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AVIATION INSURANCE AND AIRCRAFT HIJACKING

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In spite of almost universal condemnation of the practice of aircraft hijacking and some efforts, both governmental and private to prevent its occurrence, the unlawful seizure of aircraft continues to plague the air transport industry. Unfortunately, relief does not appear in sight, a fact deeply deplored by the aviation insurance industry which also has a major stake in the solution of a problem with world-wide ramifications.

The subject of aircraft hijacking in the context of insurance must be related to other risks, because hijacking is just one of a group of perils excluded from Aircraft Hull and Liability Policies under what is now called "War, Hijacking and Other Perils Exclusion Clause (AVIATION) AVN.48B."

The specific exclusions in the clause follow:

- (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
- (b) Any hostile detonation of any weapon of war employing Atomic or Nuclear Fission and/or Fusion or other like reaction or radioactive force or matter.
- (c) Strikes, riots, civil commotions or labour disturbances.
- (d) Any act of one or more persons whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (e) Any malicious act or act of sabotage.

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- (f) Confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil, military or de facto) or public or local authority.
- (g) Hijacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the aircraft acting without the consent of the Insured.

The clause continues as follows:

Furthermore, this Policy does not cover claims arising whilst the Aircraft is outside the control of the Insured by reason of any of the above perils.

The aircraft shall be deemed to have been restored to the control of the Insured on the safe return of the Aircraft to the Insured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).

It is important to note that these last two paragraphs represent changes. The previous wording excluded coverage while the aircraft was outside the control of the insured only if it resulted from one of the risks named in sections (f) or (g). Now coverage is excluded if the loss of control results from any peril mentioned in the clause, and the last paragraph now defines the point of termination of a hijacking.

The All Risks underwriter is providing coverage and promulgating rates based on the insured's operations and security provisions. Once the airline loses control of the aircraft, the risks are entirely different and often greater.

These exclusions become the insuring agreements under a War Risks Policy, with the exception of claims relating to nuclear weapons, which are presently uninsurable. Naturally, this policy, as do all, has various warranties and conditions which should be carefully reviewed, as non-compliance with some of them may void the coverage.

It should be noted that each section of the exclusions clause names related risks which could actually fall within the scope of more than one section. It might be difficult to draw the line between a "riot or civil

commotion" and a "rebellion"; or an "act of sabotage" and "an act of a person, whether or not an agent of a foreign power, for political or terrorist purposes"; or between "seizure" and "the use of usurped power." Even greater confusion is apt to result from the translation of these overlapping terms into another language, in which case it will usually be necessary to choose from several alternatives subtly different in connotation. Hijacking has been translated in at least four different ways: *apoderamiento*, *apresamiento*, *secuestro*, and *piratería*. Regardless of the original intent, are these four terms legally equivalent?

It is obvious that one who wishes complete protection must acquire the broad form of coverage. If every exclusion—except nuclear weapons—in the All Risks Policy is covered under the War Risks Policy, there should be complete coverage. The deletion of a clause, or even a word, might leave in doubt the coverage of particular risks. There have been a number of incidents which have created very difficult claim situations. Consequently, the War Risks underwriter will not longer write limited coverage.

It is possible to extend the coverage of an All Risks Policy to include the perils of strikes, riots, civil commotion, labor disturbances, any malicious act, or act of sabotage, and hijacking. But what security would there exist in a policy covering these risks if rebellion, or acts of persons carried out for political or terrorist purposes were not included?

Until a few years ago the term hijacking did not appear in aviation policies. Earlier incidents of this type were considered thefts. The flight made a non-scheduled landing, merely increasing the operational hazards, which was what the basic All Risks underwriters were providing coverage for.

As time went on, it became evident that the risks incurred were new, greater, and more accurately classifiable as political hazards. Political hazards have generally been excluded from the basic All Risks Policies and added to the War Risks Policies. The underwriting considerations are more closely allied to war risks than operational risks. Area of operations, stability of governments, and security measures constitute the underwriting focus, rather than type of aircraft, pilot experience, and maintenance.

The first clauses referring to this exposure still did not use the term "hijacking." A description of the act was incorporated as an exclusion under All Risks Policy and included as an insuring agreement under the War Risks Policy. It read as follows:

Unlawful seizure or wrongful exercise of control of the aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the aircraft acting without the consent of the insured.

The term "hijacking" is included in the current description, which reads: "Hijacking or unlawful seizure or wrongful exercise of control . . ." Basically, the original wording is the definition of hijacking for insurance purposes.

The Tokyo Convention of September 14, 1963 dealt with offenses and certain other acts committed on board aircraft. Under the terms of the Convention, it was to become effective on the ninetieth day after the deposit of the ratification of the twelfth country. The fact that it did not take effect for more than six years (December 4, 1969) showed the shameful lack of interest of the world community.

The Tokyo Convention was broad enough to cover hijacking and related incidents, but the International Civil Aviation Organization (ICAO) recognized that hijacking required special consideration beyond that provided by the Tokyo Convention. The convention held at The Hague on December 16, 1970 was devoted to hijacking and is referred to as the Hijacking Convention. It went into effect in less than one year—after the tenth country deposited its ratification. Although gratifying, it is to be deplored that a number of countries have not ratified it as yet, particularly some where the problem is more acute and others which have given refuge to offenders.

The description of hijacking in the Hijacking Convention follows, in principle, our insurance definition. Art. 1 reads, in part:

. . . unlawfully, by force or threat thereof or by any other form of intimidation, seizes or exercises control of, that aircraft, or attempts to perform any such act . . .

The Convention goes further and defines the duration of the act. As the offense is considered an in flight incident, this is accomplished by defining "in flight." Art. 3, par. 1, reads:

For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities

take over the responsibility for the aircraft and for persons and property on board.

The Convention only applies to hijackings when "the place of take-off or the place of actual landing of the aircraft on board which the offense is committed is situated outside the territory of the state of registration of the aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight" (Art. 3, par. 3).

The definition recognizes that an incident occurring solely within the state of registry falls within the scope of the local law of that state.

After the Hijacking Convention, the war risks underwriters changed certain provisions of their policies. These changes are summarized below.

1. The aircraft is covered during the course of the hijacking under the hijacking endorsement, subject to the terms of the War Risks Policy. The notable point here is that no deductible is applicable, since generally War Risks Policies contain no deductibles.

2. From the conclusion of the hijacking until the aircraft is returned to the control of the insured within the geographical limits of the All Risks Policy, the War Risks Policy is extended to cover loss or damage to the aircraft, occurring subsequent to the unlawful seizure or control, which would have been covered under the All Risks Policy had there been no hijacking. This coverage is subject to the deductibles contained in the All Risks Policy. The principal aim here is to cover the aircraft which is hijacked to a point outside the geographical limits of the All Risks Policy. In that case the War Risks underwriters continue to insure the aircraft, after the conclusion of the act of hijacking, until it safely returns to a point within the geographical limits of the All Risks Policy. For that period the coverage is subject to the All Risks Policy's deductibles.

3. If, after landing at the point to which it is hijacked — whether such point is located inside or outside the All Risks Policy's geographical limits — the aircraft remains under duress, the hijacking endorsement (without deductibles) continues in effect even after the doors are open and any or all persons on board disembark. This provision ties in with the wording of the Hijacking Convention: "The flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board" (Art. 3, par. 1).

An incident occurred in Venezuela within the last year which can be used to illustrate some of the points previously made. After the passengers had boarded, but before the stairs of a Convair 580 were with-

drawn and the door closed, two armed men rushed on board and ordered the crew to fly to Cuba, which is outside the geographical limits of the effective All Risks Policy. The flight to and from Havana proceeded without operational incidents (unfortunately, a passenger with a history of heart ailment died of a heart attack just before the landing in Havana).

These are the notable points:

1. According to the definition adopted in the Hijacking Convention, the offense was not a hijacking, even after the seizure, while the external doors were open. Coverage was nevertheless afforded under another section of the War Risks Policy, perhaps the one dealing with acts of persons for terrorist purposes.

2. From the time the doors were closed, and during the takeoff and flight from Venezuela and the landing in Havana, any loss would have been covered under the hijacking endorsement, without the application of deductibles. Coverage on this basis continued until the door was opened in Havana and the hijackers no longer held or controlled the aircraft.

3. Subsequently, the War Risks Policy continued to insure the aircraft until it safely returned to Venezuela, including the takeoff and flight from Havana and the landing in Venezuela; however, coverage during this period was subject to the All Risks Policy's deductibles. Had the aircraft first landed in Jamaica on its return to Venezuela, the changeover to the All Risks Policy would have occurred at that point.

Thus far we have concentrated on definitions of hijacking and its relation to aircraft hull insurance. We will now focus on liability, where, actually, the principle is the same: namely, the Aircraft Liability Policy is subject to the same exclusion clause (AVN. 48B) attached to the Hull Policy. In this case, however, coverage is normally reinstated under the basic Liability Policy by a further endorsement (except for the nuclear weapons exclusion).

The basic general terms and conditions of the Liability Policy apply to this extension of coverage, except for the following provisions:

1. The separate rate for this endorsement is subject to a monthly or quarterly review.

2. The automatic termination clause is applicable in the event of an outbreak of war between any of the five major powers — United States of America, Great Britain, France, Russia, and the People's Republic of China.

3. Either the insured, or the insurers may cancel the endorsement on seven days' notice.

Unlike the case of physical damage to aircraft, where time, location, and cost of damages can be readily identified, one cannot necessarily make such a determination when insuring the legal liability imposed by law or contract upon an airline. Any attempt to split a liability payment between the costs of coverage for operational and political hazards would be most difficult, if at all possible. Thus, underwriters consolidate coverage of these two areas of exposure under one policy.

The question is, what is the liability of the airlines? The answer is to be found in the same laws and regulations which determine their liability for normal operational risks, such as:

1. Local laws or air codes
2. The Warsaw Convention (1929)
3. The Hague Protocol (1955)
4. The Montreal Agreement (U.S. CAB #19800)
5. The Guatemala Protocol (1971) (in the future).

Local aviation laws will not be dealt with, as their dissimilarities are beyond the scope of this paper, but the international conventions are of particular interest, since they affect a substantial number of international passengers.

It should be borne in mind that The Hague Protocol, the Montreal Agreement, and the Guatemalan Protocol are merely extensions of, or amendments to, the Warsaw Convention. These subsequent amendments have not changed the definition of "international transportation" adopted in Art. 1, par. 2 of the Warsaw Convention and The Hague Protocol, and they apply only to those passengers whose transportation meets that definition:

[A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a Single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another Power, even though that Power is not a party to this Convention.

Under the Warsaw Convention and The Hague Protocol, "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking" (Art. 17). However, "[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures" (Art. 20, par. 1).

Also, "[i]f the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability" (Art. 21).

It is further provided that, in essence, if the carrier was negligent, compensation for the injury or death cannot exceed the policy limit; the limit can be exceeded only if wilful misconduct is proven.

The responsibility for the would-be-hijacker is generally considered to rest with the government of the country where the airport of embarkation is located. Apparently this responsibility is not being met in Latin America. Personal reports from seven countries indicate that only one country checks both the passengers and their baggage. Another checks only hand articles. In Ecuador, TAME conducts a very thorough examination. When the passenger checks in he must show his Ecuadorian identification card or passport. When the passenger goes through the gate, he must show the same document and his ticket. Before boarding the aircraft, he and his hand luggage are checked. In one country hand articles were checked for a period of time, but the practice has been discontinued.

There are many types of equipment on the market today designed to detect metal objects carried on the person or in hand luggage. There are hand instruments as well as walk-through gates, all of which are inexpensive. The airlines serving each country should do everything possible to have that government provide some type of equipment for the use of all airlines. The prevention of one hijacking could save more than the cost of the equipment. In the meantime, the time of airport guards could be better spent checking passengers and their hand luggage, than casually walking around the terminal building or airport area.

Sooner or later some injured party will attempt to prove that the airline negligently failed to take all feasible measures to prevent hijackings,

or even to prove wilful misconduct in order to recover an amount which exceeds the applicable policy limit.

The Montreal Agreement presents a very different picture for some international passengers. The carrier agrees not only to pay up to \$75,000 per passenger, but also to waive its defenses under Art. 20, par. 1 of the Warsaw Convention. Thus, whether the airline was negligent is immaterial, and fault becomes an issue only if the plaintiff seeks to prove wilful misconduct in order to recover an amount in excess of \$75,000.

Many claims have been paid to passengers who were on board Pan Am's B-747 in Cairo and the TWA B-707 in Amman. Generally, the claims have represented loss of or damage to baggage. However, some people who received minor injuries in using evacuation chutes have obtained higher amounts. Only one case has approached the Montreal limit; a New York jury awarded a mother \$61,000 and her daughter \$10,000 for "physical and emotional damages."

Although adherence to the Montreal Agreement is required by the United States Civil Aviation Board (CAB), not all international passengers stopping in the United States are subject to the Montreal Agreement. For it to be applicable, three conditions must be met:

1. The passenger must be utilizing "international transportation" as defined in Art. 1, par. 2, of the Warsaw Convention, cited previously.
2. The passenger's trip, as ticketed, must include a scheduled stop in the United States. He need not disembark; the mere fact that the aircraft has made a scheduled transit stop is sufficient.
3. The carrier must be a signatory of the Montreal Agreement.

Otherwise, the Montreal Agreement does not apply, and local or other pertinent laws govern.

The Guatemala Protocol will also provide for compensation without proof of negligence, but the limit will be \$100,000 instead of \$75,000, regardless of wilful misconduct. In other words, compensation will never exceed \$100,000.

The Guatemala Protocol is not yet in force. As provided in Art. 20, it will become effective on the ninetieth day after the deposit of the thirtieth instrument of ratification, provided the airlines of five of the ratifying states report a total of at least 40% of the international pas-

senger kilometers flown by all airlines (based on the ICAO statistics for the year 1970). Otherwise, the Protocol will not go into effect until the ninetieth day after this additional requirement is met.

It is essential that every possible step be taken to prevent hijackings, not just because of their effect on insurance, but for the traveling public to maintain confidence in airlines and governments. It is reported that one government is negotiating with a private company to electronically screen-check baggage. When called for, the passenger will be asked to submit his bags to inspection by the authorities. More widespread measures of this nature are necessary.

Hijacking is a serious offense which has been inexcusably ignored by the world community and its governments. Governments have neither provided appropriate facilities to check passengers and their luggage nor ratified The Hague Convention of 1970 on hijacking. This convention contains extradition provisions which would provide an excellent deterrent; potential hijackers would be made to realize that refuge would be denied them at their intended destinations.

Hijacking does have an effect on insurance and its cost, which could be greatly reduced by appropriate governmental action in cooperation with the airlines. It is hoped that such action will be forthcoming in the immediate future.