facilities at any airport where the aircraft may take off or land, if Tigers has not control over, or responsibility for, such employees or facilities.

15. (a) All obligations incurred by Tigers in this agreement are subject to compliance with applicable public laws and regulations, and are further subject to such affirmative acts, findings, clearances and approvals as may be required on the part of any government or governmental agency for the lawful discharge thereof, and the transportation herein described shall be performed according to and subject to any and all rules and regulations of the Civil Aeronautics Board of the United States. Tigers shall not be held answerable for damages or otherwise subjected to penalties or forfeitures under this agreement for delay or omission attributable to any law, regulation, government or governmental agency as aforesaid, nor in the event any flight cannot be flown as a result of any official action of the Civil Aeronautics Board, including the denial of the necessary exemption to Tigers to perform under this agreement.

(b) The performance of the charter flights as set forth in this agreement is predicated upon receipt by Tigers of an exemption from the Civil Aeronautics Board of the United States. Charterer agrees to furnish to Tigers the information required by applicable policy, regulations and orders of the Civil Aeronautics Board. In the event Tigers fail to secure such exemption from the Civil Aeronautics Board for any reason whatsoever at least thirty (30) days before the departure of the initial flight Tigers may cancel this agreement without any liability for penalties or damages.

(c) The charter flights contracted for in this agreement are contracted for subject to the procurement by Tigers of the necessary landing, uplift and/or offlift rights in the foreign countries that the performance of these charter flights may require. In the event Tigers is unable to secure the necessary landing, uplift and/or offlift rights Tigers may cancel any or all flights contracted for in this agreement without liability for penalties or damages.

16. Tigers reserves the right to utilize any unused portion of the Charterer's space and/or payload of each flight for its own use.

17. This agreement shall be governed by and interpreted according to the laws of the State of California. The illegality or non-validity of any paragraph, clause or provision contained or referred to in this agreement shall not affect or invalidate any other paragraph or provision hereof.

18. Tigers reserves the right to provide any or all of the services contracted for herein by means of a sub-contract with any other person or company.

No. .....

# *CONTRAT TYPE PROVISOIRE PASSAGERS & BAGAGES*

Entre les soussignés:

'une part, M ..... agissant pour le compte de ..... et ci-dessous ésigné "l'affrèteur".

'autre part, la Compagnie Nationale AIR FRANCE ci-dessous dénommée AIR FRANCE dont le siège ɔcial est à PARIS 8ème, 2, rue Marbeuf, représentée par M .....

Il a été convenu ce qui suit:

## *ARTICLE I — OBJET*

°) AIR FRANCE met à la disposition de l'affrèteur un appareil de type ..... pour effectuer un transport de passagers de ..... à .....

°) Le transport se fera suivant l'itinéraire et l'horaire prévus dans l'annexe ci-jointe. Les heures portées sur cette dernière sont des indications de temps moyens et ne sont pas garanties.

°) Le nombre maximum de passagers admis sera de ..... sous réserve de l'application des dispositions de l'article III 4°)b.

°) L'avion sera aménagé en version .....

## *ARTICLE II — PAIMENT ET PRIX*

°) Le prix total d'affrètement est fixé à ..... payable suivant les modalités exposées dans l'Annexe ci-jointe.

°) Ce prix comprend, sous réserve des dispositions particulières contenues dans ladite Annexe:

a) l'ensemble des frais d'exploitation encourus à l'occasion du transport défini dans ladite Annexe, que ceux-ci s'appliquent à l'appareil proprement dit ou à son équipage, et notamment les dépenses de carburant et lubrifiant, les traitements et indemnités du personnel navigant, les frais d'entretien des appareils, ainsi que les taxes d'aérodrome,

b) les services d'escales ainsi que les opérations de trafic,

c) la mise en place, s'il y a lieu, du personnel navigant commercial et du personnel chargé du service d'escale. Les détails d'une telle mise en place sont prévus dans l'Annexe ci-jointe.

## *ARTICLE III — OBLIGATIONS DES PARTIES*

°) AIR FRANCE fournira l'avion à l'affrèteur, en bon ordre de marche, muni des documents de bord officiels, et avec le personnel navigant nécessaire à sa conduite et à son exploitation commerciale.

!°) Son personnel sera titulaire des brevets et licences exigés pour le transport public et en règle avec les prescriptions sanitaires et de police.

3°) AIR FRANCE se chargera d'effectuer toutes les formalités administratives relatives à l'avion et à son équipage, et qu'exige le dérculement normal du voyage.

4°) AIR FRANCE assurera seule la direction technique de l'aéronef affrèté dont la conduite sera toujours exclusivement assurée par les soins de son personnel. En application de ce principe, le Commandant de Bord pourra notamment:

a) différer ou annuler le départ de l'appareil en considération des conditions atmosphériques ou techniques,

b) diminuer la charge utile autorisée en cas de conditions météorologiques défavorables,

c) si la sécurité de l'avion l'exige, soit faire en cours de route les arrêts, escales ou réparations nescessaires, soit modifier l'itinéraire ou interrompre le voyage,

5°) Il est expressément stipulé que seuls prendront place à bord de l'appareil, les personnes faisant partie de ..... (1) ou leurs conjoints ou enfants à charge.

L'affréteur s'interdit en outre, de céder des places à bord dudit appareil à toute autre personne, que ce soit à titre onéreux ou gratuit (2).

6°) L'affrèteur déclare expressément qu'il n'a fait, auprès du public, aucune publicité quelle soit, ayant trait au voyage objet du présent contrat, notamment par la voie de l'indication sur un document publicitaire ou autre, du tarif perçu par personne transportée, et qu'il s'engage à n'en pas faire.

7°) Dans tous les cas AIR FRANCE se réserve le droit d'utiliser à son profit les places laissées vacantes dans l'appareil au moment du départ.

## *ARTICLE IV*

1°) Les documents de trafic concernant les passagers et les bagages seront établis sous la responsabilité d'AIR FRANCE conformément à ses propres règles.

2°) L'affrèteur fournira tous les renseignements nécessaires à leur établissement en temps utile.

## *ARTICLE V*

Sauf dispositions contraires prévues en Annexe, les Opérations d'embarquement des passagers seront effectuées, en principe par les soins et sous la responsabilité d'AIR FRANCE et en conformité avec les indications portées aux articles I et III, relativement à la charge marchande.

## *ARTICLE VI — RESPONSABILITE*

1°) Indépendamment des dispositions du présent contrat, le transport effectué en exécution de ce dernier sera régi par les Conditions Générales de Transport Passagers et Bagages de la Compagnie AIR FRANCE, dont un extrait figure au verso des titres de transport et qui sont tenus à la disposition du public dans ses bureaux et agences.

---

(1) Nom du groupement.

(2) Les dispositions du présent § ne s'appliquent pas à un affrètement conclu avec un autre transporteur.

2°) Plus spécialement, il est convenu que la Compagnie AIR FRANCE sera dégagée des obligations contractées par elle, et que sa responsabilité ne pourra être mise en cause si, par suite d'un évènement de force majeure, tel que conditions météorologiques interdisant l'envol ou obligeant à dérouter l'avion, grève, actes de gouvernement et autres faits semblables échappant à son contrôle, ainsi que par suite de pannes mécaniques ou avaries, elle était empêchée de procéder au transport qu'elle s'est engagée à effectuer, ou si celui-ci devait être différé ou subir un retard en cours de route, ou encore si le lieu de destination prévu devait être modifié.

Dans un pareil cas AIR FRANCE ne pourra être tenue à autre chose qu'au remboursement de la partie du prix de l'affrètement correspondant à la partie du parcours non effectué. AIR FRANCE toutefois, fera tout son possible pour acheminer à leurs frais passagers et bagages jusqu'à leur lieu de destination finale.

3°) En cas de divergence entre les dispositions des conditons générales de Transport Passagers et Bagages et celles contenues dans le présent contrat, ce sont ces dernières qui prévaudront.

## *ARTICLE VII — RESILIATION*

1°) Au cas où le présent contrat viendrait à être résilié par l'affrèteur avant l'exécution du voyage, l'affrèteur sera tenu de verser à AIR FRANCE:

a) Si la résiliation intervient moins de 15 jours mais plus de deux jours avant la date prévue pour le départ, une somme égale à 5% du prix de l'affrètement.

b) Si la résiliation intervient dans les deux jours précèdant la date prévue pour le départ, une somme égale à 10% du prix de l'affrètement et majorée des frais qui auraient déjà pu être engagés par AIR FRANCE.

2°) Le non-respect par l'affrèteur des dispositions contenues dans les paragraphes 5 et 6 de l'Article III, entrainera la résiliation de plein droit du présent contrat sans préavis ni mise en demeure et las sommes déjà perçues sur le prix de l'affrètement resteront acquises au transporteur.

## *ARTICLE VIII — REGLEMENT DES DIFFERENDS*

Les différends qui pourraient naitre de l'interprétation ou de l'exécution de ce contrat seront portés devant .....

Fait à ..... le .....

en deux exemplaires originaux.

# BRITISH EUROPEAN AIRWAYS CORPORATION

## SPECIAL FLIGHT ORDER AGREEMENT

This Contract is made the day of 195

between British European Airways Corporation whose principal Office is Keyline House, Ruislip, Middlesex (hereinafter called "B.E.A".) of the first part and

(hereinafter called "the Charterer") of the second part.

Whereas the Charterer has requested B.E.A. to provide aircraft for special charter as hereinafter mentioned and whereas B.E.A. has agreed with the Charterer for such charter upon the terms herein set forth.

NOW IT IS HEREBY AGREED by and between the parties as follows: —

1. In consideration of the price as hereinafter mentioned paid to B.E.A. by the Charterer B E.A. shall provide aircraft as under for the carriage of:

2. The requirements of this Charter shall be : —
   (i) Type and number of aircraft:
   (ii) Characteristics of each aircraft available to the Charterer:
   Net Capacity:
   Seats fitted:
   Loading Limitations:
   (iii) Date of Commencement:
   (iv) Timetable and approximate itinerary: (See schedule attached).
   (v) Additional Services: B.E.A. will provide without additional charge:
   (Delete Services not required) (a) Surface transport between airports and B.E.A. Town Terminals.
   (b) Appropriate meals or light refreshments in flight.
   (c)

3. For the aircraft and services provided by B.E.A. as above the Charterer will pay the undermentioned charter price and the conditions of payment shall be as follows:

4. Demurrage shall be payable in accordance with the conditions set out on the reverse hereof at the rate of per

5. THIS Agreement is issued subject to the Conditions of Carriage printed on the reverse hereof.

AS WITNESS the hands of the duly authorised agents of the parties the day and the year first above written.

Signed by:..... 6d. STAMP .....

For and on behalf of
British European Airways Corporation

the duly authorised agent of:

The Original to be signed by Charterer over 6d. stamp and returned to B.E.A.

T. 176. (1st)

OFFICE OF ISSUE:

## CONDITIONS OF CARRIAGE

### Applicable to Special Charter Contracts

1. B.E.A. is authorised to sub-contract the performance of the whole or part of any of the obligations it has undertaken under this Contract.

2. Any reference to B.E.A. shall include any sub-contractor to whom the obligations under this contract are delegated.

3. B.E.A.'s General Conditions of Carriage of Passengers, Baggage and Goods shall be deemed to be incorporated in this contract in so far as the same are applicable hereto and are not inconsistent therewith.

4. Where the expressions "Passenger," "Consignor" and "Consignee" are used in the said General Conditions they shall be taken to refer to the Charterer and to all other persons carried in such aircraft and to such other persons as have any right title or interest in the goods carried in such aircraft as the case may require.

5. Charterers and others utilising aircraft engaged under Special Charter contracts for the carriage of themselves, or any baggage or goods will complete or ensure the completion of all Tickets, Baggage Checks, Consignment Notes and all other documents and formalities necessary for complying (a) with the provisions of the said General Conditions of Carriage which are based upon the Convention of Warsaw of 12th October, 1929, and (b) with all laws and regulations prevailing in the countries traversed by the said aircraft.

6. If there shall be any delay caused by the Charterer, or anyone acting on his behalf for whom he is responsible, in the commencement of the Charter, the terms of which are set out on the front hereof, demurrage shall run from the stipulated time of commencement until the actual commencement of the carriage.

7. The Charterer may cancel any charter flight contemplated in this contract:—
   (i) If cancellation is made 14 days or more before the time scheduled for the commencement of the flight without liability.
   (ii) If cancellation is made more than 48 hours and less than 14 days before the time scheduled for the commencement of the flight on paying to B.E.A. 10 per cent. of the charter price for that flight.
   (iii) If cancellation is made less than 48 hours before the time scheduled for the commencement of the flight and on paying to B.E.A. 50 per cent of the charter price for that flight.

8. (a) The aircraft shall be used exclusively by the Charterer (referred to on the front hereof) and/or by persons duly authorised by him, and shall not at any time be used for flying, or carriage, for hire or reward.
   (b) The Charterer shall not sell any seat or cargo space on the aircraft at less than the normal B.E.A. fare or rate for the journey in question. *(Delete 8 (a) or 8 (b) as required.)*

9. The aircraft shall be used only in accordance with the laws and regulations of the States overflown and in accordance with the Air Navigation Orders and Directions. Except in cases of "force majeure" it shall be required to land only on airports at stopping places which are duly licensed or otherwise officially approved for the purpose.

10. This contract, wherever made or performed, shall be construed according to the law of England and any action must be brought in English courts.

11. B.E.A. shall be exempt from liability due to any failure to perform its obligations under this contract arising from:—
   (a) The failure of any sub-contractor to perform any of its obligations on which B.E.A. relies for the fulfilment of this contract.
   (b) Labour disputes or strikes whether B.E.A.'s employees or of others on whom B.E.A. is depending to fulfil this contract.
   (c) Force majeure or any other cause beyond the control of B.E.A. including accidents to or failure of the aircraft or any part thereof or any machinery or apparatus used in connection therewith.

   Provided always that in the event of any such failure B.E.A. will use its best endeavours to fulfil its obligations hereunder including the provision of alternative means of transport.

12. Any difference or dispute arising between the parties hereto relating to this Contract or any matter or thing herein contained or relating thereto shall be referred to the decision of a single Arbitrator to be agreed upon by the parties hereto or in default of agreement appointed by the Law Society. The decision of such Arbitrator shall be final and binding on the parties hereto.

T.390/1

## THE SCHEDULE

1. Aircraft — Seats Fitted — Net Capacity in Kilos

2. Timetable

| Outward | | Return | |
|---|---|---|---|
| Arrive | Depart | Arrive | Depart |

3. Duration of Agreement

4. Traffic Handling will be undertaken as follows: —

Signed by ..... 6d. Stamp .....

For and on behalf of
BRITISH EUROPEAN AIRWAYS CORPORATION

the duly authorised agent of: —

To be signed by the Company over 6d. stamp and returned to B.E.A.

OFFICE OF ISSUE:

*ANNEXE AU CONTRAT TYPE PROVISOIRE PASSAGERS ET BAGAGES*

1°) Départ de ..... vers .....

Itinéraire et escales .....

Départ le ..... à ..... heures

Arrivée le ..... à ..... heures

2°) a) Les passagers seront prêts pour l'embarquement ..... heures avant celle du départ.

b) tout retard causé par l'affrèteur ou par les passagers dans l'embarquement ou le débarquement des passagers, engagera la responsabilité de ce dernier à raison de ..... par heure de retard, sans préjudice des sommes dépensées par AIR FRANCE en raison de ce retard, et dont justification sera dûment apportée par AIR FRANCE.

3°) Le prix d'affrètement sera payé par l'affrèteur, ainsi qu'il suit:

4°) Conditions particulières.

LEASE AGREEMENT made this ..... day of .....,
between .....
having its principal office at .....
hereinafter designated "Lessor", and .....,
having its principal office at .....,
hereinafter designated "Lessee",

WITNESSETH: In consideration of the mutual covenants of the parties hereto, hereinafter expressed, it is agreed as follows:

FIRST: The Lessor hereby leases to the Lessee for the exclusive use
of the Lessee ..... Aircraft bearing registration
number .....(hereinafter designated as "Aircraft"), for a
term to commence on ....., and terminate on
..... Delivery of Aircraft will be made by
Lessor to Lessee at ..... The Lessee will
deliver the Aircraft upon the termination of the term of the lease to Lessor
at .....

SECOND: Lessee agrees to pay to Lessor for the exclusive use of the aircraft leased hereunder during the term aforesaid, rent as follows:

$ .....
.....
.....
.....
.....
.....
.....
.....
.....

THIRD: It is understood that this agreement creates a lease of Aircraft only, and that the Lessee acquires no right, title or other interest in or to the above described property other than that of Lessee hereunder; that the Lessor remains the owner of the said described property subject only to such right of use by the Lessee as is herein provided.

FOURTH: The lessee represents: that the Lessee has or will obtain all operating and other authority required by law to engage in any operation for which Lessee will use Aircraft; that Lessee will use Aircraft only in conformity with such lawful authority; that Lessee shall be responsible for any fines, penalties or forfeitures occasioned by any violation thereof; and if such fines or penalties are imposed upon and paid by Lessor, Lessee shall reimburse Lessor therefor, and the same shall become a part of the rental due hereunder upon demand by Lessor; that Aircraft shall not be used or taken into any of the so-called "Iron Curtain" countries, including USSR Albania, Lithuania, Hungary, Czechoslovakia, Bulgaria. Poland, Viet Nam, East Germany (exclusive of the Western Sector of Berlin and the approach corridors thereto), Rumania, Latvia, Estonia, China and North Korea and that Lessee shall not operate Aircraft to or in any area which is in

# The Flying Tiger Line Inc.

No.

LOCKHEED AIR TERMINAL • BURBANK, CALIFORNIA

## CHARTER TRANSPORTATION AGREEMENT

THIS AGREEMENT IS MADE AND ENTERED IN _____ THIS _____ DAY OF _____ 195____

BY AND BETWEEN _____ HEREINAFTER CALLED THE "CHARTERER" AND THE FLYING TIGER LINE INC. A DELAWARE CORPORATION, HEREINAFTER CALLED "TIGERS". BOTH PARTIES HEREBY AGREE TO ALL OF THE TERMS, PROVISIONS AND STATEMENTS HEREIN AND ON THE REVERSE SIDE HEREOF:

_____ Charterer

_____ Address

_____ City and country

_____ Name of group leader

_____ Address

_____ City and country

| Date of departure | Time of departure | Orignation airport | Destination airport | Traffic stops | No. of pass. or total lbs. cargo | Type of aircraft | Max. bag. allowance per pass. | Charter price* |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

| | | DATE OF PAYMENTS | AMOUNT |
|---|---|---|---|
| TOTAL CHARTER PRICE* | $_____ | _____ | $_____ |
| TRANSPORTATION TAX (IF APPLICABLE) | _____ | _____ | _____ |
| OTHER CHARGES— | _____ | _____ | _____ |
| | TOTAL $_____ | | TOTAL $_____ |

NATURE OF TRAFFIC TO BE CARRIED: _____

CANCELLATION: _____

SPECIAL CONDITIONS: _____

HAVING FIRST READ ALL OF THE TERMS, PROVISIONS AND STATEMENTS HEREON AND ON THE REVERSE SIDE HEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT ON THE DAY AND THE YEAR FIRST WRITTEN ABOVE.

THE FLYING TIGER LINE INC.

_____ (Charterer)

BY _____

BY _____

# INCORPORATED CONTRACT TERMS AND CONDITIONS

1. Where the word "Exchange" is used herein, it shall mean the carrier which will perform the specific transportation contracted for and, where applicable, the member carriers of the Exchange.

2. The captain of the aircraft is in command and will have complete authority and discretion concerning all matters with respect to the preparation of the aircraft for flight, and flight of the aircraft. The charterer shall accept all such decisions of the captain.

3. The aircraft shall be provided, manned and equipped for charter flight, in an airworthy condition insofar as can be ascertained and accomplished by the exercise of due diligence and there shall be in effect a current certificate of airworthiness for the aircraft issued by the Federal Aviation Agency.

4. The aircraft shall be made available to the charterer at the times and places shown on the face hereof.

5. The Exchange shall be entitled to substitute aircraft and/or carriers in lieu of those specified in the charter contract and shall give appropriate and timely notice of substitution to the charterer, such notice to be given as soon after the Exchange learns of the necessity for substitution as is reasonably practicable. If the charterer does not agree to the substitution of the carrier or aircraft or if such substitution is not possible refund shall be made to the charterer for any portion of the contract not performed.

6. The charter price does not include ground transportation, accommodations, or service, but does include all expenses of operating the aircraft, the costs of the service for passengers in flight, and hotel accommodations and meals at intermediate airports which may be necessitated by the operation of the aircraft, and not herein contracted for.

7. The performance of the charter flight as set forth in this agreement is subject to receipt of an approval or exemption from the Civil Aeronautics Board and the necessary landing, overflight, in transit, uplift and/or offlift rights required. The Exchange may cancel this agreement without any liability for penalties or damages if any of the aforementioned authorizations or rights are not granted.

8. Charterer agrees, represents, and warrants that this agreement is made only on his behalf or on behalf of a "group" as defined in the regulations and policies of the Civil Aeronautics Board. The charterer agrees that he will not permit the aircraft to be used by any person other than himself and members of such group and further agrees to abide by the currently effective and applicable rules and regulations as established by the Civil Aeronautics Board concerning charter flights, and to furnish the Exchange with the information required by these rules and regulations. Charterer acknowledges receipt of a copy of Part 295 of the Economic Regulations of the Civil Aeronautics Board.

9. The Exchange may cancel this agreement without penalty or damage in the event the carrier's aircraft are requested or requisitioned for use by the Government, and, in such event, deposits received shall be refunded to the charterer.

10. This agreement may be terminated and cancelled forthwith by the Exchange by notice to the charterer if the charterer commits any breach of this agreement, or if the charterer goes bankrupt (or if a company goes into liquidation) or commits an act of bankruptcy or enters into an arrangement for the benefit of creditors.

11. In the event charterer desires to cancel flight prior to the date of initial departure, the Exchange shall be entitled to retain for its own use and account such monies as have been paid to it unless it is able to effect a resale of the flight at the same revenue rate. If a resale of the flight at the same revenue rate is made, the Exchange will retain $500.00 and will refund to the charterer such sums in excess of $500.00 that have been received by the Exchange as deposit or advance payment on this charter. If resale of the flight at a lesser rate is effected, the Exchange will retain $500.00 plus the difference between the price of the cancelled flight and the resold flight.

12. The Exchange shall have no responsibility or liability for any loss, damage, delay or prevention of the completion of this charter resulting from force majeure, an act of God, seizure under legal process, sanctions, quarantine restrictions, fire, fog, flood, unusually severe weather, inadequacy or field conditions of airports, riots or civil commotions, strikes, or labor stoppage (whether resulting from disputes between the Exchange and its employees or between other parties) war, or hazards or dangers incident to a state of war, or any other acts, matters or things, whether or not of a similar nature, beyond the control of the Exchange. If any flight contemplated herein is not performed or completed, the Exchange shall be under no liability or obligation to the charterer other than the refund of the proportionate part of the price applicable to the distance remaining unflown provided always that the Exchange in such event, will use its best efforts to find alternate or equivalent transportation for the remainder of the journey, a reasonable time being allowed by the charterer for the Exchange to complete the journey with the original aircraft.

13. The rules relating to liability established by the Convention for Unification of Certain Rules Relating to International Carriage by Air, concluded at Warsaw, Poland, on October 12, 1929, and all the provisions thereof and all other applicable laws, shall apply to the carriage hereof insofar as the same is governed thereby. Except as otherwise provided in applicable laws, the Exchange accepts no liability whatsoever for death, injury, or delay of passengers or loss or damage to or delay of their baggage or for loss or damage or delay in the delivery of the cargo.

14. Personal baggage in excess of the maximum allowable as stated in this contract will not be accepted and the Exchange has no responsibility for such excess baggage.

15. Charterer is not entitled to assign this agreement to any other party without the consent of the Exchange or to subcontract any part of the services contemplated hereunder.

16. This agreement is entered into by the charterer both on his own behalf and as agent for all persons and the owners of all goods carried in the aircraft.

17. The Exchange shall not be responsible or liable for the transportation of passengers who fail to report at the check-in point specified by the Exchange at the airport one hour prior to the scheduled departure time of the flight. If one or more members of the group fail to appear one hour prior to the time and at the place scheduled, the flight may depart as scheduled and the Exchange shall in no way be responsible for or to such individuals but shall be deemed to have completed its contractual obligation to the charterer.

18. In the event this charter covers carriage of cargo, the aircraft, ready to receive cargo, will be positioned two hours in advance of scheduled departure time and there will be an allowance of two hours after actual arrival or scheduled arrival time, whichever is later, for off-loading. Any additional off-loading or on-loading time shall be assessed to the charterer at demurrage rates specified elsewhere in this agreement, or if not elsewhere specified then at the carrier's tariff rates then in effect. All risks, costs, expenses, and liabilities for damage to the cargo or aircraft or airport properties due to the actions, negligent or otherwise, of the loading or off-loading personnel shall be the sole responsibility of the charterer. Any dunnage, special equipment or separations required shall be furnished, installed, and removed at the expense of the charterer.

19. Charterer will comply, and cause all passengers and owners of baggage and cargo carried to observe and comply with all Customs, Police, Public Health and other regulations which are applicable in states and countries in which landings are made.

20. In any situation whatsoever and wheresoever occurring, whether existing or anticipated before commencement of or during said flight, which in the judgment of the Exchange or the captain is likely to give rise to capture, seizure, detention, damages, delay, disadvantages, or loss of the aircraft, passengers, or cargo, the aircraft may return or proceed to or stop at any place the captain may consider safe or advisable under the circumstances without any liability whatsoever.

21. The Exchange and the captain shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, places of call, stoppages, discharge, disembarkation, delivery or otherwise, howsoever given by the Government of any nation or department or agency thereof or any person acting or purporting to act with the authority of such government, department or agency.

HAG/LEG/164
5th July 1951

Charter Nr

# AIRCRAFT CHARTER AGREEMENT

## It is this day mutually agreed between:

Name:

Address:

Hereinafter referred to as "Charterer"

and

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. (K.L.M. Royal Dutch Airlines), having its principal place of business at 260 Badhuisweg The Hague, the Netherlands, hereinafter referred to as "K.L.M".

IN CONSIDERATION of the mutual covenants hereinafter set forth,

that

ARTICLE 1.

**General.**

K.L.M. will charter to Charterer and Charterer will take on charter from K.L.M. the aircraft described hereunder (hereinafter referred to as "the Aircraft") for the journey, and at the price and on the terms and conditions specified in this Agreement.

a) Aircraft:

b) Chartered Space:

Maximum loadcapacity:

c) Maximum seating accommodation under this Agreement: passengers.

d) Nature of cargo:

e) Journey from: to:

f) Charter Period from: to: (included)

g) Flight Schedule:

h) Passengers baggage and/or cargo must be ready for embarking and loading hours before scheduled time of departure.

i) Charter Price:
Currency:
payable before: 19 at:
method of payment:

j) Demurrage rate per hour(s) or part thereof:
Demurrage to be calculated from:
(date and hour)
Rate per Extra Flight Hour or part thereof:

k) Cancellation Fee: % of Charter Price, if cancellation effected on or before
% of Charter Price, if cancellation effected after that date and before the beginning of the journey.

ARTICLE 2.

**Aircraft and crew.**

1. K.L.M. will provide to Charterer the Aircraft completely manned and equipped for the performance of the journey described in Article 1. It is understood that dunnage has to be provided by Charterer subject to the approval of K.L.M.
2. Unless otherwise agreed K.L.M. may substitute one or more other aircraft fit for equivalent transportation, however, K.L.M shall have no obligation to do so even if the journey cannot be performed or completed with the original aircraft, unless this would be due to negligence of K.L.M.

ARTICLE 3.

**Changes in the flight schedule.**

Changes and/or extensions of the agreed Journey, Charter period or Flight Schedule on the request of Charterer will be subject to the approval of K.L.M. and may involve alterations in the charter price.

ARTICLE 4.

**Authorizations.**

Authorizations (permits) from governmental or other authorities necessary for the performance of the charter flights will be applied for by K.L.M. but the risk for the timely granting of such authorizations and for their continuing effectiveness will be borne by Charterer, subject to the provisions of Article 8.

ARTICLE 5.

**Costs.**

1. The Charter Price specified in Article 1 shall include the cost for fuel, oil and maintenance of the Aircraft, landing fees, parking fees, hangar fees, ground service and dispatch costs for the Aircraft, salaries, flight pay and per diem of the crew, and the costs of the service for passengers during the flights and during their stay on the ground at the intermediate stations, on the basis of the service usually extended by K.L.M. to the passengers in flight and at these stations; provided that where an intermediate stop would exceed 72 hours only, the service costs for the first 72 hours only shall be included in the charterprice unless the delary is due to negligence of K.L.M.
2. All other costs, including but not limited to costs of groundtransportation at the places of departure and destination, costs for visas, customs inspection fees, customs duties, and other taxes payable in connection with the passengers, baggage and cargo transported, and all special costs incurred by K.L.M. with respect to passengers and goods in case of emergency landings, are not included in the Charter Price.

ARTICLE 6.

**Demurrage and extra flight hours.**

1. Charterer shall owe Demurrage, respectively compensation for Extra Flight Hours in accordance with Article 1, if the Charter Period or the number of flight hours indicated in the Flight Schedule is exceeded due to:
   a: the refusal or untimely granting of visas or other documents required for the transportation, embarking, disembarking, loading or unloading of passengers, baggage or goods, or
   b: passengers, baggage or cargo not being ready for embarking or loading at the times indicated in Article 1, or
   c: acts or omissions of Charterer or its officers, employees or agents or of passengers or shippers of goods
2. However, K.L.M. shall have the right to avoid such exceeding of the Charter Period or the number of flight hours, by altering or limiting the Flight Schedule with due regard to the interests of Charterer, in which case the Charter Price shall be adjusted as provided in Article 17.

ARTICLE 7.

**Payment.**

1. Charterer agrees to pay the Charter Price on or before the date mentioned in Article 1 in the currency, at the place and by the method mentioned therein. Payment of costs not included in the Charter Price and other charges provided for in this Agreement, shall be made within two weeks after the date of invoicing by K.L.M. in the same manner and in the same currency or, at K.L.M.'s choice, in the currency in which the costs are made by K.L.M.
2. In case Charterer fails to fulfil its obligation mentioned in the first paragraph of this Article or does not fulfil them in time, K.L.M. will be entitled to terminate this Agreement by simple notice, without any formal notification or judicial intervention being required, and without prejudice to Charterer's obligation to pay the charterprice and other dues.

ARTICLE 8.

**Non-performance or**
**partial performance of the journey.**

1. If due to the refusal or untimely granting of authorizations (permits) required for the performance of the Journey, or to any cause beyond the control of Charterer (other than those mentioned in Article 6), K.L.M. shall not be able to perform the Journey, this Agreement shall be terminated and the Charter Price shall not be payable and shall be refunded if paid, provided, however, that if in such event the Aircraft is kept at the disposal of Charterer at his request. Charterer shall owe a compensation therefor on the basis of the demurrage rate mentioned in Article 1 calculated as of the agreed date and hour of beginning of the Charter Period.
2. If due to a cause as mentioned in paragraph 1 of this Article 8, the Journey can be performed only partially by K.L.M. within the Charter Period, the Charter Price shall be reduced proportionately on the basis of the Charter Period consumed and the number of flight hours flown in the partial performance of the Journey.

ARTICLE 9.

**Subcontracting.**

1. Charterer shall not subcontract or give in use wholly or in part the chartered space and/or payload of the Aircraft without prior written approval of K.L.M.
2. Unless expressly otherwise agreed in writing any such approval by K.L.M. is given subject to the condition that the subcontractor shall abide with all obligations imposed upon Charterer and that Charterer shall assume full responsibility for all acts or commissions of the subcontractor and his servants or agents.

ARTICLE 12

**I. A. T. A. Clause.**

1. Charterer agrees to abide with the resolutions of the International Air Transport Association (I.A.T.A.) as introduced by the appropriate agencies of I.A.T.A., furnishing any transportation under a charter agreement to be sold or offered for sale to the general public at less than I.A.T.A. fares and rules. In case of violation K.L.M. shall have the right to refuse the transportation of the passengers or goods concerned or to cancel the entire agreement without prejudice to Charterer's obligations to pay the full charterprice.

2. It is understood that the provisions of paragraph 1 of this Article 12 shall not be deemed to permit Charterer to sell or offer for sale transportation to be performed under this Agreement unless authorization therefor has been secured from the appropriate authorities of the country or countries from, to or over which the journey will be performed, if such authorization is required by the applicable laws, rules and regulations of such countries.

ARTICLE 13

**Unused chartered space.**

Unless otherwise agreed K.L.M. is entitled to utilize any unused part of the chartered space and/or payload.

ARTICLE 14

**Liability.**

1. Unless inconsistent with the terms of this Agreement, the carriage of passengers and baggage pursuant hereto shall be subject to Articles 1, 2 (paras. 1, 2 and 3 only), 8 (paras. 1, 2 and 4 only), 9 (paras. 1, 2, 4 and 11 only), 10 and 12 to 16 (inclusive) of K.L.M.'s General Conditions of Carriage for Passengers and Baggage and the carriage of goods shall be subject to Articles 1, 2 and 5 to 14 (inclusive) of K.L.M.'s General Conditions of Carriage for Goods, and K.L.M. shall not be subjected to any other or higher liability than that provided for in said General Conditions or in the Convention of Warsaw of October 12, 1929, in so far as this Convention is applicable to the subject transportation.

2. The time shown in the flight schedule are approximate and not guaranteed and K.L.M. has the right to deviate from the flight schedule in case of circumstances not foreseen at the date of execution hereof.

3. With respect to transportation to be performed pursuant to this Agreement, K.L.M. is not and shall not be deemed to be acting as a common carrier.

4. Goods carried pursuant to this Agreement shall be deemed accepted for transportation without a declaration of value, notwithstanding the value for carriage having been indicated on the airwaybill or otherwise, unless the special valuation charges due for shipments with declared value have been paid to K.L.M. before commencement of the carriage. Unless or less valuation charges have been so paid, Charterer shall hold K.L.M. free and harmless from all increased liability arising from any declaration of value.

5. Without prejudice to the provisions of Articles 12 and 15, damages to be paid by K.L.M. in case of non-performance of this Agreement due to faults or omissions of K.L.M., its agents or employees shall in no event exceed an amount equal to the Charter Price, and damages for partial performance shall not exceed a proportionate part of the charterprice.

ARTICLE 15

**Traffic Documents.**

1. Charterer undertakes to cooperate that for all passengers, baggage and goods transported pursuant to this Agreement traffic documents are made out in accordance with the requirements, practices and principles of K.L.M. Charterer will provide K.L.M. with all information in connection with passengers, baggage and goods within the time needed for the completion of such documents.

2. In all traffic documents K.L.M. shall appear as Carrier.

ARTICLE 16

**Insurance.**

As the request of Charterer K.L.M. will act as intermediary for the insurance of passengers, baggage and goods to be carried under this Agreement, provided that K.L.M. shall not be liable for any damages caused howsoever in connection with this service.

ARTICLE 17

**Cancellation.**

1. Both parties may cancel this Agreement at any time prior to the commencement of the journey against payment of the Cancellation Fee mentioned in Article 1. No Cancellation Fee is due in the cases referred to in the second paragraph of Article 2, second paragraph of Article 7, Articles 8 and 16.

2. If Charterer terminates the Agreement after commencement of the journey the full charterprice shall be due less the amounts mentioned in Article 11.

ARTICLE 18

**Termination in case of bankruptcy, death etc.**

1. Both parties may at any time terminate this Agreement by single notice, without any formal settlement, summons or judicial intervention being required:

a. if the other party becomes insolvent, makes a general assignment for the benefit of creditors or becomes or is at bankruptcy or if a receiver of all or substantially all of its property be appointed or applied for;

b. in case of the other party's death or liquidation (as the case may be).

2. If K.L.M. terminates the Agreement pursuant to subpar. a. of the above paragraph 1, the Charter Price shall be payable in full, subject to the adjustment provided for in Article 11. If K.L.M. terminates the Agreement pursuant to subpar. b. of the above paragraph before the journey has been commenced, the Charter Price shall not be payable and shall be refunded if paid and if the journey has been partially performed by K.L.M., the Charter Price shall be reduced proportionately on the basis of the portion of the Charter Period completed and the number of flight hours flown in the partial performance of the journey.

ARTICLE 17.

**Adjustment.**

In the event the Journey either is not commenced or is not completed by reason of the termination of this Agreement by K.L.M. pursuant to paragraph 2 of Article 7 or to subpar. a. of paragraph 1 of Article 16 or of the termination by Charterer after the agreed date of commencement of the Charter Period, or if the Flight Schedule is altered or limited in accordance with the provisions of Article 6, there shall be deducted from the Charter Price the costs saved by K.L.M. with respect to oil, fuel, landing, parking and hangar fees and ground handling services; provided, however, that Charterer shall pay to K.L.M. in addition to the amount determined as afore said, extra costs, if any, incurred by K.L.M. as a consequence of the non-commencement or non-completion of the Journey or of the Flight Schedule.

ARTICLE 18.

**Engagements of passengers and shippers of goods.**

This Agreement is made by Charterer both in his own name and for his own account and in the names and for the accounts of subcontractors, passengers, and owners and other parties having or claiming any interest in the baggage and goods transported pursuant to this Agreement. Charterer guarantees the fulfilment of the obligations of subcontractors, passengers, owners and such other parties under K.L.M.'s General Conditions of Carriage and, more particularly the compensation owed by them with respect to fees, fines and other costs chargeable to or levied against K.L.M. in connection with the non-compliance with any applicable laws, or rules or regulations of governmental and other authorities.

ARTICLE 19.

**Discretion of commander of the aircraft.**

The commander of the aircraft shall have complete discretion concerning the load carried and its distribution, as to whether or not a flight shall be undertaken and as to where landings should be made, and the Charterer shall accept all such decisions as final, without prejudice to the provisions of Articles 8 and 12.

ARTICLE 20.

**Law applicable.**

1. This Agreement and the execution and performance thereof shall be governed by the laws of the Kingdom of Netherlands.
2. Actions brought by or against K.L.M. arising out of this Agreement or the execution or performance thereof will be brought only before the courts of law competent in the City of The Hague, the Netherlands, unless K.L.M. elects or approves otherwise.

ARTICLE 21.

**Alterations.**

This Agreement supersedes all preceding arrangements and stipulations between the parties concerning the subject matter thereof and can be changed only with the written approval of both parties.

ARTICLE 22.

**Headings.**

Headings are added for the purpose of reference and convenience only and are in no way to be referred to for construing the provisions of this Agreement.

SPECIAL PROVISIONS.

Executed in two counterparts and signed

for and on behalf of CHARTERER:

for and on behalf of
KONINKLIJKE LUCHTVAART
MAATSCHAPPIJ N.V.:

The.....19.....,at.....The.....19.....,at.....

# PAN AMERICAN WORLD AIRWAYS SYSTEM

## CHARTER CONTRACT

PAN AMERICAN WORLD AIRWAYS, INC., a corporation organized and existing under the laws of the State of New York, hereinafter called the "Company", and .....

.....

hereinafter called the "Charterer", hereby agree as follows:

1. The Company will provide one.....type aircraft, together with a duly licensed crew, and will undertake a flight (hereinafter called "the charter flight") with said aircraft, upon the terms and conditions herein set forth, commencing at approximately ..... o'clock on ....., 19....., over the following itinerary .....

.....

.....

(Insert all stops and any special routing)

and with layover at the following places.....

.....

(Insert place and length of time for each layover)

in addition to stops made for operating reasons.

For the purpose of the charter flight the aircraft will be ferried from.....

to ..... and from ..... to .....

2. The charter price payable by the Charterer, including mileage, ferry, layover, excess valuation on baggage, valuation on cargo and insurance charges, taxes payable in respect of the charter flight or transportation sold thereon, and expenses incurred or to be incurred by the Company either for its own account or for the account of the Charterer in connection with the charter flight as provided in Paragraph 5 hereof, shall be $..... The foregoing charter price has been calculated in accordance with the Company's published tariff applicable to the charter flight described in Paragraph 1 above, the excess valuation charge on baggage, the valuation charge on cargo, and the insurance charge included therein having been calculated as follows:

(a) Excess valuation charge on baggage at the rate of $..... per $100 (U. S. currency), on all value in excess of $100 declared for any passenger's baggage, has been calculated on a total excess valuation of . . . . . $.....

(b) Valuation charge on cargo has been calculated in accordance with the Company's applicable published tariff on the value of $..... estimated as the amount to be declared by the charterer pursuant to Paragraph 9.

(c) Insurance charge for cargo at the rate of $..... per $100 (U. S. currency) of value declared for cargo for insurance purposes has been calculated on a decared value of . . . . . $.....

In the event of any changes in (i) the routing, layover time or ferry time, or (ii) excess valuation of baggage, declared value of cargo, or declared value for insurance purposes, or (iii) the charges incurred for the account of the Charterer in accordance with Paragraph 5 hereof, an appropriate adjustment in the charter price will be made in accordance with the Company's applicable published tariffs with respect to any change referred to in (i), or at the applicable rate set forth in the preceding sentence with respect to any change referred to in (ii) or by the amount of the change in the charges referred to in (iii).

3. The Charterer shall have the right to utilize all available space on the aircraft during the charter flight. The Company's decision as to the amount of space available to be utilized on any portion of the charter flight shall be final. Any space available to the Charterer but not utilized by the Charterer (may) (may not) be utilized by the Company for transportation of Company personnel or property and for other free transportation.

4. The Charterer will pay the Company the total charter price set forth in Paragraph 2, prior to the commencement of the charter flight or in accordance with existing arrangements between the parties for settlement of accounts. At the conclusion of the charter flight any necessary adjustment in the price provided for in Paragraph 2 will be made and any additional amount due to the Company, together with any additional charges pursuant to Paragraph 5, will be paid by the Charterer promptly upon receipt of a statement therefor from the Company.

5. All expenses for fuel, oil, crew salary and crew expense, and landing fees for the aircraft, will be for the account of the Company. All other expenses in connection with the charter flight, including transportation tax or any other tax in respect of the charter flight or transportation sold thereon, shall be for the account of the Charterer. No charge will be made for loading or unloading the aircraft unless it shall require the use of personnel or equipment not regularly utilized by the Company in connection with its commercial operations at the site where the loading or unloading is done. The cost to the Company of utilizing any such equipment or personnel shall be for the account of the Charterer.

6. The Company shall have the right to select the route for the charter flight; provided, however, that the shortest route which, in the opinion of the Company, is safe and feasible, will be followed. In case of mechanical difficulties, damage to the aircraft, adverse weather conditions, violations of the provisions of this contract by the Charterer, or other circumstances which, in the opinion of the Company, require such action, the charter flight may be cancelled or delayed at the point of origin or at any other point, or any point on the itinerary may be omitted, in which event the charter flight shall be that portion, if any, of the flight completed and the Charterer shall pay the Company the charter price calculated on the basis of the mileage completed. In case of a partially completed flight, the charter price (not including charges referred to in Paragraph 5) shall be adjusted by a mileage prorate, that is to say, the total mileage which was to be flown on the charter flight will be divided into said portion of the charter price to ascertain a price per mile which will be applied to the mileage flown. For the purpose of this paragraph, the mileage flown or to be flown shall be deemed to be the direct airport-to-airport mileage between the airports at which stops are made, unless a special routing is indicated in Paragraph 1 of this contract, in which event the mileage flown or to be flown on the portion of the route covered by such special routing shall be the actual mileage as determined by the Company's flight report, or, if no flight report is made, by the Company's flight plan.

7. If the Company shall find that landing facilities at any point on the itinerary of the charter flight are, in its opinion, not adequate for safe use on the charter flight at such point, or if landing is prohibited or restricted by law, regulation, weather or operating conditions, the Company may substitute in place thereof the nearest point at which, in its judgment, suitable facilities are available and landing can be made.

8. The Charterer agrees that the aircraft will at all times be under the exclusive command and control of the pilot in charge, whose orders will be strictly complied with by the Charterer and all passengers. The pilot in charge shall not be obligated to comply with any request from the Charterer or any passenger, the Company's entire obligation being set forth in this contract. The time of loading and departure from the original point and all intermediate points on the charter flight shall be determined by the Company. In the event that the Charterer does not have the passengers and cargo ready for loading at the time specified, the charter flight may proceed without the full load or may be cancelled at the option of the Company.

9. (a) Prior to the commencement of the charter flight, the Charterer will furnish the Company with a list of the names of all passengers and a declaration setting forth a description and the value of all property (including baggage and cargo) to be transported on the charter flight, signed by or on behalf of the Charterer. Not more than $500,000 (U. S. currency) worth of "general property" and $1,000,000 (U. S. currency) of "valuable property" (both as defined in the Company's published tariffs) shall be carried on the aircraft at any one time unless special arrangement between the Company and the Charterer has been made in advance.

(b) Except as provided in subparagraph (c) below, the Company's standard form of contract ticket shall be issued by the Company to each passenger transported on the charter flight, and the Company's standard form of baggage check (which may be part of the ticket and, in such event, also a baggage identification tag) shall be issued to each passenger in respect of each article of baggage checked by such passenger for transportation on the charter flight. In all cases the Company's standard form of Air Waybill (or other contract for transportation of cargo) shall be issued by the Company to the shipper of all cargo transported on the charter flight.

(c) In the case of transportation wholly within or between the United States, its territories and possessions, the Company and the Charterer may by agreement dispense with the requirements of the first sentence of subparagraph (b). In the event of such agreement the Company may issue a single ticket to the Charterer together with a list of all passengers being transported on the aircraft and a single baggage check for all baggage carried on the aircraft, and will issue a baggage identification tag to each passenger in respect of each article of checked baggage.

(d) Neither party shall permit any passenger, baggage, cargo or other property to be carried on the aircraft unless an appropriate ticket, baggage check, Air Waybill, or other contract for transportation of cargo or other property shall have been issued in respect thereof. The Company, the Charterer and all passengers or shippers will be bound by the terms and conditions of said tickets, baggage checks, Air Waybills and other contracts. Any action taken by the Charterer in respect of tickets, baggage checks, Air Waybills, or other contracts for transportation of cargo or other property shall be deemed to be as agent for the passenger or shipper.

(e) The Company shall have such and only such liability to passengers or shippers in respect of the charter flight as exists under the tickets, baggage checks, Air Waybills, or other contracts for transportation of cargo or other property, so issued by the Company. The Company shall have no liability to the Charterer in respect of claims made by passengers and shippers against the Charterer relating to acts of the Company in respect of the charter flight except within the same limits as provided in the preceding sentence. During the charter flight the Charterer will be named as an additional assured under certain of the liability insurance regularly carried by the Company, which will insure the Company and the Charterer, on the terms set forth in the respective policies of insurance, against liability for claims by others for injury to or death of persons, including passengers on the aircraft but excluding the crew members, or for loss of or damage to property, including the property carried on the aircraft, arising out of or in any way connected with the charter flight. A certificate from the insurer evidencing such insurance will be furnished to the Charterer upon request.

(f) None of the provisions of this paragraph 9 shall apply to Company personnel or property transported on the charter flight.

10. The Charterer hereby represents and warrants that he has carefully read and completed the Charter Application (including attachments thereto) and that all statements made by him therein are true and correct to the best of his knowledge and belief. The Charterer further represents, warrants and agrees that he has not already held out and will not hold out by advertisement, course of conduct or other means, individual passages to the public generally for transportation on the charter trip. The Charterer agrees and stipulates on his own behalf, and on behalf of anyone deriving rights from him, that they will not sell directly or indirectly any of the chartered space, provided that this shall not preclude re-sale of space within a group as defined in (i) below in this Paragraph 10. The Charterer further agrees that on his part he will not permit the aircraft to be used by persons who make a financial contribution to the cost of the charter, other than a member of a group as defined below in this Paragraph 10. Where the Charterer shall, to the extent authorized herein, make any charge to third parties (including passengers and shippers) for transportation on the charter flight, the Charterer agrees to notify the Company in advance and such charges shall be subject to approval of the Company. For the purpose of this Paragraph 10 a group shall be considered to be (i) individuals (including members of their immediate families) whose principal aims, purposes and objectives are other than travel and who have sufficient affinity existing prior to the application for charter transportation to distinguish them and set them apart from the general public; or (ii) individuals on whose behalf this contract is entered into by the Charterer, provided that no such individuals have been publicly solicited (as defined in the Charter Application) directly or indirectly, by the Charterer, the group or members of the group or by an agent or representative of any of them. If the Charterer shall permit the aircraft to be used by any individual who is a member of a group as defined in (i) above, the Charterer further represents and warrants that each such individual was a member of such group at the time of application for the charter flight provided for herein, and has been such a member for at least 6 months immediately prior to the date on which the charter flight shall commence as herein provided. If the Charterer is directly or indirectly engaged in providing surface transportation, the Charterer further represents, warrants and agrees that there shall be permitted on the charter flight only personnel and property of the Charterer, and, where necessitated by an emergency, the Charterer's passengers, baggage and cargo, provided the Charterer has not demanded or received, and will not demand or receive, from any passengers and shippers any compensation over and above that paid or payable in respect of the surface transportation for which the charter flight is substituted.

11. In the event that any representation herein or in the Charter Application by the Charterer is false or any agreement, warranty or stipulation of Paragraph 10 of this contract or any other provision of this contract is violated by the Charterer or by any member of a group on behalf of which the charter is made, the Company shall have the right to immediately cancel this contract and, in the event that the charter flight has commenced, to terminate the charter flight at any time, all without liability of any kind to the charterer or any member of such group. In the event of such termination of the charter flight the charter price shall be calculated in accordance with Paragraph 6. Neither the payment of the charter price nor the termination of this contract for such reason shall affect the Company's right to collect damages from the Charterer for such violation.

12. No article shall be permitted on board the aircraft, either as baggage, cargo or otherwise, which cannot be transported in accordance with the Company's published tariffs and applicable laws and government or Company regulations, or which, in the opinion of the Company, would endanger the safety of the flight or would not be suitable for transportation on the aircraft.

13. The Company shall not be liable for any failure or delay in connection with the charter flight or in doing any act to be performed by it pursuant to this contract if such failure or delay shall be due or in any manner caused by the laws, regulations, acts, demands, orders, or interpositions of any government or any subdivision or agent thereof, acts of God, strikes, fire, flood, weather, war, rebellion, insurrection, or any other cause or causes beyond its control, whether similar to or dissimilar from the causes here enumerated.

14. No officer, agent, representative or employee of the Company is authorized to alter, modify, or waive any provision of this contract.

15. This contract shall be interpreted in accordance with the laws of the State of New York, United States of America.

16. This contract is subject to the Company's applicable tariffs, which are incorporated herein and made a part hereof and may be inspected at any of the Company's offices or at airports from which it operates regular service.

Dated....., 19.....

**PAN AMERICAN WORLD AIRWAYS, INC.**

.....
Charterer

By .....
(Name and Title)

By .....

.....
(Location)

a state of war, declared or undeclared, or rebellion or other civil disorder of a type which might endanger Aircraft, safety of crew or subject Aircraft to seizure.

FIFTH: The Lessor agrees as follows:

(a) To furnish a complete crew, each member of which shall be properly trained and experienced and whose salaries and compensation shall be paid and provided for by the Lessor. It is understood and agreed, however, that the said crew members shall be under the direct, sole and exclusive supervision of the Lessee at all times when the said Aircraft is being operated by said Lessee.

(b) At the request of Lessee, to furnish and supply all gasoline, oil, landing fees, maintenance supplies and equipment required or necessary for the operation of said Aircraft at its own cost and expense, and to regularly check up, inspect, repair and maintain the said Aircraft in proper order and condition at all times, the Lessee to return the said Aircraft to .....
....., for such service.

(c) To pay or reimburse Lessee for all servicing, repairs and maintenance necessary or required by the Aircraft while same is en route on any of its flights. In the event of a break-down of Aircraft while en route, and a consequent inability of same to be operated to its destination, the Lessor agrees to pay or reimburse Lessee for any and all expenses reasonably necessary to restore Aircraft to operating condition.

(d) To supply Lessee with another Aircraft of the same general type, construction and condition as the one hereby leased, within ..... day after written notice from Lessee to Lessor that the said latter Aircraft has broken down or become inoperable by Lessee and in such event, this lease and all its terms and provisions shall apply to such alternate Aircraft.

(e) To turn over to Lessee the Aircraft herein leased or any alternate Aircraft properly equipped with all necessary lights and mechanical devices or otherwise, so as to fully comply with all laws, ordinances, or lawful regulations of any authority having legal power and jurisdiction to make regulations therefor, and Lessor agrees to make whole and save harmless Lessee from any damage or penalty which Lessee may suffer by reason of the failure of any such Aircraft to be so equipped.

(f) To furnish and supply, at its own cost and expense, liability insurance unconditionally covering all liability for personal injury or property damage resulting from operation of the aforesaid Aircraft, and to pay all premiums therefor. Such insurance shall be for not less than
.....($).....).
Lessor shall also carry public liability and property damage insurance covering the aforesaid Aircraft for loss or damage from any cause in amounts of.....($).....).

SIXTH: Any and all notices to be given under this agreement shall be given to the Lessor at
.....,
and to Lessee at.....

IN WITNESS WHEREOF, The parties have hereunto set their hands and seals the day and year first above written.

By: .....

By: .....

# CONVENTION,

**complémentaire à la Convention de Varsovie, pour l'unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel.**

LES ETATS SIGNATAIRES DE LA PRESENTE CONVENTION

CONSIDERANT que la Convention de Varsovie ne contient pas de disposition particulière relative au transport aérien international effectué par une personne qui n'est pas partie au contrat de transport

CONSIDERANT qu'il est donc souhaitable de formuler des règles applicables à cette situation

SONT CONVENUS DE CE QUI SUIT:

# CONVENTION,

**Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier.**

THE STATES SIGNATORY TO THE PRESENT CONVENTION

NOTING that the Warsaw Convention does not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage

CONSIDERING that it is therefore desirable to formulate rules to apply in such circumstances

HAVE AGREED AS FOLLOWS:

**Article Premier**

Dans la présente Convention:

*a)* "Convention de Varsovie" signifie soit la Convention pour l'unification de certaines règles relatives au transport aérien international, signée à Varsovie le 12 octobre 1929, soit la Convention de Varsovie, amendée à la Haye en 1955, selon que le transport, aux termes du contrat visé à l'alinéa *b)*, est régi par l'une ou par l'autre;

*b)* "transporteur contractuel" signifie une personne partie à un contrat de transport régi par la Convention de Varsovie et conclu avec un passager ou un expéditeur ou avec une personne agissant pour le compte du passager ou de l'expéditeur;

*c)* "transporteur de fait" signifie une personne, autre que le transporteur contractuel, qui, en vertu d'une autorisation donnée par le transporteur contractuel, effectue tout ou partie du transport prévu à l'alinéa *b)* mais n'est pas, en ce qui concerne cette partie, un transporteur successif au sens de la Convention de Varsovie. Cette autorisation est présumée, sauf preuve contraire.

**Article 1**

In this Convention:

*a)* "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, or the Warsaw Convention as amended at The Hague, 1955, according to whether the carriage under the agreement referred to in paragraph *b)* is governed by the one or by the other;

*b)* "contracting carrier" means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor;

*c)* "actual carrier" means a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph *b)* but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.

**Article II**

Sauf disposition contraire de la présente Convention, si un transporteur de fait effectue tout ou partie du transport qui, conformément au contrat visé à l'article premier, alinéa *b)*, est régi par la Convention de Varsovie, le transporteur contractuel et le transporteur de fait sont soumis aux règles de la Convention de Varsovie, le premier pour la totalité du transport envisagé dans le contrat, le second seulement pour le transport qu'il effectue.

**Article II**

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article I, paragraph *b)*, is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.

**Article III**

1. Les actes et omissions du transporteur de fait ou de ses préposés agissant dans l'exercice de leurs fonctions, relatifs au transport effectué par le transporteur de fait, sont réputés être également ceux du transporteur contractuel.

**Article III**

1. The acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. Les actes et omissions du transporteur contractuel ou de ses préposés agissant dans l'exercice de leurs fonctions, relatifs au transport effectué par le transporteur de fait, sont réputés être également ceux du transporteur de fait. Toutefois, aucun de ces actes ou omissions ne pourra soumettre le transporteur de fait à une responsabilité dépassant les limites prévues à l'article 22 de la Convention de Varsovie. Aucun accord spécial aux termes duquel le transporteur contractuel assume des obligations que n'impose pas la Convention de Varsovie, aucune renonciation à des droits prévus par ladite Convention ou aucune déclaration spéciale d'intérêt à la livraison, visée à l'article 22 de ladite Convention, n'auront d'effet à l'égard du transporteur de fait, sauf consentement de ce dernier.

2. The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention or any special declaration of interest in delivery at destination contemplated in Article 22 of the said Convention, shall not affect the actual carrier unless agreed to by him.

**Article IV**

Les ordres ou protestations à notifier au transporteur, en application de la Convention de Varsovie, ont le même effet qu'ils soient adressés au transporteur contractuel ou au transporteur de fait. Toutefois, les ordres visés à l'article 12 de la Convention de Varsovie n'ont d'effet que s'ils sont adressés au transporteur contractuel.

**Article IV**

Any complaint to be made or order to be given under the Warsaw Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevetheless, orders referred to in Article 12 of the Warsaw Convention shall only be effective if addressed to the contracting carrier.

Article V

En ce qui concerne le transport effectué par le transporteur de fait, tout préposé de ce transporteur ou du transporteur contractuel, s'il prouve qu'il a agi dans l'exercice de ses fonctions, peut se prévaloir des limites de responsabilité applicables, en vertu de la présente Convention, au transporteur dont il est le préposé, sauf s'il est prouvé qu'il a agi de telle façon que les limites de responsabilité ne puissent être invoquées aux termes de la Convention de Varsovie.

Article VI

En ce qui concerne le transport effectué par le transporteur de fait, le montant total de la réparation qui peut être obtenu de ce transporteur, du transporteur contractuel et de leurs préposés quand ils ont agi dans l'exercice de leurs fonctions, ne peut pas dépasser l'indemnité la plus élevée qui peut être mise à charge soit du transporteur contractuel, soit du transporteur de fait, en vertu de la présente Convention, sous réserve qu'aucune des personnes mentionnées dans le présent article ne puisse être tenue pour responsable au delà de la limite qui lui est applicable.

Article V

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he is unless it is proved that he acted in a manner which, under the Warsaw Convention, prevents the limits of liability from being invoked.

Article VI

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him.

**Article VII**

Toute action en responsabilité, relative au transport effectué par le transporteur de fait, peut être intentée, au choix du demandeur, contre ce transporteur ou le transporteur contractuel ou contre l'un et l'autre, conjointement ou séparément. Si l'action est intentée contre l'un seulement de ces transporteurs, ledit transporteur aura le droit d'appeler l'autre transporteur en intervention devant le tribunal saisi, les effets de cette intervention ainsi que la procédure qui lui est applicable étant réglés par la loi de ce tribunal.

**Article VIII**

Toute action en responsabilité, prévue à l'article VII de la présente Convention, doit être portée, au choix du demandeur, soit devant l'un des tribunaux où une action peut être intentée au transporteur contractuel, conformément à l'article 28 de la Convention de Varsovie, soit devant le tribunal du domicile du transporteur de fait ou du siège principal de son exploitation.

**Article VII**

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

**Article VIII**

Any action for damages contemplated in Article VII of this Convention must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 28 of the Warsaw Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business.

## Article IX

1. Toute clause tendant à exonérer le transporteur contractuel ou le transporteur de fait de leur responsabilité en vertu de la présente Convention ou à établir une limite inféricure à celle qui est fixée dans la présente Convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention.

2 En ce qui concerne le transport effectué par le transporteur de fait, le paragraphe précédent ne s'applique pas aux clauses concernant la perte ou le dommage résultant de la nature ou du vice propre des marchandises transportées.

3. Sont nulles toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente Convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport des marchandises, les clauses d'arbitrage sont admises, dans les limites de la présente Convention, lorsque l'arbitrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article VIII.

## Article IX

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Convention or to fix a lower limit than that which is applicable according to this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Convention.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

3. Any clause contained in an agreement for carriage and all special agreements entered into before the damage ocurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for the carriage of cargo arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place in one of the jurisdictions referred to in Article VIII.

**Article X**

Sous réserve de l'article VII, aucune disposition de la présente Convention ne peut être interprétée comme affectant les droits et obligations existant entre les deux transporteurs.

**Article XI**

La présente Convention, jusqu'à la date de son entrée en vigueur dans les conditions prévues à l'article XIII, est ouverte à la signature de tout Etat qui, à cette date, sera membre de l'Organisation des Nations Unies ou d'une Institution spécialisée.

**Article XII**

1. La présente Convention est soumise à la ratification des Etats signataires.

2. Les instruments de ratification seront déposés auprès du Gouvernement des Etats-Unis du Mexique.

**Article X**

Except as provided in Article VII, nothing in this Convention shall affect the rights and obligations of the two carriers between themselves.

**Article XI**

Until the date on which this Convention comes into force in accordance with the provisions of Article XIII, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

**Article XII**

1. This Convention shall be subject to ratification by the signatory States.

2. The instruments of ratification shall be deposited with the Government of the United States of Mexico.

**Article XIII**

Lorsque la présente Convention aura réuni les ratifications de cinq Etats signataires, elle entrera en vigueur entre ces Etats le quatre-vingt-dixième jour après le dépôt du cinquième instrument de ratification. A l'égard de chaque Etat qui la ratifiera par la suite, elle entrera en vigueur le quatre-vingt-dixième jour après le dépôt de son instrument de ratification.

2. Dès son entrée en vigueur, la présente Convention sera enregistrée auprès de l'Organisation des Nations Unies et de l'Organisation de l'Aviation civile internationale par le Gouvernement des Etats-Unis du Mexique.

**Article XIII**

1. As soon as five of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the fifth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the United Nations and the International Civil Aviation Organization by the Government of the United States of Mexico.

**Article XIV**

1. La présente Convention sera ouverte, après son entrée en vigueur, à l'adhésion de tout Etat membre de l'Organisation des Nations Unies ou d'une Institution spécialisée.

2. Cette adhésion sera effectuée par le dépôt d'un instrument d'adhésion auprès du Gouvernement des Etats-Unis du Mexique et prendra effet le quatre-vingt-dixième jour qui suivra la date de ce dépôt.

**Article XIV**

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the Government of the United States of Mexico and shall take effect as from the ninetieth day after the date of such deposit.

**Article XV**

1. Tout Etat contractant peut dénoncer la présente Convention par une notification faite au Gouvernement des Etats-Unis du Mexique.

2. Cette dénonciation prendra effet six mois après la date de réceptio nde la notification par le Gouvernement des Etats-Unis du Mexique.

**Article XVI**

1. Tout Etat contractant peut, lors de la ratification de la présente Convention ou de l'adhésion a celle-ci ou ultérieurement, déclarer au moyen d'une notification adressée au Gouvernement des Etats-Unis du Mexique que la présente Convention s'étendra à l'un quelconque des territoires qu'il représente dans les relations extérieures.

2. Quatre-vingt-dix jours après la date de réception de ladite notification par le Gouvernement des Etats-Unis du Mexique, la présente Convention s'étendra aux territoires visés par la notification.

**Article XV**

1. Any Contracting State may denounce this Convention by notification addressed to the Government of the United States of Mexico.

2. Denunciation shall take effect six months after the date of receipt by the Government of the United States of Mexico of the notification of denunciation.

**Article XVI**

1. Any Contracting State may at the time of its ratification of or accession to this Convention or at any time thereafter declare by notification to the Government of the United States of Mexico that the Convention shall extend to any of the territories for whose international relations it is responsible.

2. The Convention shall, ninety days after the date of the receipt of such notification by the Government of the United States of Mexico, extend to the territories named therein.

3. Tout Etat contractant peut, conformément aux dispositions de l'article XV, dénoncer la présente Convention séparément, pour tous ou pour l'un quelconque des territoires que cet Etat représente dans les relations extérieures.

**Article XVII**

Il ne sera admis aucune réserve à la présente Convention.

**Article XVIII**

Le Gouvernement des Etats-Unis du Mexique notifiera à l'Organisation de l'Aviation civile internationale et à tous les Etats membres de l'Organisation des Nations Unies ou d'une Institution spécialisée:

*a)* toute signature de la présente Convention et la date de cette signature;

*b)* le dépôt de tout instrument de ratification ou d'adhésion et la date de ce dépôt;

*c)* la date à laquelle la présente Convention entre en vigueur conformément au premier paragraphe de l'article XIII;

*d)* la réception de toute notification de dénonciation et la date de réception;

*e)* la réception de toute déclaration ou notification faite en vertu de l'article XVI et la date de réception.

3. Any Contracting State may denounce this Convention, in accordance with the provisions of Article XV, separately for any or all of the territories for the international relations of which such State is responsible.

**Article XVII**

No reservation may be made to this Convention.

**Article XVIII**

The Government of the United States of Mexico shall give notice to the International Civil Aviation Organization and to all States Members of the United Nations or of any of the Specialized Agencies:

*a)* of any signature of this Convention and the date thereof;

*b)* of the deposit of any instrument of ratification or accession and the date thereof;

*c)* of the date on which this Convention comes into force in accordance with Article XIII, paragraph 1;

*d)* of the receipt of any notification of denunciation and the date thereof;

*e)* of the receipt of any declaration or notification made under Article XVI and the date thereof.

EN FOI DE QUOI les Plénipotentiaires soussignés, dûment autorisés, ont signé la présente Convention.

FAIT à Guadalajara, le dix huitième jour du mois de septembre de l'an mil neuf cent soixante et un en trois textes authentiques rédigés dans les langues française, anglaise et espagnole. En cas de divergence, le texte en langue française langue dans laquelle la Convention de Varsovie du 12 octobre 1929 avait été rédigée, fera foi. Le Gouvernement des Etats-Unis du Mexique établira une traduction officielle du texte de la Convention en langue russe.

La présente Convention sera déposée auprès du Gouvernement des Etats-Unis du Mexique où, conformément aux dispositions de l'article XI, elle restera ouverte à la signature et ce Gouvernement transmettra des copies certifiées conformes de la présente Convention à l'Organisation de l'Aviation civile internationale et à tous les Etats membres de l'Organisation des Nations Unies ou d'une Institution spécialisée.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Guadalajara on the eighteenth day of September One Thousand Nine Hundred and Sixty-one in three authentic texts drawn up in the English, French and Spanish languages. In case of any inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail. The Government of the United States of Mexico will establish an official translation of the text of the Convention in the Russian language.

This Convention shall be deposited with the Government of the United States of Mexico with which, in accordance with Article XI, it shall remain open for signature, and that Government shall send certified copies thereof to the International Civil Aviation Organization and to all States Members of the United Nations or of any Specialized Agency.

Price Sw. Cr. 65:—

Cover by Jacob W. F. Sundberg