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DIYAH AS A THIRD DIMENSION TO AIR CARRIER LIABLITY CONVENTIONS

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DEDICATION

To My beloved wife Hanady in gratitude for the aid, patience and encouragement I received from her.

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First and foremost, I am indebted to my supervisor, Prof. Richard Janda, for his valuable support and genuine guidance in supervising this thesis. His amazing ability to analyse issues in detail was a great asset for this thesis. Through my six years of D.C.L, he has been assisting me relentlessly and taking me hand by hand towards the end and conclusion. On more than an occasion, I reached to a point close to despair and began to believe that I would not make it and finish the thesis. It is Prof. Janda who coaxed me out of these states like a psychiatrist. His continuous support and eagerness to take my progress forward made me feel that I was working on a worthwhile project.

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TABLE OF CONTENTS

ABSTRACT

This abstract is written on the 11th of September 2006 – the fifth anniversary of the 9/11 attacks on the World Trade Center and the Pentagon by Al-Qaeda. These attacks are taken to be a turning point in the relationship between Islam and the West. For the author, these attacks, the overwhelming counter-attacks by some of the western states on some Islamic states, as well as the endless Palestinian-Israeli disputes, are the result of misunderstanding and misconceptions that Islam and the West have of each other.

While politics and politicians are destroying means of communication amongst these nations by the creation of such a state of war, scholars should exert their best efforts to build bridges of understanding and tolerance.

This thesis is but a single brick in the much needed bridge of communication and understanding between the great civilisations of west and east. It seeks to show how the world's various legal traditions can benefit from each other. It attempts to do so by introducing the Islamic system of *diyah* and showing how it can interplay with and impact on the interpretation of international law. The example chosen is the existing set of air carrier liability conventions. 9/11 reminds us that attacks on air transport have been a chosen means of sowing conflict.

Yet peaceful use of air transport is among the most practical ties that bind the world together. Air carrier liability conventions render international air transport possible. The thesis shows how Islamic *diyah* can productively interact with these conventions. It can act as a median point at which the two extremes of the Warsaw System prescribing limited liability and the Montreal Convention prescribing unlimited liability can meet. The thesis shows as well how *diyah* can provide a useful methodology for integrating air carrier contractual and extra-contractual liability regimes.

To assist the reader unfamiliar with Islamic-*fiqh*, the thesis it is divided into two parts. The first is devoted to an introduction to Islamic-*fiqh*, and the second treats the interaction of *diyah* with the air carrier liability conventions.

ABRÉGÉ

L'auteur rédige cet abrégé le 11 septembre 2005, soit au moment du cinquième anniversaire des attaques contre le World Trade Center et le Pentagon par Al-Qaeda. Ces attaques sont perçues comme un point tournant dans les relations entre l'Islam et l'Occident. Selon l'auteur, ces attaques, les contre-attaques massives, et les conflits palestino-israéliens sans fin sont le résultat des malentendus entre l'Islam est l'Occident.

Pendant que la politique et les politiciens détruirsent les moyens de communication entre ces nations en créant un état de guerre, les universitaires devraient concentrer leurs efforts sur la construction des ponts de compréhension et de tolérance.

Cette thèse se veut une simple brique dans la construction de ce pont, si nécessaire, de communication et de connaissance entre les grandes civilisations de l'ouest et de l'est. Elle cherche à montrer comment les traditions juridiques du monde peuvent bénéficier mutuellement de leur rencontre. Elle essaie de le faire en présentant le système islamique du *diyah* pour illustrer comment ce système peut interagir avec le droit international et influencer son interprétation. L'exemple choisi est la constellation existante de conventions sur la responsabilité des transporteurs aériens. Le 11 septembre nous rappelle que une attaque contre le transport aérien a été le moyen choisi pour semer le conflit.

Pourtant, l'utilisation pacifique du transport aérien constitue un des meilleurs liens pratique pour réunir le monde. Les conventions sur la responsabilité civile des transporteurs aériens rendent le transport aérien international possible. La thèse démontre que le *diyah* islamique peut co-exister de façon productive avec ces conventions. Le *diyah* peut se positionner comme point médian auquel les deux extrêmes de la Convention de Varsovie, qui édicte la responsabilité limitée, et la Convention de Montréal, qui édicte la responsabilité illimitée, peuvent se rencontrer. Cette thèse établie également que le *diyah* peut fournir une méthodologie utile pour intégrer la responsabilité contractuelle et extracontractuelle des transporteurs aériens.

Pour aider le lecteur non familier avec le *fiqh* islamique, la thèse est divisée en deux parties. La première présente une introduction au *fiqh* islamique pendant que la et deuxième traite de l'interaction entre le *diyah* et les conventions sur la responsabilité civile des transporteurs aériens.

INTRODUCTION

Civil aviation is an area in which there is a clear need for concrete working rules of international law that can function within various legal traditions, including Islamic and western traditions. One of the major areas which need such a concrete regulatory framework is civil liability for the obvious reason that people flying between countries, including Islamic and non-Islamic countries, need to know on what basis they might be compensated for loss.

Civil liability pertaining to international carriage of passengers by air has been regulated by the Warsaw Convention of 1929[1] and its supplementary instruments collectively called Warsaw System.[2] The Warsaw Convention has received a significant number of ratifications in a manner which made it applicable to almost every state in the world including a majority of Islamic states. The Montreal Convention of 1999, which is gradually superseding the Warsaw Convention, has already been ratified by many states, including Islamic states, and has the prospect of being ratified by many more.[3] Whereas the Warsaw and Montreal Convention both address contractual liability of air carriers, the Rome Convention of 1952[4] addresses their extra-contractual liability. While it has received relatively

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[1] *Convention for the Unification of Certain Rules Relating to International Transportation by Air,* 12 October 1929, ICAO Doc. 7838 [hereinafter *Warsaw Convention*].

[2] See Section 6.1, below, for more on Warsaw System.

[3] *Convention for the Unification of Certain Rules for Carriage by Air,* 28 May 1999, ICAO Doc. 9740 [hereinafter *Montreal Convention*].

[4] *Convention on the Damage Caused by Foreign Aircraft to Third Parties on the Surface,* 7 October 1952, ICAO Doc. 7364 [hereinafter *Rome Convention*].

few ratifications, several Islamic countries, including Egypt and Algeria, have ratified the Rome Convention.

Despite ratification of the Warsaw System, the Montreal Convention and the Rome Convention [collectively referred to in this thesis as the "air carrier liability Conventions"] by Islamic states, it would be accurate to say that Islamic *Sharī'a* did not play any role whatsoever in their creation. This does not mean, however, that they are inconsistent with *Sharī'a*.

There are various reasons for such limited involvement by *Sharī'a* in this regard. A major part of the currently known Islamic world was ruled by the Ottoman Empire until it was dissolved in 1924. One cannot say that any of the post-Ottoman Islamic states had played any major role in air carriage and its regulation before the early 1960s. Until that point in time, most of the currently known Islamic states were under colonization or were newly formed.

The first Islamic state[5] to ratify the Warsaw Convention was Indonesia on the 2nd of February 1952. It was followed by Egypt, which ratified the Warsaw Convention on the 6th of September 1955 and the Hague Protocol on the 26th of April 1956. Three years later Morocco ratified the Warsaw Convention on the 5th of January 1958.

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[5] The term Islamic State is used here in its broadest meaning as it refers to states where majority of (i.e. more than 50% of its population) are Muslims.

The Kingdom of Saudi Arabia was the first state to ratify the Warsaw Convention and the Hague Protocol while applying Islamic *Sharī'a* as its law. This ratification took place on the 27th of January 1969.[6] It took a long time before most other major Islamic states, such as Iran, joined the Convention.[7] The timing of ratification of the Rome Convention was similar. In short, neither the Warsaw Convention nor the Rome Convention were negotiated with the active participation of explicitly Islamic states.

Nonetheless, most of Islamic states that ultimately ratified Warsaw and Rome were present at the Diplomatic Conference held in May 1999 for the adoption of the Montreal Convention. They did have influence on the drafting of the Montreal Convention. These States were mostly led and represented at the Conference by Saudi Arabia and Egypt. The latter lead a consortium of some 50 other African States, while Saudi Arabia represented the rest of the Persian Gulf region.

Such participation and involvement of the Islamic states in the drafting process of the Montreal Convention may be enough to suggest that *Sharī'a* was sufficiently represented at the Conference. It may also lead to a comfortable conclusion that the Montreal Convention is in essence coherent with Islamic *Sharī'a*. Such coherence, should not, however, preclude the hypothesis that the introduction of certain principles of Islamic *Sharī'a* such as the principle of *diyah*[8] in the manner

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[6] Pakistan ratified the Hague Protocol on 16/1/1961 before ratifying the Convention on 26/12/1969.

[7] Iran ratified the Convention in 1975.

[8] See Section 2.1.1, below, for more on *diyah*.

followed in this thesis, would lead to further thoughtful suggestions and enhance the Warsaw, Montreal and Rome Conventions with a third dimension in addition to the dimensions or perspectives of the Common and Civil Law traditions.

By introducing the principle of *diyah* and considering its impact on the concepts and principles relating to the liability regime adopted by the Warsaw Convention and the Montreal Convention of 1999, this thesis explores the intersection of western schools of legal thought with Islamic schools of legal thought in a domain that has clear overlapping significance — international civil aviation. The thesis seeks not only to show how Islamic-*fiqh* would work within the air carrier liability Conventions, but also to explore what light Islamic-*fiqh* can cast on their elaboration and further development.

To comprehend the role *diyah* can play, we need to keep in mind that the Warsaw Convention was created to unify the rules relating to international carriage by air. The Convention has nevertheless always been subject to paradoxical views amongst the states that are party to it. Much ink has been spilled about the reasons behind conflicts over interpretation of the provisions of the Warsaw Convention. One of the major reasons relates to the fact that soon after the inception of the Warsaw Convention, victims and their heirs realized that the amount of compensation prescribed by the Convention was insufficient. They therefore kept on trying to overcome the limits of liability as defined by the

Warsaw Convention through litigation. The struggle against liability limits led to the various amendments to the Warsaw Convention.

While the Warsaw Convention has been repeatedly described as overprotective in favour of air carriers as against passengers, the author does not endorse this statement in full. Taking into consideration the Consumer Price Index (CPI)[9] of the value of the limits of liability as prescribed by the Warsaw Convention at the time of inception, we would find that it was roughly equal to US$93,000 in 2006.[10] The thesis argues that the actual problem with Warsaw in this regard is that it did not adopt a flexible methodology, which would take into consideration any alterations to the value of currencies. Such inflexibility coincided with rapid inflation of currencies through 1930s – 1950s. Another problem the Warsaw Convention had is that it based air carriers' liability on the contract of carriage and adopted stringent formalities the absence of which would render void any agreement with regard to limits of liability. This is why a spectacular number of cases address the matter of formalities through which plaintiffs are usually trying to escape the limits of liability enjoyed by air carriers.

The seventy years of such difficulties, adjustments and developments of the Warsaw Convention resulted in the birth of the Montreal Convention. To avoid some of the problems associated with the Warsaw System, the Montreal

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[9] For more on on this topic, see United States of America, Department of Labor Homepage <http://www.bls.gov/news.release/cpi.nr0.htm> (date accessed 20/6/2006).

[10] See the Economic History Service Homepage in association with Miami University and Wake Forest University <http://eh.net/hmit/compare/> (date accessed 20/6/2006); the American Institute for Economic Research <http://www.aier.org/cgi-aier/colcalculator.cgi> (date accessed 20/6/2006).

Convention adopted a two-tier liability regime. It adopted strict liability for claims up to 100,000 Special Drawing Rights (SDRs)[11] and equipped air carriers with the right of defence for amounts exceeding 100,000 SDRs. The thesis argues that the Montreal methodology was an extreme reaction to the limits of liability adopted by the Warsaw Convention. Such methodology overly favours passengers against air carriers.

The Montreal Convention adopted another important innovation as it provides that the limits of liability as prescribed by the Convention shall be reviewed every five years. The thesis argues that in the absence of a methodology for assigning limits of liability for bodily injury, periodic review could simply open a Pandora's box.

In addition to the above, both the Warsaw System and the Montreal Convention base air carriers' liability on the contract of carriage. This has resulted in the exclusion of air carriers' liability towards those who get injured or killed in air accidents while not being aboard the aircraft. The extra-contractual liability regime adopted by the Rome Convention concentrates on the air carrier rather than on the persons suffering from the damage. To limit the liability of air carriers, it puts the persons suffering from the damage or their heirs in a pool and distributes the limited amount of compensation to them equally. As a result of

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[11] SDR's value is determined on a daily basis by averaging a basket of leading currencies (The Euro, Japanese Yen, Pond Sterling and U.S. Dollar): See the Official Website of International Monetary Fund, <http://www.imf.org/external/np/exr/facts/sdr.HTM> (date accessed: 21 January 2005).

these various regimes people killed on board an aircraft and those killed on the ground by the same accident may well be compensated differently.

Through this thesis, the author tries to shed light on the principle of *diyah* adopted by Islamic *Sharī'a* and introduce it as a median solution between the three variant regimes adopted by the Warsaw System, the Montreal Convention and the Rome Convention. One of the most important criteria of *diyah* as a median point is that it does not rely on contract but yet cannot be taken as a pure extra-contractual regime. This is so because the limits of *diyah* are not based on contract, but such limits can be raised by virtue of a contract.

To introduce the principle of *diyah*, the author devotes the first part of the thesis as an introduction to Islamic *Sharī'a*. This part introduces some basic concepts and terminology without which the rest of the thesis would be hard to comprehend. The author presumes that both readers who have deeper knowledge of *Sharī'a* and those who are unfamiliar with *Sharī'a* require disclosure of the standpoint from which the author reaches to his conclusions.

The first Chapter of Part 1 seeks to clarify the misleading interchangeable use of the terms Islamic *Sharī'a* and Islamic Law. This Chapter begins with a brief illustration of the impact of translation on such misconceptions, suggesting that transliteration would be a much better approach to reflect on the exact meaning of each of the terms. The first Chapter then elaborates on how the author

understands the terms *Sharī'a*, *Maqasid Al-Sharī'a, Islamic-fiqh, Usul Fiqh* and *Islamic Law*. These four terms become key to the subsequent analysis.

Chapter II addresses the matter of accidents and compensation under Islamic-*fiqh*. The introduction to the chapter notes that liability, be it contractual or extra-contractual, is usually covered under the subject of *damân* in conventional Islamic-*fiqh* literature. However, unlike in the conventional Western legal literature, liability arising out of wrongful death and injuries is usually addressed in Islamic-*fiqh* literature under criminal acts, *Ginâyât*.

Chapter II then elaborates on the matters of both contractual and extra-contractual liability resulting from accidents causing loss of life or bodily injuries. The first part of this chapter is dedicated to the subject of *diyah* and *irsh* as extra-contractual liability and the second part elaborates on the issue of contracts and contractual liability.

Chapter III discusses how international convention and treaties are treated according to *Sharī'a*. It provides a brief chronological presentation of the nature of the relationship between the Islamic State and surrounding States. The chapter then explores some of the most important treaties and conventions concluded by the Prophet (PBUH), as well as some others concluded by the ensuing caliphs.

These three chapters comprising Part 1 of the Thesis are designed to provide a solid ground for addressing the main subject matter of the thesis, which is the interplay between *Sharī'a* and the air carrier liability Conventions.

Part 2 begins with a review of the ordinary interpretation of the air carrier liability Conventions as informed by civil law and common law traditions. Using the analysis from Part 1 of the thesis, Part 2 then illustrates how *Sharī'a* and the ordinary interpretation can benefit from each other.

The air carrier liability Conventions evolved in a pure common and civil law environment without taking into consideration the principle of *diyah* adopted by *Sharī'a*, which asserts that wrongdoers' liability is limited but may be raised by virtue of agreement or penalty. *Diyah*, the author contends, provides a middle way between the Rome and Warsaw lower limits and the unlimited liability agreed in Montreal. Part 2 of the thesis emphasizes that because *diyah* does not rely on contract in limiting liability, it could have had an immense impact on the drafting of the Warsaw Convention. The resulting legal framework would not have evolved in the way it has today. Bearing this analysis in mind, the author formulates a number of proposals based on grounds that were not taken in consideration at the time of adopting the existing regimes.

Chapter IV of Part 2 reviews the evolution of the air carrier liability Conventions. It includes a brief discussion of each of the instruments composing the Warsaw

System and an overview of the Rome and Montreal Conventions. Chapter V delves more deeply into the Rome Convention and the extra-contractual liability of air carriers. The discussion is designed to establish a contrast with the relevant principles of Islamic *Sharī'a*. Chapter VI undertakes more detailed discussion of the nature and formation of the contract of carriage. Chapters VI sets the stage for Chapter VII, which discusses contractual liability under the Warsaw System and the Montreal Convention, and how this compares with Islamic *Sharī'a*.

It is important to emphasize that although the principle of *diyah,* which is the central concept to this thesis, originates in the Holy *Qur'ân* and Sunnah of the Prophet,[12] the author's purpose is to present the methodology of *diyah* and to apply it rather than to interpret and apply the theology behind it. The author is seeking to write as an objective jurist rather than with a view to advancing any particular theological standpoint.

It is also worth noting that the author has faced three systematic difficulties while drafting this thesis: scarcity of sources, the translation of Arabic terms, and the range of methodologies among Islamic schools of thought. Each of these is discussed briefly in turn.

Although sources on Islamic *Sharī'a* and other Islamic related topics are readily available in Arabic and English languages, and although McGill's aviation law

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[12] See Sections 5.1.1.1 and 5.1.1.2, below, for more on Holy *Qur'ān* and *Sunnah*.

library has a wide range of sources on air carrier liability Conventions, there are only three texts that consider Warsaw together with Islamic *Sharī'a*. These are:

1. An Article written by Kairas N. Kabraji entitled "Damages and forum and jurisdiction considerations – multiple jurisdictions, forum shopping and widely diverse damages awards complicate the speedy resolution of aviation claims – in an Islamic jurisdiction." [13]
2. *Air Carrier's Unlimited Liability Under the Warsaw System,* an unpublished thesis submitted in 1990 by Asmatullah Khan to the Faculty of Graduate Studies and Research at McGill University.
3. *Tahdīd Mas'ûliat Al-Naqil Al-Gawi Fi Daw' Ittifaqiyât Warsaw 1929 Wa Al-Protocolat Al- Mo'adila Laha,*[14] an unpublished Master's degree thesis written in Arabic and submitted by Mamdouh Al-Hodhaili[15] to The Faculty of Economics and Administration, Law Department at King Abdul-Aziz University in 1996.

Despite the valuable information contained in each of these texts, such a small inventory of references posed a challenge for the author. In particular, this thesis addresses subjects that are not really addressed by any of these texts. For example, none of these texts addresses the two-tier regime adopted by the Montreal Convention. None of the texts addresses the Rome Convention. Although such gaps created an extra burden on the author, they have allowed this thesis to explore uncharted territory.

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[13] (1984) IX:4 Air Law Journal 216.
[14] The title of the Thesis is translated to "Limitation of Air Carrier's Liability under the Warsaw Convention 1929 and its Amending Protocols".
[15] Mamdouh Al-Hodhaili is an IASL graduate.

As regards translation, knowing the importance and delicacy of the subject matter of the thesis, the author is very keen to present his work to an English-language audience while preserving Arabic terms in their original meaning and with an understanding of their original context. After long consideration, the author decided to use Arabic terms throughout the thesis and avoid translation as much as possible. While appreciating and understanding the difficulties resulting from adopting this approach especially for those who are not familiar with the Arabic language and Islamic terminology, the author suggests that this approach results in a more accurate and precise presentation. Indeed, Part 1 of the thesis is in large part designed to define and contextualize the terminology deployed in Part 2.

As regards Islamic methodology, the subject matter of the thesis made it almost impossible to proceed without reference to the significant diversity amongst Islamic schools of *fiqh*. However, the author tried to avoid adopting what would be called in the context of Islamic studies comparative jurisprudence (*fiqh muqâran*). A detailed comparative approach would have taken the thesis away from its central focus on the air carrier liability Conventions and would have made it unnecessarily lengthy. Bearing in mind that this is a legal text rather than a text in Islamic studies, the author has attempted to maintain in the background a comparative understanding of the doctrinal approach to the provisions of the

Qur'ân and *Sunnah* without taking the reader too deeply into diverse analyses of Islamic-*fiqh*.

Finally, it is worth noting that the thesis does not intend to magnify the differences between Islamic-*fiqh* and the western schools of law, nor does it try to make a compromise between them. Rather, it offers the perspectives of the two schools on an 'as is' basis. This is grounded on the belief that Islamic-*fiqh* and Western Schools of law have two distinct personalities despite the numerous similarities between them. Following such a methodology in the exploration of such new fields as e-ticketing offers the prospect of fruitful future studies. It can also contribute to de-mystifying the encounter of Islamic-*fiqh* and western law – something that is sadly needed in today's world.

PART 1: PRINCIPLES OF ISLAMIC LAW RELEVANT TO INTERNATIONAL CONVENTIONS ON AIR CARRIER LIABILITY

Chapter I: An Introduction to Sharī'a and Islamic Law

1.1 Introduction

In the West, the term '*Sharī'a*' often connotes a rigid code of law and is frequently used interchangeably with the term 'Islamic Law'. This has produced a bleak image of *Sharī'a*, with the rules pertaining thereto viewed as inflexible and given rise to a foreign body of law incompatible with a modern legal architecture. Such perceived detachment from contemporary international legal systems gave rise to a metaphorical barrier preventing *Sharī'a* and international laws from interacting with each other.

This thesis focuses on the interplay of *Sharī'a* and the laws pertaining thereto with the international norms of law and seeks to clarify the relationship between *Sharī'a* and air carrier liability Conventions. This introduction, therefore, has three objectives:

First: it will define some basic concepts central to the thesis as a whole, focusing specifically on the relationship between the terms *Sharī'a*, *Fiqh*, *Usûl Fiqh* and Islamic Law.

Second: it will sketch the historical foundation of Islamic Law so as to provide a basic account of the interplay of sources and traditions that characterize law in the contemporary Islamic world.

Third: it will show how Islamic law and international law interact with each other through international conventions. This will prepare the ground for the remainder of the thesis, which will turn to the specific case of air carriers' contractual and extra-contractual liability for damage caused to persons on the ground or on board as a result of international air transport and the role that *Sharī'a* and the laws pertaining thereto can play in its interpretation and implementation of international norms.

The central concept of this introduction is that although the conceptions of Islamic Law and *Sharī'a* are linked to each other like a body to the soul, they are, nevertheless, distinct, unlike how they are frequently perceived in the West.

This Chapter begins with a discussion of the impact of translation on current common misconceptions of the terms *Sharī'a* and Islamic Law. An understanding of the impact of translation is necessary to comprehend the rest of this Part.

1.2 The Impact of Translation

Paradigms are the way we visualize or conceptualize things. We interpret terms and incidents on the grounds of the paradigm we have built throughout our life experiences. This notion has even entered popular literature. For example. Stephen R. Covey asserts in *The Seven Habits of Highly Effective People*, "It is not what happens to us that affects our behaviour, it is the way we interpret it".

An incident may be interpreted differently according to the paradigms deployed by the person. Similarly, we interpret terms differently due to our diverse paradigms.

The paradigms through which the West and Muslims generally perceive each other is affected by their different cultures, the problem of inaccurate or literal translation, the complex historical backdrop and the conflicting shared desire to lead the world. Sadly, perhaps, the relationship between Christianity and Islam can be analogized to a sports game between two highly competitive teams in which the triumph and celebrations of one team means that the match was a disaster for the other.[16]

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[16] See generally K. Armstrong, *Muhammad: A Biography of the Prophet* (New York: HarperCollins, 1992) at 22-44; R.W. Southern, *Western views of Islam In the Middle Ages*, (Cambridge: Harvard University Press, 1962) at 21. See also E. Said, *Orientalism* (New York: Random House, 1978); R. Fletcher, *The Cross and the Crescent: Christianity and Islam from Muhammad to the Reformation* (NewYork: Viking Penguin, 2004).

Translation plays a major role in exposing cultures to each other. When it comes to translation from one semantically wealthy language like Arabic or French to another semantically wealthy language like English, literal translation risks influencing mutual understanding.

It is beyond doubt that the roots of the contemporary image of Islam and Muslims in the West is linked to the effects of translation. Many terms in a language convey a hue of inspiration that the corresponding translation cannot transmit. Rather, a translation may infer a meaning that is never intended in the original text. This hue of inspiration may be termed *metaphor.*[17]

A metaphor, like Adam Smith's "invisible hand", may sometimes create a translation problem, since literal rendering hardly captures the functional significance of the original text.[18] Translation can get close to the image of a specific term. In the Warsaw Convention, for instance, the French term *"établissement"* of Article 28 is translated as "*place of business*" although the two terms do not precisely correspond, since the French connotes the business itself as well as the main meaning – its location.

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[17] For a detailed account of the role of metaphor in law, see M. Prémont, *Tropismes du droit : logique métaphorique et logique métonymique du langage juridique* (Montréal : Liber, 2003).

[18] S.S. Ali, "Euphemism In Translation: A Comprehensive Study of Euphemistic Expressions in Two Translations of The Holy *Qur'ān*" (1999) XLIII:2 The Islamic Quarterly 100 at 100.

The usual translation of the Arabic term *Sharī'a* as Islamic Law[19] inspires and emphasizes the link between religion and law, a concept that is interpreted differently in the West.[20] In the West, the relationship between religion and law is of an "either or" nature. As Winnifred Fallers Sullivan very accurately describes it:[21]

> [a]t the same time, however, while acknowledging the tremendous influence [religion and law have] had in shaping the other in [the United States] and in the Western tradition generally, the two are caught in opposition. It is an opposition that might be traced in the Western conversation from Paul's preoccupation with the opposition of faith and law...

In this context, no doubt a term like Islamic Law would carry a negative connotation.[22]

On the other hand, Muslims' faith is that God is the only true lawgiver and consequently the rejection of the link between Law and Religion is inherently inapplicable.

It is essential to consider diverse socio-ethical contexts when translating from one language to another, especially exposure to other civilizations is

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[19] See generally, I. Goldziher, *Introduction to Islamic Theology and Law*, trans. A. Hamori & R. Hamori (Princeton: Princeton University Press, 1981); W.M. Watt, *Islamic Philosophy and Theology*, (Edinburgh: Edinburgh University Press, 1985).

[20] See Sections 1.3 & 1.6, below, for more on this topic.

[21] W.F. Sullivan, "A New Discourse and Practice" in S. M. Feldman, ed., *Law & Religion: A Critical Anthology* (New York and London: New York University Press, 2000) 35 at 45.

[22] See generally *Lemon* v. *Kurtzman* 465 U.S. 668, 687-88 (1971); *County of Allegheny* v. *American Civil Liberties Union* 492 U.S. 573, 592-94 (1989); *Lee* v. *Weisman*, 505 U.S. 577 (1992); *Employment Division; Dept. of Human Resources* v. *Smith* 494 U.S. 872, 890 (1990).

concerned. [23] Transliteration often offers a rich solution to the problems associated with literal translation. For example, in the early days of the Islamic Righteous Caliphate, Muslims adopted Persian terms with an Arabic accent. From there, words like *Diwan* and *Eiwan* entered the Arabic dictionary. Of course, this has also occurred in the West. For example, the Arabic name *Ibn Rushd* was taken up in European languages as *Averroes* and the name *Ibn Siena* became *Avicenna*. Nevertheless, some words are transliterated after being translated, and in such cases transliteration may cause an even more complicated problem than translation. A good example is again the term *Sharī'a* which is labelled as Islamic Law. The generalized labelling of *Sharī'a* as Islamic Law has led to a sense of confusion in the literature with respect to the actual meaning of the two terms. The following excerpts attest to this:

> The Sharia'h, as Islamic law is called in Arabic, is the complex of divinely revealed rules which the faithful Muslim must observe if he seeks to perform the duties of religion. The crucial difference between Islamic and Western law is immediately apparent from this description. The unique ground of validity of Islamic Law is that it is the manifested will of the Almighty: it does not depend on the authority of any earthly lawgiver. The consequences of these differences are manifold. One of these consequences is that Islamic Law is in principle immutable.[24]

> ...[A] new compromise must be found between the basic and categorical demands of the Islamic region and the need in a changing world for law which is capable of change[25]

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[23] M.I. Okpanachi "Islam And the English Language: Between Liguistic Imperative & Cultural Contradiction" (1999) XLIII:2 The Islamic Quarterly 114 at 117.

[24] K. Zweigert & H. Kotz, *Introduction to Comparative Law,* trans. T. Weir, vol. 1, 2nd ed. (Oxford: Clarendon Press, 1987) at 373.

[25] *Ibid.* at 382.

> The point was eventually accepted by the whole community in the form of the doctrine that all social and political life must be based on the Shari'a or revealed divine law.[26]
>
> [H]e memorized the *Qur'ân* and he studied the Shari'a or revealed law.[27]

In addition to the examples above, in his book *Introduction to Islamic Theology and Law*, Iganz Goldziher mixes the terms *Law* and *Sharī'a* in a manner that leaves no room for uncertainty that both are the same despite the fact that he sometimes refers to *Sharī'a* as the "Religious Law".

In contrast to such labelling, Arabic Islamic legal literature usually conducts comparisons between the terms *Sharī'a* and *Law* considering the latter as departure from the path of God to the effect of calling it *Al-Quanûn Al-Wad'ī* or the human made law.[28]

After the decolonization era, in the second half of the 20th century, some Muslims denounced the application of *Sharī'a* in courts and considered it a backward practice. They opined that the application of *Sharī'a* is the main reason for Arab States not keeping pace with the advancement in the West, where progress is linked to its secular methodology. Such trends caused these Muslims to be

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[26] See Watt, *Supra* note 19 at 12.

[27] See *ibid* at 73.

[28] See generally A. Owdah, *Al-Tashrī' Al-Ğina'e Al-Islami Muqāranan Bel-Quanūn Al-waḍ'e*, 8th ed. (Beirut: Al-Risalah, 1986) at 4 – 76; M. Al- Aqeel, *Al-Ḥaq Al-Tabī'e Wa Quawanīnuh* (Ibn Hazm, 1996) at 37; A.S. Al-Humaid, *Al-Tashrī' Al-Ğina'e Al-Islami: Baḥth Fi Al-Tashrī' Al-Ğina'e AL-Islami Al-Muqāran Bel-Quawanīn Al-Waḍ'eyah*, 4th ed. (Ṭwaiq, 1993); S. Yaḥya & M. Omar & N. Sa'ad, *Mabāde' Al-Quanūn: Al-madkhal Ilā Al-Quanūn Wa Nazariyat Al-Iltizam*, 2nd ed. (Okaz, 1990) at 19; See contra A. Al-Sanhori, *Masader Al-ḥaq Fi Al-Fiqh Al-Islami* (Beirut: Dar Iḥyaa' Alturath AL-Arabi, 1997).

labelled as seculars, Westernizers or even as non-believers. [29] Indeed, some Islamic governments, in order to keep up with the perceived advancement of the West, have adopted secular legislation that may sometimes not be in accordance with the main provisions and basic principles of *Sharī'a*.

Thus, a battle of terminology is inevitable without an understanding between the two sides. The diverse paradigms need to meet on neutral ground, so to speak. Hence, the author suggests that it is crucial to understand the terms employed in this thesis as they are defined below, in order to convey the arguments of the thesis with some precision.

The main terms to reflect upon are *Sharī'a*, *Maqâsid* Al-*Sharī'a*, *Fiqh*, *Usûl* Al-*Fiqh*, Law and Islamic Law. The following explanations will attempt to carry the transliterated word to the reader with its hue, avoiding any direct translation. To understand the metaphor of these terms, an elaboration on what the author calls Basic Philosophy is needed.

1.3 Sharī'a

In the archaic Arabic language, the term *Sharī'a* means a "water hole" (where animals gather to drink) or, alternately "the straight path". In Islamic context, however, there is a very wide range of definitions. One possible definition, which

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[29] See generally M.Qutub, *Wāqe'onā Al-Mo'āṣer*, 3rd ed. (Almadinnah, 1990) at 324 –351.

the author does not endorse, is that the term *Sharī'a* refers to the sum total of divine laws, which were revealed to the Prophet Mohammad PBUH, which are recorded in the *Qur'ân*, and are derived from the prophet's divinely guided lifestyle (called the *Sunna*).[30] Another definition that the author does not endorse refers to *Sharī'a* as the totality of divine categorizations of human acts.[31] These two foregoing definitions mix together *Sharī'a*, *Fiqh* and Law.

A better definition refers to *Sharī'a* as the creed, actions of worship, behaviour, transactions and socialization systems in its various aspects that God had prescribed to his servants for the sake of their welfare and happiness in the earthly life and the heavenly life.[32] This definition keeps a distinction between the three overlapping terms *Sharī'a*, *Fiqh* and Islamic Law. It, moreover, clarifies that *Sharī'a* is not a Code of Law but, rather, a manifestation of generic forms to attain welfare and happiness in our earthly and heavenly lives. This definition also denotes three different aspects of human lives that *Sharī'a* covers; namely creed, acts of worship and acts of transaction.

The term *Sharī'a* and its derivatives; *Shara'a* and *Sher'atan* are mentioned in the *Qur'ân* once each in three different verses:

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[30] B. Philips, *The Evolution of Fiqh: (Isalmic Law & The Madhabs)*, 3rd ed. (International Islamic Publishing House, 1999) at 1.

[31] B. G. Weiss, *The Spirit of Islamic Law* (Athens, Georgia 1998) at 17.

[32] M.K. Al-Qattan, *Tareekh Al-Tashrī' Al-Islami*, 2nd ed. (Maktabat Al-ma'āref Lelnashr Waltawzī', 1996) at 3.

> ...we have ordained a law and assigned a path (*Sher'atan*) for each of you...[33]
>
> He has ordained (*Shara'a*) for you the faith which He ordained on Noah, and which We have revealed to you; which We enjoined on Abraham, Moses and Jesus saying: 'Observe the Faith and do not divide yourselves into factions.[34]
>
> And now we have set you on the right path (*Sharī'a*). Follow it, and do not yield to the desires of ignorant men[35]

Such references to *Sharī'a* as the right path betokens its importance for Muslims, as the right path of life. It also implies its comprehensiveness as a system of life. This right path is the path Muslims recite seventeen times a day in their daily prayers calling upon God "guide us to the straight path".[36] Besides, Muslims believe that the reference to *Sharī'a* as "water hole" entails its ability to satisfy various human needs across beliefs and time. To evaluate the comprehensiveness of *Sharī'a*, it is not wrong to say that Islam means submission to God, and *Sharī'a* is the divine delineation of the life of submission.[37]

Sharī'a combines three interacting aspects of human life, the creed "'*Aqīdah*", acts of worship "'*Ibâdât* (pl.) '*Ibâdah* (sing.)" and transactions "*Mu'âmalât* (pl.)

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[33] The Holy *Qur'ān* 5:48.

[34] The Holy *Qur'ān* 42:13.

[35] The Holy *Qur'ān* 45:18.

[36] The Holy *Qur'ān* 1:6.

[37] B. G. Weiss *supra* note 31 at 18.

Mu'âmalah" (sing.).[38] The broad scope of *Sharī'a* makes it impossible to compare with the term Law as used and understood in much contemporary legal terminology. If law is thought of as the body of binding rules for a community, *Sharī'a* includes law and much else besides law, and it is misleading to equate *Sharī'a* and law.[39]

Whilst *'Ibâdât* and *Mu'âmalât* are the subject matter of *Fiqh* and *Usûl Fiqh* as is discussed below, the branch of knowledge that addresses *'Aqīdah* is called *Tawhīd*, or "science of monotheism". It studies the aspects of Muslims' beliefs in God. Its main theme is to stop Muslims from attributing to God what does not belong to Him and from worshiping gods or goddesses, along with or other than God Himself. *Tawhīd* is based on the literal interpretation of the stipulations of *Qur'ân* and Sunna. Its main objective is to purify the understanding of the Islamic belief that there is no god but God. While *Tawhīd* tries to identify God on the grounds of the *Qur'ân* and Sunna (*Naql*), Islamic philosophy and *Kalâm*[40] tries to do the same through mental exercise (*'Aql*). Philosophy and *Kalâm* are to a great extent responsible for dividing Muslims into sects like *Mu'tziliet* and *Asha'eriet*.[41]

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[38] See generally I.M. Al-Shatibi, *Al-Muwāfaqāt Fi Uṣul Al- Sharī'a,* vol. 4 (Beirut: Al-Maktaba Al-'Aṣriyah, 2002). Arabic terms are hereafter sometimes transliterated in singular (sing.) and plural (pl.) forms since these forms are often quite dissimilar.

[39] B. G. Weiss, *supra* note 31 at 17.

[40] Lexically *Kalām* means "talk" but *'Ilm Al-kalām* or the science of *kalām* means that part of Islamic knowledge which deals with the philosophical aspects of Islamic theology.

[41] See I, Goldziher, *supra* note 19 at 85 and 167 – 229.

As regards *'Aqīdah* (creed), the foundational text of *Sharī'a* is detailed, specific and complete and does not accept any additions or alterations. A major part of the immense literature relating to *Aqīdah*, however, is concerned with arguments between the *'Aql* and *Naql* schools concerning heart purification and philosophizing on the ramifications of the *Sharī'a*'s stipulations in this regard.

The author suggests that one of the main causes of the confusion between *Sharī'a* and Law is that Muhammad (PBUH), besides being the Prophet, was the political leader and ruler of his day. This meant that he had to legislate, and although the rules were unwritten, they were to be followed by his people. Bearing in mind that *Sharī'a* is understood to be the totality of the foundational stipulations of the *Qur'ân* and the Prophet, *Sharī'a* and Law were in tandem as one concept throughout the Prophet's life.

After the death of the Prophet, *Sharī'a* and Law had to detach. The Caliph had to legislate for people according to the intentions of *Sharī'a* or *Maqâsid* Al-*Sharī'a*, a subject addressed by the following section.

1.4 *Maqâsid Al-Sharī'a*

The term *Maqâsid* (pl.) *Maqsûd* (sing.) means "intention behind an act or word". In Islamic context, although *Maqâsid Al-Sharī'a* is the subject matter of an

elaborate literature,[42] Islamic jurists including Al-Shatibi did not pay a great deal of attention to its definition. Nevertheless, it may be best defined as the reasons or rationale for which the foundational text of *Sharī'a* was revealed.[43]

The study of *Maqâsid Al-Sharī'a* relates directly to the question of whether the foundational text of *Sharī'a* (i.e. *Qur'ân* and *Sunna*) has a rationale behind it or, rather, whether it is a series of dos and don'ts beyond human reasoning to which obedience is due as an act of pure religious worship and submission to God.

The majority of the *Qur'ânic* verses and Sunna provisions that lay down a generic rule or a specific law onto humans identify a rationale behind the rules. For example, with regard to *'Ibâdât* (acts of worship), after prescribing prayer, the *Qur'ân* states that the rationale behind prayer is that "[p]rayer fends off lewdness and evil,"[44] and after prescribing fasting (*Sawm*) for the month of Ramadan, the *Qur'ân* states that, "perchance you will guide yourselves against evil".

Another example is the general principle that "God does not wish to burden you"[45] and the correlating prescriptions that "God wishes to lighten your burdens

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[42] See generally I.M. Al-Shatibi, *supra* note 38; M.I. Al-Boukhary, *Al-Adab Al-Mufrad* (Beirut: Dar Al-Basha'er Al-Islamiyyah, 1409/1989); M.M. Al-Ghazali, *Al-Mustasfa Fi 'Ilm Al-Usūl*, 2vols. (Cairo: Al-Maktaba Al-Amiriyya, 1324/1906); A.A. Al-Juwaini, *Al-Burhan fi Usul Al-Fiqh* (Cairo: Dar Al-Anssar, 1400/1980).

[43] A. Al-Raysooni, *Nazariyat Al-maqāsid Ind Al-Imam Al-Shatibi* (Al-Dar Al-Alameyah Lelketab Al-Islami, 1992) at 7.

[44] The Holy *Qur'ān*, 29:45.

[45] The Holy *Qur'ān*,5:6.

for human was created weak"[46] and "God does not charge a soul with more than it can bear."[47] To these is jointed joined as an explanation of the Prophet (PBUH) "when I ordain upon you an action, you should adhere to it only within the limits of your personal ability." The message is that at both the subjective and objective levels, laws should not burden people with what they can not bear like, for example, heavy taxes.

Another important example in the field of *Mu'âmalât* is verse 2:282, the longest verse of the *Qur'ân*, which reads:

> O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allâh has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allâh, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable to dictate for himself, then let his guardian dictate in justice. And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her. And the witnesses should not refuse when they are called (for evidence). You should not become weary to write it (your contract), whether it be small or big, for its fixed term, that is more just with Allâh; more solid as evidence, and more convenient to prevent doubts among yourselves, save when it is a present trade which you carry out on the spot among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract. Let neither scribe nor witness suffer any harm, but if you do (such harm), it would be wickedness in you. So be afraid of Allâh; and Allâh teaches you. And Allâh is the All-Knower of each and everything.[48]

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[46] The Holy *Qur'ān*,4:28.

[47] The Holy *Qur'ān*,2:286.

[48] The Holy *Qur'ān*, 2:282.

This verse encourages people to put their agreements in writing and makes an exception for commercial transactions due to their nature. [49] It is important, however, to notice that although the verse touches on the means of writing and witnessing, it nevertheless emphasizes that they are not prescribed as the only means of evidence but rather as examples, which could be replaced by any other means that have similar or higher evidentiary values.[50]

The rationale behind this verse is the attainment of the three values of "It is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves. "

As such, *Sharī'a* has a rationale, will and intention behind its provisions (*Maqâsid Al-Sharī'a*). In his valuable book *Al-Mowâfaqât*, The Andalusian jurist Abu Ishaq Al-Shatibī, concludes that *Sharī'a* is ordained by God to attain the welfare (*Masâleh* (pl.) *Maslaha* (sing.)) of people. The attainment of this welfare is achieved through the prohibition of that which is harmful and the promotion of that which is beneficial to people in this world and in the hereafter.[51] This welfare is of three categories, namely *Darûrât* (pl.) *Darûrah* (sing.) *viz.* indispensable or vital, *Hâgiyât* (pl.) *Hâgī* (sing.) *viz.* necessary and *Tahsiniyât* (pl.) *Tahsinī* (sing.) *viz.* (complementary or favouring improvement).

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[49] When the verse is read with the one that directly follows it, the conclusion is that it is encouraging rather than obliging.

[50] This is deduced from the part of the verse that stipulates "it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves".

[51] See W.B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Uṣul al-fiqh* (Cambridge, 1999) at 89.

Belonging to *Darûrât* are, respectively, the protection of one's religion (*Hifz Al-dîn*), protection of life (*Hifz al-nafs*), protection of private property (*Hifz Al-Mâl*), protection of mind (*Hifz Al-'Aql*) and protection of offspring (*Hifz al-Nasl*). Most of the stipulations of the foundational text in relation to these five central points of human life are detailed and specific. To protect lives, for example, murder is sanctioned by the most severe penalty: execution. Likewise, to protect the mind, intoxication by wine or other substances is prohibited. Furthermore, as the need to protect one's life is more vital than the need to protect one's mind, if consumption of wine is the only means to protect the life of a person, this would be permitted within the limits of achieving the aim of protecting life.

Hâgiyat are the substances or means needed to render *Darûrât* possible. *Hâgiyât* are needed to ease humans' life, keep it in order and lighten their burdens and difficulties.[52] We can differentiate between *Darûrât* and *Hâgiyat* by determining whether the existence of a substance, rule, or norm would or would not be linked directly to the five central points belonging to *Darûrât*. An example of *Hâgiyat* is that lease of accommodation must be possible, since a prohibition of this would force people to buy, which may not be affordable to everybody. Thus, the permission of the lease is necessary to ease the life and lighten burden.

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[52] See A.M. Al-Garny, *Al-Mukhtaṣar Al-waǧīz fī Maqāṣid Al-tashrī'* (Jeddah: Al-Andalus Al-khddraa', 1999) at 35.

Tahsinât are what would enhance and improve human lives. For example, ticketing may be considered necessary (*hâgiyat*) for travel but electronic ticketing may be considered an enhancement (*tahsiniyat*).

It may thus be suggested that *Sharī'a* has a horizontal and vertical set of categories. Horizontally it is categorized according to *'Aqīdah*, *'Ibâdât* and *Mu'âmalât,* which characterize the nature of the norms, and vertically it is categorized according to *Darûriyat*, *Hâgiyat* and *Tahsiniyat*, which characterize the intention behind the noms.

It is the author's opinion that *Maqâsid Al-Sharī'a* is very much the spirit of the foundational text which inspires the learned Jurists' intellectual efforts to deduce or found rulings upon which the foundational text is silent or not explicit. Such intellectual efforts are called *Igtihad* which is the essence of the evolution of Islamic-*fiqh.*

1.4.1 Igtihad and Ikhtilaf

Semantically, *Igtihad* means 'utmost-effort'. [53] Within Islam, *Igtihad* is the intellectual activity or the reasoning of the legal scholars, whose teachings are endowed with religious (or quasi-religious) authority. [54]

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[53] R. W. Maqsood, *A Basic dictionary of Islam* (Goodword Books, 1999) at 103.

[54] W. B. Hallaq, *supra* note 51 at 15.

Igtihad falls into two categories. First it is the application of *Igtihad* to an ambiguous, absolute or general provision of the foundational text. Second is the application of *Igtihad* to elaborate a rule in matters about which the foundational text is silent.[55] There is no room for *Igtihad*, on the other hand, when it comes to a definite and explicit ruling of a foundational text. For example, there is no room for *Igtihad* to the rule that prayer is obligatory.

Whereas *Igtihad* is based on the intellectual capabilities of the scholars, it is possible that the opinion of scholars may vary. It is even possible that a scholar may adopt an opinion in a case, which may vary or be repudiated subsequently. Imam Shafi'ī, for example, produced two *Mad'hab* or schools of Islamic-*fiqh* of which one was adopted while being in Iraq and the other was adopted when he moved to Egypt.

Although *Igtihad* is the core of the evolution of Islamic-*fiqh*, it nevertheless has had a period of suspension when some scholars thought that the gate of *Igtihad* was closed. This period of suspension affected the evolution of Islamic-*fiqh* in a manner that resulted in its contemporary image in the West, which this thesis tries in part to reverse.

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[55] See A. Khallaf, *Maṣāder Al-tashrī' Al-Islamī Fī Ma La Naṣ Fīh*, 5th ed. (Dar Al-qalam, 1402-1982) at 7 – 8.

For example, according to Prof. A. M. Serajuddin:[56]

> The principle of *Igtihad* had a great role in shaping and determining Islamic Jurisprudence in its formative phase. Any expert jurist was then free to go to the roots of *Sharī'a* and interpret them himself. With the crystallization of legal thought and setting up of the schools of law the scope of igtihad was gradually curtained by the beginning of the 10th century there was a consensus among the jurists that the principles of law as settled by recognized schools were sacrosanct and immutable and that there was no longer any necessity for new legal principles to be deduced. This closure of the gate of *Igtihad* had sad results. On account of this, Islamic law and society largely sterile and stagnant for the next one thousand years and the great age of science and technology which revolutionized men's thinking and action quietly passed the Muslim societies different parts of the world by.

On the contrary, the author suggests that the door of *Igtihad* was open to jurists at the order of God. Besides, Sunna attempts to open wide the door of *Igtihad*, as is made clear in the famous *Hadīth* (the reported sayings and deeds of the Prophet (PBUH)) of Mu'âdh Ibn Jabal, the companion of the Prophet, who was sent by the Prophet (PBUH) as an ambassador to Yemen. In this *Hadīth*, Mu'âdh got the approval and commendation of the Prophet (PBUH) when he decided to conduct his personal *Igtihad* "*Agtahidu ra'yī*" if he faced a situation about which the *Qur'ân* and the *Sunna* are silent. In addition, it is reported that the Prophet (PBUH) ordained "If a *Mugtahid* is right he receives two rewards, and if he is mistaken he receives one reward".

Nevertheless, a *Mugtahid* (a jurist who conducts *Igtihad*) has to comply with certain conditions and qualifications to conduct *Igtihad*. A *Mugtahid* has to have a

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[56] A. M. Serajuddin, *Shari'ā Law and Society: Tradition and Change in south Asia* (Oxford: Oxford University Press, 1999).

comprehensive knowledge about the textual sources (foundational text of *Sharī'a*) pertaining to the matter in question. Furthermore, a *Mugtahid* should be acquainted with the Arabic language in a manner that enables him or her to understand the reflections of the textual sources according to which *Igtihad* should be conducted.

It is worth noting that the admission of *Igtihad* gives rise to the possibility of *Ikhtilaf* (disagreement among the scholars). *Ikhtilaf* is a natural offspring of giving the lead to human reasoning in interpreting the foundational text or elaborating rules about which the foundational text is silent.

Imam Shafi'ī in his valuable book *Al-Risala* replied to the question of the permissibility of *Ikhtilaf* among the Islamic jurists as follows:

> On all matters concerning which GOD provided clear textual evidence in His Book or a Sunna uttered by the Prophet's Tongue, disagreement among those to whom these texts are known is unlawful. As to matters that are liable to different interpretations or derived from analogy, so that he who interprets or applies analogy arrives at a decision different from that arrived at by another, I do not hold that disagreement of this kind constitutes such strictness as that arising from textual evidence[57]

Permissible *Ikhtilaf* is the outcome of the variation in the methodology of deduction and *Usûl Al-Fiqh* followed by the various *Mugtahid* in addition to the natural and cultural variation in their intellectual capabilities. Disagreement may

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[57] Imam Al-shafi'i, *Al- Risala*, Trans. Khadduri, M., (Baltimore: Johns Hopkins Press, 1961) at 334.

also result from the divergence among jurists in the ranking and prevalence of the sources of jurisprudence other than the *Qur'ân* and *Sunna*. [58]

This kind of *Ikhtilaf* is a source of great richness in Islam and reflects the capacity of Islamic *Sharî'a* to accommodate all nations, races, cultures and advancements of human beings. *Sharî'a* is not only a manifestation of orders and laws prescribing actions to abide by or to refrain from. Rather *Sharî'a* provides us with a framework of intentions and goals and gives scholars all the tools needed and the freedom necessary in order to draw their own portrait of laws that reflect those intentions and goals.

1.5 Fiqh and Usûl Fiqh

As noted previously, *Sharî'a* intervenes in Muslims' lives in three aspects namely *'Aqîdah*, *'Ibadât* and *Mu'âmalât*. It will be recalled that *Tawhîd* is the part of the knowledge that deals with *'Aqîdah* or creed.

As an offspring of the belief in submission to God, Muslims would want to make sure that the other two aspects of their life, *'Ibadât* and *Mu'âmalât* also are in line with God's wishes. *Fiqh* and *Usûl Fiqh* are responsible for this conformity and purification.

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[58] See generally A. Mohamed, "Principles of Islamic Jurisprudence According to Imam Muhammad Idris Al-Shafi'i" (1999) XLIII:4 The Islamic Q. at 279-287.

Fiqh literally means "the true understanding of what is intended" *Usûl Fiqh* means the roots of this understanding. In their totality, *Fiqh* and *Usûl Fiqh* compile the Islamic Jurisprudence. In Islamic terms *Usûl Fiqh* refers to the part of jurisprudence that is concerned with deducing Islamic rules from their sources.[59] *Fiqh* is the body of rules thereby deduced as well as the part of Jurisprudence that is concerned with the articulation of actual rules as deduced by the jurists.[60]

All humans' acts whether they come within *'Ibadât* or *Mu'âmalât* are labelled under one of five categories, namely *Wagib* (obligatory), *Mandûb* (recommended), *Mubâh* (permissible), *Makrûh* (repugnant) and *Harâm* (prohibited). The role of Islamic jurists or *Fuqahâ'* (pl.) *Faqîh* (sing.) is to ascribe human acts to one of these categories in order to ensure its classification according to *Sharî'a*. This role played by the *Faqîh* is called *Fatwa*. *Fatwa* is not so much a law as it is an interpretation. *Fatwa* is,best understood as a personal opinion of a jurist or group of jurists with which a person may comply. Jurists build their opinions on the grounds of the *Qur'ân* and *Sunna* in addition to other sources namely *Igmâ'* (consensus), *Qiyâs* (reasoning by analogy) and some other means such as *Masâleh Mursalah*, *Istihsân*, and *Shar'o-Man-Qablanâ* which are the subject matter of *Usûl Al-Fiqh* discussed in the next subsection

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[59] Y. Al-Qaraḍāwī, *Madkhal Lederāsat Al-Shar'īa Al-Islamiyah*, 2nd ed. (Mo'assasat Al-Resālah, 1997) at 10.

[60] B. G. Weiss, *supra* note 31 at x.

We may observe that *Fiqh* was never intended to look the way it does today. When the first few generations of jurists appeared, they were responding to the questions of their contemporaries and studying their deeds and actions for the purpose of ensuring conformity with what God has ordained. As such, the methodology through which *Fiqh* was established and flourished was to describe and respond to factual circumstances rather than to apply any general theory. The first few manuscripts of Islamic-*fiqh* attest to this. Imam Shafi'ī wrote his wonderful manuscript *Al-Risâlah* as a reply message to the caliph. Similarly, Muhammad b. Alhasan Al-Shaiybânī wrote his *Al-Kharâg* as a reply to questions raised by the caliph Harûn Al-rashīd. The manuscripts of *Fuqahâ'* until the third generation, such as Imam Malik, Ibn Gurayg, Awzâ'ī, Sufyân Al-thawrī and Hammâd ibn Salamah concentrated on manifestation and verification of *Hadith* rather than *Fiqh.*[61] Even Al-Muwata', the famous book of Imam Malik which reflects some of his *fatwa* is considered as a book of *Hadīth* rather than a book of *Fiqh*, since it is essentially an interpretation of certain sayings of the Prophet (PBUH)..[62]

Although this illustration shows that *Fiqh* and *Sharī'a* are not the same, it is wise nevertheless to emphasize that *Sharī'a* and *Fiqh* are not completely separate or independent of each other in the sense that *Fiqh* is itself an offspring of *Sharī'a.*

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[61] See M. K. Al-Qattan, *supra* note 32 at 287.

[62] *Ibid.*

As an example of the interaction between *Sharī'a* and *Fiqh*, the *Qur'ân* refers to Muslims in one verse, as "...those who conduct their affairs by mutual consultation..."[63], and in another verse an order is given to the Prophet, the superior example for all Muslim rulers, to "...consult them in the affairs..."[64] Thus, as a rule of *Sharī'a*, Muslim rulers or governments should seek consultation before arriving at decisions. Nevertheless, the methods and procedures of consultation are to be devised by the means of *Fiqh* in a manner that accords with the intention of the *Qur'ânic* verses (*Maqâsid Al-Sharī'a*). Consultation may therefore take place in a parliament, congress, *Maglis Al-shûrâ* (board of consultation) or through any means that accords with both the intention of *Sharī'a* and the advancement of humanity.

The basic principles of *Usûl Fiqh* were founded by Imam Shafi'ī.[65] It flourished as a science later however, when the followers of a particular school of *fiqh* or *madhab* started studying the methodology followed by the founders of the *madhab* they follow.

Usûl Fiqh is the main tool for Islamic jurists to conduct *Igtihad*, *viz.* the intellectual activity or the reasoning of the legal scholars, whose teachings are endowed with

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[63] The Holy *Qur'ān*, 42:38.

[64] The Holy *Qur'ān*, 3:159.

[65] See M. K. Al-Qattan, *supra* note 32 at 369.

religious authority.[66] It manifests the sources of Islamic-*fiqh* and the methodology through which they should be understood and evaluated.

One point should be emphasized here before discussing the sources of Islamic-*fiqh* in somewhat greater detail. Although Islamic-*fiqh* was established and flourished with very powerful links to theology, it has now developed as an independent legal methodology. It is thus available to be deployed in the broadest range of social contexts, including air carrier liability, which is the subject-matter of this thesis.

1.5.1 The Sources of Islamic-*Fiqh*

The sources of Islamic-*fiqh* are of two categories; divine and human.[67] The first and most important is the revealed divine sources, namely *Qur'ân* and *Sunna*. The second is the other sources which include *Igmâ'*, *qiyâs* (Reasoning by analogy), *Istihsân* (Juristic preference) and *Istishâb* (Presumption of continuity).[68] The second set of sources is not detached however, from the revealed sources since they rely on them. Nevertheless they are based on the reasoning and understanding of the human intellect applied to the divine sources. The author, however, is of the opinion that the second category of sources might best be

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[66] See W. B. Hallaq, *supra* note 51 at 15.

[67] For a rich discussion of the sources of Islamic-*fiqh*, see Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford U. Press, 2000) at 159-162.

[68] See M.H. Kamali, "Sources, Nature and Objectives of Sharee'aa" (1989) XXXIII:4 Islamic Law Quarterly 219 at 219.

understood as methodologies for deducing a ruling from the foundational text rather than true sources of *Fiqh*.

1.5.1.1 The Holy *Qur'ân*

The *Qur'ân* is the primary and most important source of Islamic-*fiqh*. It is considered by Muslims to be the divine words of GOD (ALLÂH) which were revealed by the Angel Gabriel to Muhammad (PBUH) and which have been conveyed to us by continuous testimony (*Tawâtor*) of worship to ALLÂH through the recital of its verses and the adherence to its rules.[69]

It was revealed in verses and portions in response to the needs of the Islamic community or nation (Ummah) in the days of the Prophet. The first verses or *Ayah* (pl.) *Ayat* (sing.) revealed to the Prophet (PBUH) were

> "Read! In the Name of your Lord Who has created (all that exists). He has created man from a clot (a piece of thick coagulated blood). Read! And Your Lord is the Most Generous. Who has taught (the writing) by the pen. He has taught man that which he knew not."[70]

The last verse of *Qur'ân* was revealed twenty-three years later. It states

> "...[T]his day I have perfected your religion for you, completed my favour upon you and have chosen for you Islam as your religion..."[71]

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[69] See M. K. Al-Qattan, *supra* note 32 at 39.

[70] The Holy *Qur'ān*, (96:1-5).

[71] The Holy *Qur'ān* (5:3).

The *Qur'ân*, is composed of thirty *Juzo'* (parts), 114 *Sûrah* (Chapters) and 6,235 *Âyât* (Verses). There are some 500 *Âyât* in connection with Legal matters.[72] These *Âyât* are called *Âyât Al-Ahkâm* (Verses of rulings). The vast majority of other *Âyât* deal with moral and religious aspects of *Sharī'a* in addition to devotional matters and remembrance of the hereafter. Therefore the *Qur'ân* refers to itself as *Hudâ* (the book of Guidance) and *Dhikr* (The book of remembrance) rather than as a code of law.[73] In this regard, it is noteworthy that the verses of the *Qur'ân* are a source of legislation and must not be read in isolation from each other. On the contrary, each and every verse of the *Qur'ân* should be read as an integral part of one whole. Many of the *Qur'ânic* stipulations are interpretations of each other and some other verses are interpreted by *Sunna*.

1.5.1.2 The *Sunna* (Tradition of the Prophet)

Sunna is what is reported and conveyed to us from the sayings, actions and approvals of the Prophet PBUH.[74] The authority of Sunna as a source of Islamic-*fiqh* is based on the *Qur'ân* which provides that:

> Say: obey Allah and obey the messenger, but if you turn away, he (Messenger Muhammad PBUH) is only responsible for the duty placed on

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[72] See M.H. Kamali, *supra* note 68 at 219.

[73] *Ibid.* at 219.

[74] See Y. Al-Qaraḍāwī, *supra* note 59 at 44.

him (i.e. to convey Allah's message) and you for that placed on you. If you obey him, you shall be in the right guidance. The Messenger's duty is only to convey the message in a clear way.[75]

"... [A]nd whatsoever the messenger (Muhammad PBUH) gives you, take it; and whatsoever he forbids you, abstain from it..."[76]

Sunna interacts with the *Qur'ân* in various manners. It may reiterate and incorporate a ruling which originates in the *Qur'ân*. It may also explain or interpret *Qur'ânic* verses by clarifying the ambiguous, qualifying the absolute and specifying the general. Lastly, it may establish a rule in matters about which the *Qur'ân* is silent.[77]

The authenticity of *Sunna* is based on the way it is reported and conveyed to us. The most authentic is *Al-Hadîth Al-Mutawâter* which is conveyed by continuous plural testimony back to the Prophet.[78] With a lower degree of definitiveness and authenticity comes *Hadith Al-Âahâd* which is conveyed to us by continuous singular testimony.

Sunna is collected and laid down in several voluminous manuscripts that include *Sahih Al-Bokhârî* and *Sahih Muslim* which are considered by Sunnî Muslims to be the most authentic and infallible books after the holy *Qur'ân*. They were compiled and collected following a very detailed and accurate scientific

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[75] The Holy *Qur'ān*, (24:54).

[76] The Holy *Qur'ān*, (95:7).

[77] *See* M.H. Kamali, *supra* note 68 at 219-222.

[78] See Y. Al-Qaraḍāwî, supra note 59 at 46.

methodology in order to verify the authenticity of each *Hadith* contained therein. Such a collection and verification of Sunna had enormous ramifications in the schools of *Fiqh* which tended to rely on and refer to them before resorting to the other sources of Islamic-*fiqh*.

The *Qur'ân* and *Sunna*, the foundational texts, are the two divine sources which are agreed upon unanimously among Islamic jurists. However if a ruling is not prescribed explicitly in either the *Qur'ân* or the *Sunna*, recourse is usually given to *Igmâ'* and to the other sources which in their totality combine the main tools for a jurist to conduct *Igtihad*.

1.5.1.3 Igmâ'

Igmâ' is the third source of Islamic-*fiqh* to which we may turn when there is no explicit and definite command of GOD in the foundational text. *Igmâ'* literally means unanimity. In Islamic terminology, it is defined as "the general consensus among Islamic scholars of a particular age in relation to the legal rule correctly applicable to the situation."[79]

The authority of *Igmâ'* is based upon the *Qur'ân* and *Sunna.* The former stipulates:[80]

> And whoever contradicts and opposes the Messenger (Muhammad PBUH) after the right path has been shown clearly to him, and follows

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[79] See C.G. Weermantry, *Islamic Jurisprudence: An International Perspective* (Hampshire & London: MacMillan, 1988) at 39.

[80] The Holy *Qur'ān*, (3:115).

other than the believers' way, We shall keep him in the path he has chosen... "

Moreover, in the context of ordering Muslims to attach themselves to *Jamâ'ah* (the majority of the Islamic Community) the Prophet (PBUH) stated "Only those who seek the pleasure of paradise will follow the community, for the devil can pursue one person, but stands far away from two"[81] and in assurance of its freedom from error he said "My community will never unite in error."

According to A. Khallaf, *Igmâ'* is linked, moreover, to the principle of *Shûrâ* (consultation) whereby the ruler is requested to consult others before concluding a resolution. According to this principle of *Shûrâ*, the Prophet (PBUH) used to consult his companions on major decisions. Abû Bakr and Omar, the first and the second caliphs of Islam used to follow the same method of consultation before reaching a conclusion with regard to matters which would affect the whole nation. Such a link between the principles of *Igmâ'* and *Shûrâ*, which the author fully endorses, is an Islamic mirror to the contemporary legislative bodies in modern states.

The authenticity of *Igmâ'* varies, however, according to the principles followed by the various schools of Islamic-*fiqh*. According to some schools of *Fiqh*, *Igmâ'* is not taken as a source of *Fiqh*. Some other schools of *Fiqh*, on the other hand, would consider the *Igmâ'* of the scholars on a case at any time enough to take

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[81] See Imam Al-shafi'I, supra note 57at 286.

the decision to be an immutable ruling. An intermediate approach is that *Igmâ'* may be rectified by another reliable *Igmâ'*.

Finally, it is important to reiterate that in spite of the discord over the authority of *Igmâ'*, it comes third in the ranking of the sources of Islamic-*fiqh.*

1.5.1.4 Qiyâs

When the foundational text is silent about a case and no *Igmâ'* is concluded in relation thereto, a jurist may resort to reasoning by analogy (*Qiyâs*). *Qiyâs* literally means to measure or to compare. In the context of *Fiqh*, *Qiyâs* is the verdict given by a jurist (*mugtahid*) who considers a case in comparison with a case judged by the Prophet PBUH.[82] Such a verdict is pronounced on the basis of common or effective causes (*'illah*) which were kept in view in laying down the text. If a *mugtahid* determines the rationale (*'illah*) behind the text; then he/she may apply the rule of that text, on the basis of analogy, in another case which shares the same rationale.[83] The principles of *ratio decidendi* of common law and *'illah* of Islamic-*fiqh* are very much alike. That is true also with regard to the principle of *stare decisis* of common law and *Qiyâs*.

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[82] Glossary of the translation of the meanings of the holy *Qur'ān*, (King Fahad Complex For the Printing of the Holy *Qur'ān* 1417H 1997) Appendix I, at 880.

[83] See generally B.R. Verma, *Mohammedan Law in India and Pakistan*, 4th ed. (Law publishers, 1970) at 15.

However, the authority of the three other sources (*Qur'ân*, *Sunna* and *Igmâ'*) will prevail if there is any contradiction between them and Qiyâs, which constitutes a lower level of authority.[84]

1.5.1.5 Other sources of Islamic-*fiqh*

The recognition of *Qiyâs* by Islamic Jurists paved the way for the introduction of some other equitable doctrines, such as *istihsân* (Juristic preference), *istishab* (the inferring of one thing from another) and *istislah* (the Common welfare). Although these principles are vastly inferior sources of *Fiqh* when compared to the three original sources (*Qur'ân*, *Sunna* and *Igmâ'*), they are powerful tools in the hands of formal Islamic legislative bodies in developing laws which conform with both the intention of *Sharî'a* and the evolution of the community.

1.6 Islamic Law

As shown above, the author suggests that the term Islamic law in its contemporary understanding in the West and in many Islamic states does not reflect what it ought to. To the contrary, the widespread introduction of this term as a direct translation of the Islamic term *Sharî'a*, which has its roots in the

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[84] *Ibid.* at 14.

Arabic language, has resulted in the ambiguity and misunderstanding that the most Western scholars and lay people seem to have encountered.[85]

However, the author suggests that the term *Islamic law* may be correctly understood in various ways. It may refer to those laws which are derived from *Sharī'a* as opposed to those which have their roots in the Civil law systems, Common law systems or any other legal systems. It may also be understood as that group of laws, which are applied by Islamic states in accordance with *Sharī'a*. Finally, Islamic law may refer to those laws which do not contradict the spirit and teachings of *Sharī'a*. For example, the Warsaw Convention can be seen as Islamic law provided that it does not contradict *Sharī'a*. Thus, any laws, whether constitutional, civil, commercial or otherwise shall be considered Islamic so long as they do not conflict with *Sharī'a*.

One of the roles of the *fiqh*, in relation to laws, is to establish whether a law is Islamic (i.e. it does not conflict with *Sharī'a*). The author takes the view, however, that an opinion of *fuqahâ'* should not be considered as a formal law unless it is approved by the legislative body of the government. Moreover, while laws generally relate only to human interaction, *fiqh* includes rules which apply to both worship and human interaction. Therefore the opinions of *fuqaha'* are labelled as *fatwa* and not Law.

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[85] It should be said, however that neither Bernard Weiss nor Wael Hallaq fall prey to this problem. Patrick Glenn, following Coulson, is careful to specify that *fiqh* "extends not only to civil and criminal law as they are known in the west but also to etiquette, food, hygiene and prayer": see *supra* note 67 at 171.

Accordingly, the erroneous reference to *Sharī'a* and *Fiqh* as "Islamic Law" should be corrected through the creation of a more accurate translation or through restricting ourselves to transliteration.

1.7 Conclusion

As explained, *Sharī'a* is *not* Islamic Law. It is, rather, a rich source of law and of much else.[86] *Sharī'a* is a comprehensive system that covers and inspires the three aspects of human life namely *'Aqīdah* (creed), *'ibadât* (acts of worship) and *mu'âmalât* (acts of interaction among humans).

Islamic Law, on the other hand, is an artificial term created through the process of translation of the Arabic term *Sharī'a*, which gained widespread translation as Islamic Law. Such a translation gave an erroneous image of *Sharī'a* and Islamic Law as a rigid inadaptable code of rules.

Sharī'a is both a white canvas as well as a limitless spectrum of colours and a broad panoply of tools for the jurist to paint on. All he or she has to do is to make sure that the painting does not go out of the frame. All laws, be they derived from Common or Civil law traditions or constitutional, commercial, or criminal law in

[86] It should be acknowledged that there is debate within Western schools of legal theory about the definition of the term "law". Thus, for example, the narrow positivistic conception of John Austin must be constrasted with the broader, pluralistic conception of Lon Fuller. To align *Sharī'a* with "Islamic law" under a broad conception of the term "law" is less problematic than to do so under a narrow, positivistic conception.

subject matter, are Islamic so long as the painting is kept within the broad frame of *Sharīʿa*. Having such a distinction between these two terms is of essence to this thesis which contends that the introduction of *Sharīʿa* as a legal system would provide all jurists, not only Muslims, with a third dimension of understanding with regard to Private International Air Law.

Chapter II: Accidents and Compensation under Islamic-*fiqh*

Having reviewed the foundational principles, sources and methodologies of Islamic-*fiqh* in the previous chapter, the purpose of this chapter to review how Islamic-*fiqh* treats liability and compensation for accidents. Such a discussion is a necessary prelude to a consideration of how Islamic-*fiqh* interacts with air carrier liability Conventions.

The traditional literature of Islamic-*fiqh* address the subject of liability, be it contractual or extra-contractual, under the subject of *damân*. This is sometimes used alternatively with the term *Kafâla*.[87] The subject of *damân* is itself scattered through various subjects which come under *Fiqh Al-Mu'âmalât*. Despite the diverse categorization of *damân* by Islamic jurists, they all agree to divide it into two categories *damân al-'aqd* (contractual liability) and *daman al-fi'l* (extra-contractual liability).[88]

Although liabilities arising out of wrongful death and injuries are usually addressed as a subject of civil law by conventional legal literature, usually addressed in Islamic-*fiqh* literature under criminal acts, *ginâyât*. This notion of compensation in lieu of bodily injuries or loss of life is admitted by the foundational text of *Sharī'a* under the name of *diyah* and *irsh*.

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[87] Sheikh A. Alkhafif, *Alḍamān Fi Al-Fiqh Al-Islamī* (Dar Alfikr Alarabi, 1997) at 4.

[88] M. Al-Mousa, *Nadzariyat Al-Ḍamān Al-Shakhṣī (Al-Kafala)* (Riyadh: Al-Obaikan, 1999) at 33.

Diyah is, by nature, an extra-contractual liability with an extraordinary nature as it is sometimes considered a form of punishment in addition to being an ordinary remedy.

This chapter will elaborate on the matters of both contractual and extra-contractual liabilities resulting from incidents and accidents causing loss of life or bodily injuries from the perspective of Islamic-*fiqh*. The first part of this chapter will be dedicated to the subject of *diyah* and *irsh* as extra-contractual liability and the second part will elaborate on the issue of contracts and contractual liability.

2.1 Extra-contractual Liability

Like the contemporary western legal systems, Islamic-*fiqh* differentiated between liabilities on the grounds of the original legal bond between the wrongdoer and the victim. When liability arises out of breach of contract, then it is considered a contractual liability *damân al-'aqd*. Extra-contractual liabilities *damân al-fi'l* are those arising coincidently without linkage to a contract. Liability arising out of wrongful death is usually addressed as an extra-contractual or tortious liability under the title of *diyah*.

2.1.1 Definition of *Diyah*

In her "A Basic Dictionary of Islam", R. W. Maqsood translates the definition of *diyah* as "financial compensation (or blood-money) for injuries or death". This definition accords with the definition given by Imam Al-Jurajani in his Al-Ta'rīfât and most of the other Islamic-*fiqh* literature.

Some other scholars concentrate in their definition on the cause of *diyah* rather than its nature to define it as "the compensation made obligatory as a result of an offense which shall be paid to the victim or his heirs"[89]

The term *diyah* is used alternatively with the term *irsh*. However it is now almost conventional that *diyah* is undestod to be the financial compensation for death, while *irsh* is the financial compensation for injuries.

2.1.2 Historical Preview

Long before Islam evolved, Arabs used to indulge in wars of revenge, some of which lasted many years.[90] The sufferings and hostilities that such battles caused to Arabic tribes encouraged them to find better alternatives to circumvent the endless chain of revenge.[91] The alternative was the compensation of the victim's heirs with money which should be paid not only by the offender but also by his tribe (*'âqilah*). This, however, did not solve the problem where the victim of a

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[89] See S. Sabiq, *Fiqh Al-Sunnah*, Vol. 3 (Al-Fath Lel-e'ilam Al-arabi 1416H-1995) at 52.

[90] The war of Daḥis and Alghabrā', which was a war of revenge between two Arabic tribes, lasted more than 40 years.

[91] See A.F. Bahnasi, *Al-Diyah fi Al- Sharī'a Al-Islamiyah* (Dar Al-Shorooq 1404H-1984) at 16-17.

high ranking tribe or his heirs were seeking the killing of a free man for the killing of one of their slaves or a master of the other tribe in place of the regular victim. The *Qur'ân*, therefore, introduced the rule of *qisas* which may be interpreted as 'an eye for an eye' rule. It also encourages, in the same verse, the victim and his/her heirs to forgive the offender as it provides:

> O you who believe ! Al-*qisas* (the Law of Equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother[92] of the killer against blood-money, then adhering to it with fairness and payment of the blood-money to the heir should be made in fairness. This is an allevation and a mercy from your Lord. So after this whoever transgresses the limits (i.e. kills the killer after taking the blood-money) he shall have a painful torment[93]

This verse is, as such, not revealed to encourage *qisâs* but rather to restrict it or at least to regulate it and avoid exaggeration.

Islam, moreover, adopted the principle of *diyah* and invested it with considerable legal signicance. The *Qur'ân* provides:

> It is not for a believer to kill a believer except (that it be) by mistake; and whosoever kills a believer by mistake, (it is ordained that) he must set free a believing slave and a *diayh* be given to the deceased's family unless they remit it. If the deceased belonged to a people at war with you and he was a believer, the freeing of a believing slave (is prescribed); and if he belonged to a people with whom you have a treaty of mutual alliance, *diyah* must be paid to his family, and a believing slave must be freed. And whosoever finds

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[92] In the context of Islamic terminology, relations amongst all Muslims are expressed as brotherhood. The verse, therefore, refers to victim's heir as the killer's brother in remembrance of the original powerful link between them as brothers in Islam so as to encourage forgiveness.
[93] The Holy *Qur'ān*, (2:178).

this beyond his means, he must fast for two consecutive months in order to seek repentance from ALLAH. And ALLAH is ever all-knowing, all-wise[94]

The Prophet (PBUH) described the value of *diyah* in camels which was the market indicator at that point of time. As reported by Abudawûd, *diyah* was designated as one hundred camels which was equivalent to eight hundred golden coins (*dinar*) or eight thousand silver coins (*dirham*). Another *hadîth* narrated by 'Amr Ibn Sho'ayb and reported by Abudawûd and Nasâ'î provides that the Prophet PBUH ruled that *diyah* in the case of wrongful death is one hundred camels. Thirty of these should be *bint makhâd* (a female camel about to deliver), the second thirty should be *bint labûn* (a female camel that can breastfeed), the third thirty should be *huqa* (mature female camel capable of getting pregnant) and ten should be *ibn labûn* (a two year old male camel).

The Second Caliph, Omar Ibn Al-Khatâb raised the value of *diyah* to one thousand golden *dinar* or twelve thousand silver *derham* on the grounds of an increase of the value of camels. The action taken by Omar opened the door for jurists and rulers to evaluate the appropriate value of *diyah* and to fulfill the intention underlying its prescription.

2.1.3 The Nature Of and Rationale Behind *Diyah*

[94] The Holy *Qur'ān*, (4:92).

Amongst the goals of *diyah* is the compensation of the victim or his/her heirs for the loss they sustained and the suffering they encountered. But is it a mere compensation or remedy? Does it not act as a punishment or even a sanction against the offender?

Sanctions and penalties under Islamic-*fiqh* are personal. Only the offender and nobody else shall be sanctioned for his deeds. This principle is deduced from the Holy *Qur'ân* which repeatedly provides that "No soul shall bear another's burden"[95] In addition to this established rule of the *Qur'ân*, Al-Nassa'ī reported on the authority of Ibn Mas'oûd that "No man shall be punished for the act of his father or brother". In the case of *diyah*, however, it is not the offender who shall, always, take the whole burden of *diyah*. It is, sometimes, obligatory, as well for the *'âqilah*[96] of the offender. This rule of *diyah* is linked directly to the nature of the act that caused the death.

The author considers it necessary to elaborate on the causes of death before elaborating on whether *diyah* is a sanction or mere compensation.

Islamic jurists categorize acts causing death of another person into three categories; it may be intentional (*al-qatl al-'amd*), quasi intentional (*Al-qatl Shibh 'Amd*)[97] or wrongful death (*al-qatl al-khata'*).

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[95] See verses (6:164), (17:15), (35:18), (39:7) and (53:38) of the Holy *Qur'ān*.

[96] *'Aqilah* is the group of people, tribe or family to which the offender belongs.

[97] The school of Imam Malik does not admit the category of *Al-Katl Shibh Al-Amd*.

As an explicit ruling of *Qur'ân*, *al-qatl al-'amd*, the intentional waste of another's life, is sanctioned by *qisas* unless one of the heirs decides to forgive the aggressor. *Diyah* is, hence, obligatory onto the aggressor himself not the *'âqila*h.

In the case of *al-qatl shibh al-'amd* and *al-qatl al-khata'*, where both lack the intention to kill, the offender is not subject to any corporal penalties. In addition to the offender, the offender's *'âqilah* must pay *diyah* to the victim's heirs.

It is very clear that such categorization is based on the presence of intention in the act. Such a presence is deduced from the facts of and tools used in the incidents that caused the death. If the offender shoots the victim with a gun, the intention to kill is presumed. However if he/she hits the victim with a piece of wood, this ordinarily would not cause death hence the intention to kill does not exist, rather death is caused by gross negligence. The killing is in this case *shibh 'amd*. Thirdly, if a soccer player kicks the ball hitting the goalkeeper in the chest and causing his death, intention is not even probable and the killing is in this case *qatl khata'*.

Consequently, when the offender causes the death intentionally, *diyah* is a punishment besides being compensation. It is, therefore, obligatory to the offender himself and nobody else. When the deed lacks intention, on the other hand, *diyah* is a mere compensation for the victim or his/her heirs. To avoid it being a punishment or rather to ease the burden of such compensation, it is

spread over a wide spectrum of people called *'âqilah*. This spreading alerts the community and heightens their level of care. The author suggests that this spreading of liability may be considered an early form of insurance.

It is clear that although the role of *diyah* is to prevent people from wasting others' lives and to compensate victims or their heirs for the loss they sustained, the author is of the opinion that although it is in principle not always a punishment,[98] it must always be evaluated in a manner that keeps it effective and efficient. This is achieved by letting the payers fear and feel the burden of such compensation.[99]

2.1.4 Conditions of *Diyah*

There are certain conditions pertaining to the offender and others pertaining to the victim of an incident that must be fulfilled for *diyah* to be ordered in favour of the victim or his/her heirs.

2.1.4.1 Conditions Pertaining to the Offender

The offender has to have legal capacity (*rushd*) in the case of *al-qatl al-'amd*. Legal capacity under Islamic-*fiqh* requires physical puberty and mental maturity.

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[98] See *contra* A. Al-Sanhori, *supra* note 28 at 48.

[99] See S. Sabiq, *supra* note 89 at 53.

Bulûgh (physical puberty) is the age when a male voluntarily or involuntarily emits seminal fluid[100] and a female has her first menstruation. However, there are other indicative signs of *bulûgh* such as the appearance of coarse hair around the sexual organs, this sign is however not given any significance by the Hanafies.[101] In the absence of any of these physical signs of puberty, a fixed age is applied to determine puberty. The Maliki and Hanafi Schools consider seventeen as the age of puberty for both males and females.[102]

Most of *fuqahâ'* agree that a person is *rashîd* when, in addition to physical puberty, he/she is mentally mature (*'âqil*). *Bulûgh* is in principle a prima-facie evidence that the person is *rashîd*.

Accordingly, if a minor wilfully kills a person, he/she shall not be subjected to any corporal penalty. Nonetheless, heirs of the victim are still entitled to *diyah* as a form of compensation and relief. It is, however, disputed among *fuqaha'* whether *diyah* should be paid by the minor offender or by his *'âqila*. Some provide that so long as *qisas* is not applied against the minor, then *diyah* will also not be a punishment against the minor. *'Âqilah* shall, therefore, bear the burden of *diyah*. Some, on the other hand, provide that so long as the act is wilful (*'amd*), the offender shall pay the *diyah* from his own money despite being a minor.

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[100] See N. Saleh, "Definition and Formation of Contract Under Islamic Laws" (1990) Arab Law Q. 110.

[101] See S.Sabiq, *supra* note 89 at 453.

[102] *Ibid.*

It is the responsibility of minors' guardians to supervise and control their actions. Moreover minors, usually, don't own enough money or assets to compensate the heirs. The author is, therefore, of the opinion that in the case of an offense by a minor, *'âqilah* should pay the *diyah*, not the minor. This is in the interest of both the heirs and the minor.

2.1.4.2 Conditions Pertaining To the Aggrieved

The *Qur'ân* is explicit with regard to the fact that there should not be any difference in the value of *diyah* amongst Muslims and non-Muslims. It states:

> ...and if he belonged to a people with whom you have a treaty of mutual alliance, *diyah* must be paid to his family, and a believing slave must be freed. And whosoever finds this beyond his means, he must fast for two consecutive months in order to seek repentance from ALLAH. And ALLAH is ever all-knowing, all-wise.[103]

Nonetheless, jurists interpret the captioned verse in different ways. The Hanafi[104] School considers that the value of *diyah* does not vary according to whether the victim is Muslim or non-Muslim due to the explicit provision of the captioned *Qur'ân*ic verse. The Hanafi School does not even differentiate between *dhami* (Non-Muslims who reside in an Islamic state) and *harbi* (Non-Muslim who belongs to a state in warfare with the state of the aggressor).

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[103] The Holy *Qur'ān*, (4:92).
[104] The author agrees with the opinion of the Hanafi School.

The other three major schools differentiate between Muslims and non-Muslims. For the Shafi'ī' School, the *diyah* for Christians and Jews is one third of the *diyah* for Muslims, and the *diyah* for atheists or polytheists is two thirds of one tenth of the *diyah* of Muslims. Shafi'ī' recounts that 'Omar and 'Othmân (the 2nd and 3rd Caliphs) have ruled as such.

The Maliki School rules that the *diyah* of non-Muslims is one half the *diyah* of a Muslim on the grounds of a ruling by 'Omar Ibn 'Abdul'Aziz.[105] Malikis did not have any authentic text of *Sharī'a* that provides as such, but they believe that 'Omar Bin 'Abdul'Aziz would not decide something without there being an authentic textual provision of *Sharī'a*.

Lastly, the Hanbali School considers that if the non-Muslim is a Christian or a Jew, and is *dhami* or *mo'âhed* (from a State not in warfare with the Islamic State) and has been killed intentionally, the *diyah* is identical to the *diyah* for Muslims. However if he/she is killed mistakenly, the *diyah* is then one half of the Muslims' *diyah*.

2.1.5 'Âqilah

As previously discussed, *diyah* is sometimes borne by the *'âqilah* instead of, or in addition to the offender. The term *âqila* therefore needs further explanation as to

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[105] 'Omar Ibn 'Abdul'Aziz is the 8th Umayyades Caliph. He is well known amongst Islamic historians as the 5th righteous caliph for his good deeds and just rulings.

its precise meaning and how it could be dealt with in the contemporary legal relations.

Lexically, *'âqila* is the person's paternal relatives.[106] Nonetheless, it is not interpreted as such in the Islamic-*fiqh* literature, since jurists have various opinions as to who is the *'âqilah* of a person.

For the Hanafi School, the offender's *'âqilah* are those free, adult and mature males belonging to the same *diwan* as the offender.[107] However, if the offender does not belong to any *diwan*, his tribe shall bear the burden of *diyah*. The Maliki School shares the same view but with the condition that any of the *'âqilah* members who are unable to afford the money shall be excluded therefrom. Sahfi'i and Hanbali Schools provide that *'âqilah* is the tribe of the offender.

If the offender does not have any *'âqilah*, the State bears the burden of *diyah* as a replacement according to one opinion adopted by AlShafi'i.[108] The Hanafi School however rejects this opinion on the grounds that females and children have rights to the public money of the State, and as such paying *diyah* from such public money means that they also are sharing indirectly the burden of *diyah* where they ought not to.

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[106] See A.F. Bahnasi, *supra* note 91 at 61.

[107] The early Islamic states used to segregate peoples into areas each of which were called *diwan*. The people of each *diwan* were paying a sort of monetary social aid according with their needs and occupations.

[108] See A.F. Bahnasi, *supra* note 91 at at 67.

The four schools of *fiqh* share the view that *'âqilah* is, however, paying this amount as a form of relief for the victim or his/her heirs. Therefore they should not be overburdened with the payment of such an amount. The ruler shall divide the shares amongst the *'âqilah* individuals while bearing in mind this concept.

2.1.6 Al-Irsh

Irsh is the obligatory compensation imposed against the aggressor for bodily injuries that do not cause death.[109] This term is sometimes used interchangeably with the term *diyah*.

Irsh is divided into two categories as follows:

- Predetermined *Irsh*: *Sharī'a* has prescribed a specific amount to be paid in certain events, for example the *irsh* due in the case of loss of a part of the body, such as the hands or legs. Islamic jurists, usually, use the term *irsh* to refer to this category.

- Undetermined *Irsh*: For which *Sharī'a* did not prescribe any amount, but rather it is left to the judge to determine each case independently according to specific rules. This category of *irsh* is usually called *hokumat 'adl*.

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[109] A. M. Al-Jurjani, *Al-Tarifat* (Dar Al-Kitab Al-Arabi 1423-2002) at 22.

The basic rule for determining the quantum of *irsh* may best be expressed by the following equation:

Irsh =(The lost organ/ number of similar organ in the body) *Diyah*

As such, if, due to an accident, a person loses a hand then he/she shall get one half of the amount prescribed for *diyah*. But if he/she loses his/her nose then he/she shall be entitled to the whole *diyah*. A person shall deserve *irsh* if the accident results in losing an organ or the function thereof, an example being the loss of vision.

Such a rule may not be applied in the case of injuries that do not result in loss of organs, such as breaking an arm or causing bleeding.

2.1.7 The Quantum of *Diyah* and Irsh in the Contemporary Islamic Legal Systems

As illustrated above, the quantum of *diyah* was determined by the Prophet (PBUH) as one hundred camels, one thousand golden coins (*Dinâr*) or ten thousand silver coins (*Dirham*). The three are replaced in the contemporary Islamic legal systems by currencies. The methodology followed by most of the current Islamic state legislations for converting the value of *diyah* to the contemporary currencies is a direct exchange of camels and *dirham* to the currency. According to this methodology, Saudi Arabian courts, for instance,

determine *diyah* at the value of 100,000 -120,000 Saudi Riyals. Saudi Riyals are exchanged at a fixed rate of 0.26 U.S. Dollars per Riyal. This means that the value of *diyah* under Saudi law is currently U.S. $26,667.[110] Qatar and Kuwait have determined *diyah* at approximately the same rate.

This methodology may be safe for ensuring compliance with the literal sense of the foundational text of *Sharī'a*. The author however presumes that this methodology of direct exchange jeopardizes the main intention behind *diyah*. This methodology may result in compensating the victim or his/her heirs with less than the foundational text of *Sharī'a* intended. The author, therefore, suggests that the economic value of the currency shall be taken into consideration when determining the quantum of *diyah* in modern currencies. This suggestion is based on the report that the second caliph, Omar Ibn Al-Khattab, increased the value of *diyah* in golden and silver coinage on the grounds of the increment in the value of camels at that point of time.

2.1.8 The Economic Value of Camels, Dinar and Dirham in the Prophet's Era

In the Prophetic Era, camels were the principal means of transportation in addition to being used for the production of milk and relied upon for meat. Owning a camel was a wealth in itself. The main authorities on Islamic history in

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[110] This is higher than the limits of liability under Warsaw Convention and Hague Protocol and 45% of the Montreal Agreement of 1964.

the Prophet's era like Wâqidī, Al-Tabarī and Ibn Kathīr reported that missionaries were sharing the ride of a camel. With such economic value, a camel had attributed to it a monetary value of between 40 and 84 *dirham*.[111] A *Dirham* weighs 3.024 grams of silver.[112]

Camels were usually exchanged in the rate of 10 sheep per camel[113] (i.e. a sheep would be worth between 4 to 8.4 *dirham*). The exchange value of 100 camels to 8000 or 10000 *dirham* shows that the Prophet (PBUH) fixed the value of camels in *dirham* and *dinar* at the maximum rate.

In volume III of his *Sirah*, Ibn Sa'd states that Abubakr, the first Caliph, asked for remuneration of 3000 *dirham* per annum as the caliph of the Islamic State to maintain himself, his wife, three children and a freed slave (*mawla*). The annual income of 3000 dirham would barely equate to 35 camels at the rate established above. Since Abubakr had requested comfortable but not sumptuous remuneration, this means that *diyah* resembles three years' income of a middle class family with six members.

Moreover, the increment 'Omar Ibn AL-Khatâb, the second caliph, made in the exchange value of camels to *Dinar* and *Dirahm* reflects that the *Dinar* and

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[111] See generally M. Y. Siddiqi, "Role of Booty in the Economy During the Prophet's Time" (1989) Journal of King AbdulAziz University: Islamic Economics 83.

[112] See generally A. H. Al-Kurdī, "Al-Maqādīr Al-Shar'iyah Wa Mā Yat'allaq Biha Men Al-Aḥkām Al-Shar'iyah Wa Mā Yoqābilohā Men Al-Maqādīr Al-Mo'āserah" (2001) 16:47 Journal of Sharia and Islamic Studies 245.

[113] M. Y. Siddiqi, *supra* note 111.

Dirham value which the Prophet (PBUH) designated for camels was based on their relative economic value rather than intending to affix them a constant value.

The following is a practical example of how we may calculate *diyah* according to this suggestion, applying the general observation that the Prophet (PBUH) fixed the exchange value at the highest rate:

> We may take the highest income according to the Indicators on Income and Economic Activity of the United Nations for the year 2001-2002 which indicates that Luxembourg has the highest level of GDP totalling US$ 44,783.[114] The total amount of *diyah* would consequently be US$ 537,396 This number is taken on the grounds of the following calculation:

((Per capita GDP 2 Adults) + ((Per capita GDP 4 dependants) /2)) 3.

Such a methodology has the advantage of simplicity, but others are possible as well as is discussed in the Conclusion to this thesis.

2.2 Damân Al-Aqd (Contractual Liabilities)

To have a comprehensive grasp of the issue of contractual liabilities under Islamic-*fiqh*, it would be appropriate to shed some light on how Islamic-*fiqh* treats

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[114] UN Homepage <http://unstats.un.org/unsd/demographic/social/inc-eco.htm#adult> (date accessed 17/2/2004).

contracts and obligations resulting there from before examining contractual liabilities.

This is worth doing for several reasons. International treaties and conventions – including Warsaw, Montreal and Rome — are considered by Islamic jurists a form of a contract signed by states. This means that it would be necessary to understand basic principles of contracts under Islamic-*fiqh* before turning to the discussion of the concepts of international treaties under Isalmic-*fiqh*. Another important issue that has made a relatively lengthy elaboration in this section necessary is that the subject matter of the thesis is intimately connected to the contract of carriage of passengers by air. This contract can not be addressed from the Islamic-*fiqh* perspective unless such basic principles of contracts are well defined.

A final reason for this elaboration on the matter of contracts in Islamic-*fiqh* is that the thesis also touches upon the subject of insurance. Insurance is a contract in principle and we need to understand the Islamic aspects of contract to address insurance from an Islamic-*fiqh* point of view.

2.2.1 Contracts Under Islamic-*fiqh*

Islamic *Nazary'at Al-'Aqd* (pl. *'Uqûd*), or the theory of contracts, was dealt with by Islamic jurists differently than other aspects of law. Instead of researching the

theoretical values of *'aqd*, jurists investigated the legal impacts of some specific practiced legal dispositions and studied them independently. These various dispositions shared some similar characteristics that correspond to the lexical meaning of the word *'aqd* as employed by the *Qur'ân*ic verse cited above. These dispositions are preceded by the word *'aqd* to reflect that they bind the *dhimmah*[115] of the parties or one of them towards the other. Such methodology of reporting the practice rather than practicing the theory gave Islamic-*fiqh* of contracts (*'uqûd*) a very distinct personality. The most basic practice upon which most, if not all, jurists ground their analysis of contracts is the contract of sale, *'aqd al-bay'*. A particular methodology, illustrated below, resulted in what is called "nominate contracts", *al-'uqûd al-musammâh.* The methodology, moreover, concluded in an understanding of contractual liabilities by our ancestors that is completely different from what we know in the contemporary Civil and Common Law traditions.

2.2.2 Definition of 'Aqd

Lexically, the word *'aqd* is derived from the root "*'aqada*" which means to tie or to bind.[116] Jurists delineate *'aqd* as "the legally sound exchange of an offer and acceptance in such a manner that leaves its impact on the subject matter"[117]

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[115] For more on *dhimmah,* see section 2.1.6 below.

[116] See S.E.Rayner, *The Theory of Contracts in Islamic Law* (London: Graham & Tortman, 1991) at 87.

[117] See M. Zahraa, "Negotiating Contracts In Islamic And Middle Eastern Laws" (1998) 13:3 Arab Law Quarterly at 265.

Being merely an expression of ones will, *'aqd* excludes all prerequisites of *legis actio* for the contract to be executable unless specifically stated in the law or the contract itself. The objective nature of *'aqd* under Islamic-*fiqh* makes it different from the Contract of civil law, which arguably has a subjective nature.

It is extremely important to note that although the definition does not denote unilateral dispositions or obligations as contracts, some major jurists refer to them as *'aqd* or *'uqûd*.

2.2.3 Al-*''Uqûd* Al-Musammât (Nominate Contracts) under Islamic-*fiqh*

The methodology followed by the learned jurists of Islamic-*fiqh* resulted in having a large number of nominate contracts (*Al-'Uqûd Al-Musammât*) like *'aqd al-bay'e* (Contract of sale), *'aqd al-ijâr* (Contract of Hire), *'aqd al-rahn* (Contract of Mortage) and *'aqd al-wakâlah* (Contract of Agency).

The phenomenon of *al-'uqûd al-musammât* raises the question of the permissibility of creating and enforcing variant types of *'aqd* other than those introduced by our ancestors.

The reply to this question could be deduced from the Holy *Qur'ân* which stipulates "O you who believe! Fulfill your obligations"[118] The term obligations or,

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[118] Holy *Qur'ān*, (5:2).

as expressed in Arabic, *'uqûd*, suggests that there are no restrictions on concluding an *'aqd*. The Prophet (PBUH) reiterated this fact in a *hadith* reported by Al-Tirmidhi to the effect that

> Every agreement is lawful among Muslims except one which declares forbidden that which is allowed, or declares allowed that which is forbidden.

These two divine stipulations expressly grant to Muslims the freedom to enter into any agreement provided that the two quoted conditions are fulfilled.

Thus, *al-'uqûd al-musammât* is an offspring of a general methodology and not an aspect of theology followed by jurists while studying the various types of dispositions within their era.

Accordingly, there is not and there should not be any restriction on the conclusion of any contract (*'aqd*) that is outside the scope of *al-'uqûd al-musammât* save the caution of abiding by *halâl* (legitimacy) and *harâm* (illegitimacy) of *Sharī'a*, which corresponds to the concept of *public order* in Western systems.

2.2.4 Arcân Al-'Aqd (Fundamental Elements of Contracts) under Islamic-*fiqh*

There are three fundamental elements for an *'aqd* to be valid. These elements are:

- *Al-Tarâdĩ*(Mutual consent)
- *Al-Mahal* (The object of the contract)
- *Al-Sabab* (Consideration or cause of the contract)

Each of these elements should be investigated independently.

2.2.4.1 Al-*Tarâdĩ* (Mutual Consent)

As in western systems, *al-tarâdĩ* (mutual Consent) is the most fundamental element of *'aqd*. It combines four inter-related aspects; *sighat al-'aqd* (the form of contract), *tattabuk al-iradatayn fi majlis al-'aqd* (the meeting of the two wills), *attraf al-tarâdĩ* (parties to the consent) and *eyoup al-iradah* (defects of wills).

2.2.4.1.1 *Sighat Al-'Aqd* (Form of the Contract)

Sighat Al-'Aqd is composed of two parts, namely, *ijâb* (offer) and *qabûl* (acceptance). *Ijâb* is the manifestation of the offer that is made by the offeror. *Qabûl* is the manifestation of the acceptance that is made by the offeree.

For *sighat al-'aqd* to be valid, *qabûl* must be identical to *ijâb*, and both should be certain.

Ijâb and *qabûl* may be *lafẓĩ* (oral), *kitâbĩ* (in writing) or by *ishârah* (inferred by a conduct). As to the evidentiary value, oral expression has precedence and

preference over the other types of expression.[119] Expression of *ijâb* or *qabûl* may, however, be *sareeh* (explicit) or *dimni* (implicit).

With great similarity to Common Law,[120] silence of the offeree is not a means of communicating his assent to an offer. As such, the offeror may not infer or impose contractual liability upon an offeree by proclaiming that his silence shall be considered consent.

When *ijâb* and *qabûl* (*sighat al-'aqd*) are *mutaqâbil* (consistent) and *sareeh* (explicit), then *'aqd* should be interpreted in accordance with the expressions of the parties despite the alleged intentions. On the other hand, if the expressions are unclear or *ijâb* and *qabûl* are inconsistent, it may be necessary to investigate the intentions of the parties. Such reliance on *sighat al-'aqd* is due to it being considered *prima facie* evidence that reflects the inner intentions and wills of the contractors.[121]

Formalities are of minor value in Islamic-*fiqh*. *Ijâb* and *qabûl* may be inferred in any manner that reflects certainty as to the actual intentions of the parties. In a simple sales contract (*emptio/venditio*), for instance, *ijâb* may take the form of any language or action that reflects the actual intent of the offeror. The offeror may only need to extend his hands with the object of sale and the offeree may

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[119] See A. Al-Sanhori, *supra* note 28 at 66.

[120] See *Felthouse* v. *Bindley* (1862) 11 CBNS 869.

[121] See A. Al-Sanhori, *supra* note 28 at 70.

accept the offer by extending his hands with the proper monetary value in exchange of the object (*mo'aatah*).

In addition, *ijâb* and *qabûl* should be made by persons who have the capacity to do so.[122]

2.2.4.1.2 *Tatâbuq Al-Irâdatayn Fi Majlis Al-'Aqd* (The Meeting of the Two Wills at a Meeting Session)

The notion and importance of *majlis al-'aqd* (meeting session) is based on the *hadîth* narrated by Ibn Omar to the effect that:

> Each of the seller and the purchaser has the right to opt (accept or reject) so long as they didn't separate from each other save the case of *bay' al-kheyâr* (sale with the right to return for refund).

It is obvious that an *'aqd* is formed when *ijâb* and *qabûl* are properly communicated and consistently exchanged by the parties. Such communication has to take place in/at[123] *majlis al-'aqd*.

However, the general rule is that an *ijâb* shall continue to be valid and the offeree shall continue to have the right to accept or reject the offer, *kheyâr al-qabûl*,

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[122] The matter of capacity will be discussed later in this chapter.

[123] At this point of illustration "in" and "at" are used to infer the variant interpretations of *Majlis Al-'Aqd*. Some authors denote it as the location wherein the meeting is conducted. Some others focus on the time sequence implied by the *hadîth* without reference to a specific location. The Author stands by the latter interpretation.

throughout the period of the meeting session. Nevertheless, upon the occurrence of any of the following events, the state of *ijâb* by the offeror shall be terminated:

- *Kheyâr al-rogû'*: where the offeror revokes his offer before the other party communicates his *qabûl* in/at the same meeting session.

- *Intehâ' al-majlis*: where the meeting session lapses without receiving the *qabûl* of the offeree.

- *Qabûl*: where the offeree communicates his acceptance to the offeror to conclude the *'aqd*.

The term *majlis al-'aqd* is subject to two different interpretations. It may be defined as the location where the meeting is conducted. It may, on the other hand, be interpreted as being the segment of time during which *qabûl* should be communicated.[124]

2.2.4.1.3 *Atraf Al-tarâdî* (Parties to the Consent)

Points 2.2.4.1.1 and 2.2.4.1.2 above briefly discussed the objective aspects of Al-*tarâdî*. Point c will deal with the subjective aspect.

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[124] See generally A. Al-Sanhori, *supra* note 28 at 1-30.

For *Al-tarâdī* to be valid, persons exchanging *Ijâb* and *Qabûl* must have full legal capacity *Ahley'yet Al-Adâ'*. The notion of *Ahley'yet Al-Adâ'* is based on the *Qur'ânic* order:

> To those weak of understanding make not over your property, which GOD hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them release their property to them; but consume it not wastefully, nor in haste against their growing up[125]

In harmony with the general rule of the protection of human interests and the avoidance of blights[126], the *Qur'ânic* verse orders that a person, whether male or female, may not be permitted to enter into any legal dispositions unless he/she satisfies the requirements of *Ahley'yet Al-Adâ'*. These requirements are:

i. To have attained *Bulûgh* (Physical Puberty); and
ii. To have a certain level of mental ability *Rushd* (Prudence);

2.2.4.1.4 *'Oyûb Al-Irâdah* (Defects of Will)

For an *'aqd* to be valid, the mutual consent of the parties should be based on wills that are devoid of defects. The wills must be free from any of the following defects (*'oyûb al-irâdah*) for the contract to be validly concluded:

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[125] Holy *Qur'ān*, (4:5&6).

[126] See Y. Al-Qaraḍāwī, *supra* note 59 at 53ff.

iii. *Ikrâh* (Coercion)

An *'aqd* is void if entered into under *Ikrâh*. *Ikrâh* would exist if a person were to sign a contract under the influence of coercion and fear, without which he/she would not have signed. *Ikrâh*, therefore must emanate from a person who has the ability and means to cause the feared harm expected by the other party.

iv. *Tadlīs* (Deceit or Misrepresentation)

If one party is misled by the other by the bias of *tadlīs* or misrepresentation, the contract is void. For *tadlīs* to be effective, it has to induce the conclusion of a contract that the party would otherwise not have agreed to except for the misrepresentation.

v. *Ghalat* (Mistake or Misconception of One or More of the Features of the Subject Matter).

The mistake (*ghalat*), that affects the validity of a contract is gross mistake (*ghalat jawhary*). This kind of ghalat could occur with regard to; the object of the contract, the other party, the value and price of the contract, or the applicable law. For instance, if a seller sells a diamond to the purchaser

who finds out that he mistakenly bought a piece of glass, the contract is void.

2.2.4.2 *Mahal Al-'Aqd* (The Object of The Contract)

The object of the contract must be valid. Therefore, a contract is void when the subject matter is, for example, adultery or usury.

The majority of jurists require that *mah$al al-'aqd* (the object of the contract) be valid and present at the conclusion of the contract. These prerequisites are made to avoid *gharar* (aleatory contracts) and not for the mere unavailability of the object. Consequently, if *mah$al al-'aqd* is not present but the parties know that it will be available, the contract is valid. A typical example of a contract where the object is not available but the contract is permitted is *bay' al-salam* (sale with advanced payment and late delivery), which is explicitly permitted by the Prophet (PBUH).

In addition to validity and availability, there are some other conditions regarding *mah$al al-'aqd*, such as the undisputed ownership of the object and the possibility of identifying the object to avoid *'oyûb al-iradah*. In addition, the object must have a value.

The requiremnt of value is, however, different from consideration, known in Common Law. Consideration requires that the transaction be of a value, while Islamic-*fiqh* requires that the object itself should bear a value regardless of the value at which the contract is concluded, which may be zero.

2.2.4.3 *Al-Sabab* (Cause of the Contract)

The general rule concerning a transaction is that "every transaction is allowed unless it is explicitly prohibited by a provision or an injunction"[127] However, contrary to what this formulation may suggest, the general rule does not signify that there is a single manifestation of what is permitted and what is not. Rather, every individual contract should be investigated independently. Grapes, for instance, are a valid object under *Sharī'a* and there must not be any prohibition concerning the sale of grapes. However, if grapes are sold to a manufacturer of alcoholic drinks[128] then the cause of the contract is not valid and the contract should be void.

2.2.5 *Al-Mas'ûliya Al-'Aqdiya* (Contractual Liability)

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[127] M. Zahraa, *supra* note 117 at 272

[128] Intoxication is prohibited by Islam. Therefore, production of alcoholic drinks is not permitted.

The concept of liability under Islamic-*fiqh* is reflected in the two maxims adopted by Islamic jurists providing (الخراج بالضمان) (Gain accompanies liability for loss)[129] and (الأجر والضمان لايجتمعان) (Hire and liability for loss do not coincide).[130]

According to the first maxim, (gain accompanies liability for loss), if one party enjoys full benefit of the object of the contract, then he/she bears full risk of loss like an owner. Indeed jurists, especially Hanafis, have given numerous interpretations and explanations of this maxim. In general terms, the party benefiting from the object shall act as a guarantor of the object. The following two examples will clarify this:

In *'aqd al-'ariya* (contract of gratuitous loan), where the borrower reaps all the profit of the object, he assumes the risk of loss of the object. If he/she holds the object as a gratuitous agent, on the other hand, he/she does not bear any risk of loss for there is no benefit to reap. Not to misapprehend this maxim, it applies also for non-gratuitous contracts. If someone, for example, bought an object that can generate offspring (an animal for instance) on the condition of return for refund if found defective, the purchaser has the right to return the object for a full refund despite the fact that he/she has generated revenue or an offspring from the object prior to the refund. This is on the grounds that the contract itself is obsolete because of the defect but the purchaser was a guarantor of the

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[129] *Mijallat Al-Ahkam Al-Adliyah*, para. 85.

[130] *Ibid.* para. 86.

purchased object when it was in his/her hand and bore the risk of loss for that period.[131]

The second maxim (hire and liability for loss do not coincide) means that in the case of rent or a lease (*igâra*), the lessor bears the risk of loss (*damân*) whereas the rent here constitutes the profit.[132] Indeed, such burden of risk of loss is subject to the fulfilment of the conditions of the contract. For example, if someone rented an apartment as a residential unit but he/she misused it as a small factory which resulted in the destruction of the apartment, the lessee bears the risk of loss minus the rent value.

The aforementioned two maxims apply only if the object has a value by itself. Moreover, if the object is fungible then compensation shall be in kind. Non-fungible objects are compensated in equivalent value.

2.2.6 Penalty Clauses and Liquidated Damages Under Islamic-*fiqh*

The usual question to be asked after elaborating on the basics of contractual liability and the two principal maxims in relation thereto, is whether penalties and liquidated damages clauses are permissible under Islamic-*fiqh*.

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[131] A. Al-Sanhori, *supra* note 28 at 119.

[132] See F.E. Vogel and S.L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International 1998) at 113. See *contra* A. Al-Sanhori, *supra* note 28 at 119.

However, before jumping to the matter of permissibility of such clauses, it is necessary to elaborate on the meaning and permissibility of conditions to a contract in general under Islamic-*fiqh*.

As elaborated previously, the original status and rule of transactions is that "every transaction is allowed unless it is explicitly prohibited by a provision or an injunction" As such, conditions are permissible unless it is stated otherwise by a provision or an injunction.[133] *Qur'ânic* provisions pertaining to contracts and conditions do not contain any prohibitions. As for *Sunna*, there are five major *hadîth* upon which Islamic *jurists* have established their rulings in relation to the permissibility of conditions or stipulation in contracts. These *hadîth* are as follows:

A *hadîth* is reported in all the major seven books of *hadîth* on the authority of Jaber Ibn Abdullah that, during a trip back to Medinah, he sold his camel to the Prophet (PBUH) on the condition of carrying him to Medinah. Although it is true that this *hadîth* is reported with minor variations between the major books of *hadîth*. Some omit to report that the sale was conditional on the camel carrying Jaber to Medinah, However, Imam Bukhari claims that the report that includes the condition is highly authoritative and, therefore, shall overrule others. Nonetheless, Imam Shafi'ī[134] and Imam Abuhanifah have ruled otherwise.

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[133] See *contra* F.E. Vogel and S.L. Hayes, *supra* note 132 at 97.

[134] Imam Ibn Hajar and Imam Nawawi, who belong to Shafi'i school, reversed Shafi'i's rule in concord with Bukhari.

The *hadīth* of "Barira" condemns any condition or term "not in the book of God". As for Ibn Taimiyah, this *hadīth* prohibits conditions that do not accord with *Sharī'a* and does not prohibit the principle of stipulating a term or condition in the contract.

There is *hadīth* of prohibition of "Sale and Condition", which is a weak *hadīth* upon which jurists should not base any rule.[135]

The *hadīth* of the prohibition of "two conditions in a single sale" is elaborated upon by Imam Ibn Al-Qayim who concluded this *hadīth* targets *ribâ* (usury), which is prohibited under *Sharī'a*.[136]

> Accordingly, despite the opinion of some jurists or researchers with regard to tidiness of permissibility of the stipulation of conditions or terms in contract, it is obvious that it is permissible for contractors to stipulate any condition that does not breach the rulings or intentions of *Sharī'a*.

Although the *Qur'ân* encourages people to forgive each other, it nevertheless permits the victim or the person subjected to harm by another to penalize the offender. This penalty must not in any circumstances exceed the damage caused by the offense. Amongst such provisions of the *Qur'ân* is verse 42:40 which provides:

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[135] See A. A. Al-Saloos, "Al-Sharṭ Al-Ğaza'ī Wa Taṭbīkātuh Al-Mo'āṣerah" (2001) 12:14 The Islamic Fiqh Council Journal 59 at 118.

[136] See Imam Ibn Al-Qayim, *'Awn Al-Ma'būd Sharḥ Sunan Abi Dawūd*, Vol.9, (Midinnah Al-Maktabah Al-Salafiyah 1388-1969) at 402-409.

> An ill-treatment may be rewarded with similar ill-treatment. But he who forgives and seeks reconcilement shall be recompensed by God. God does not love the wrongdoers

As for Sunna, there is the famous *hadīth* that provides "A person shall not harm others and shall not likewise let himself be harmed"

These provisions of *Sharī'a* affirm that the concept of penalty is admitted but in a manner that shall not exceed restitution.

Penalty clauses are permissible unless they make forbidden that which is allowed, or allow that which is forbidden.

As the two main defects resulting in the invalidity of contracts are *ribâ* (*usury*) and *gharar* (aleatory),[137] it would be opportune to investigate penalties as a cause of *ribâ* or *gharar.*

In Islamic terminology, contemporary contractual obligations are either *dayn* or *'ayn*, which roughly correspond to the Western terms *rights in personam* and *rights in rem.* [138]

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[137] See A. A. Al-Saloos, *supra* note 135 at 59.

[138] See A. Al-Sanhori, *supra* note 27 at 15.

'Ayn and *dayn* are abbreviations of *al-iltizam* (obligation) *bel'ayn* and *al-iltizam beldayn*. The distinction between *'ayn* and *dayn* are based on the nature of the subject matter of the obligation. If the subject matter is corporeal, it is *'ayn*. If the subject matter is incorporeal, then it is *dayn*.[139]

Dayn is linked to the *dhimmah* of the person. *Dhimmah* has two related meanings: from a subjective angle it is the qualification to bear obligations and enjoy rights recognized in each human being by right of birth. From an objective angle *dhimmah* is the receipt of incorporeal properties[140].

Hence, *dayn* requires the intervention of the person to whom it is linked (the debtor). Moreover, as in Western systems, the existence of *dayn* requires a *mutalaba* (claim) to be laid against the debtor[141]. On the other hand, to discharge an obligation *'ayn* needs, in principle, neither a claim on the debtor nor indeed his intervention.[142]

Nevertheless, *dayn* and *'ayn* are not completely distinct from each other. Whereas *'ayn* may also be linked to the *dhimmah* of the debtor and it may be a subject of *mutalaba*. *'Ayn*, for instance, may be the subject matter of a *guarantee*, which means, under Islamic-*fiqh*, that the guarantor's *dhimmah* and

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[139] See M. A. Al-Zarka, *Al-Madkhal Ila Nazariyat Al-Iltizām Al-'Ammah Fī Al-Fiqh Al-Islamī* (Dar Al-Qalam 1420 – 1999) at 83-84.

[140] N. Saleh, *supra* note 100 at 102.

[141] A. Al-Sanhori, *supra* note 28 at 21-22.

[142] See N. Saleh, *supra* note 100 at 104.

the debtor's *dhimmah* are joined together. Moreover, a debtor who is under an obligation to deliver *'ayn*, has his *dhimmah* charged with that obligation.

Hence, contractual penalty clauses may apply to *dayn* or *'ayn* so long as they are created by an *'aqd* (Contract). Surcharges on delayed payments are amongst the examples of penalty clauses related to *dayn*. The permissibility of such penalty clauses could constitute an independent piece of research. The Islamic-*fiqh* Council of the Muslim World League has concluded, however, that it is not permissible for the seller, in the case of sale with instalments, to ask for surcharges against the delayed payments whether stipulated in the contract or not.[143] The Islamic-*fiqh* Council has concluded as such with the perception that surcharges against delayed payments is a form of prohibited *ribâ* which should be avoided. Although the author agrees with this conclusion in relation to civil or non-commercial transactions, he does not entirely endorse this conclusion when it comes to pure commercial transactions for reasons that go beyond the scope of this thesis.[144]

As damages encountered by the passenger are either injuries or damage to their luggage, it is obvious that the contract of carriage is an *ayn* on the part of the carrier, who undertakes to transport passengers and their luggage safely. It is more important, therefore, to investigate whether it is permissible to incorporate

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[143] See A. A. Al-Saloos, *supra* note 135 at 105 ff.

[144] Compare F.E. Vogel and S.L. Hayes, *supra* note 132, M. O. Shubair, *Al-Mo'āmalāt Al-Māliyah Al-Mo'āṣirah Fī Al-Fiqh Al-Islamī* (Dar Al-Nafa'es, 1419-1999), M. N. Al-'Aani, *Aḥkām Taghayur Qimat Al-'Omlah Al-Nakdiyah Wa Atharoha Fī Tasdīd Al-Qarḍ* (Dar Al-Nafa'es, 1421- 2000) .

into contracts pertaining to *ayn*, like the contract of carriage, on the part of the carrier, a stipulation that operates as a penalty clause.

In its seventh session, The Islamic-*fiqh* Council of the Muslim World League decided that it is permissible for the parties to a contract of *istisn'a*[145] to stipulate a penalty clause against non-fulfillment of the covenants.[146] Parallel reasoning should apply to the contract of carriage.

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[145] A contract by which one party undertakes to create and deliver an object to the other for reward (Turn Key Contract).

[146] A. A. Al-Saloos, *supra* note 135 at 59.

Chapter III:The Concept of International Conventions & Treaties in Sharī'a

Islam did not arise in isolation from the other great civilizations surrounding Arabia. Despite the unprecedented revolution in traditions he brought about, the Prophet (PBUH) was not completely detached from the traditions of his ancestors and contemporaries, nor did he ignore the traditions of the civilizations in the vicinity of the Islamic state he would establish. Such an interaction and encounter between the Islamic state he established and neighbouring civilizations manifested itself in the diplomatic envoys they exchanged, the treaties they concluded, and the wars in the early era as well as later eras of Islamic States.

International conventions and treaties are seen by Islamic jurists as contracts, although they are between sovereigns rather than between individuals. Such a conception means that the various aspects of contracts established and elaborated in Chapter II above shall be taken in consideration while investigating the concept of international conventions.

This chapter will shed some light on the concept of international conventions and treaties in *Sharī'a* and Islamic-*fiqh*. It will give a brief chronological presentation of the nature of the relationship between the Islamic State and the surrounding States. The chapter will then explore some of the most important treaties and

conventions concluded by the Prophet (PBUH), as well as some others concluded by the ensuing caliphs.

3.1 An Overview

At the outset, it is important to take into consideration that the early Islamic jurists did not use the notion of Public Law, as compared to Private Law, adopted by the western legal systems. Topics in relation to public international law are, therefore, scattered in books of *siysa shari'yah* (Islamic principles of politics) and *siyar* (conduct of the sovereign). Moreover, the conduct of the sovereign in relation to other states is also discussed in the books of Islamic-*fiqh* under the section of *gihad*. It is, therefore, very difficult to trace the main resources on this matter in a chronological fashion. Nor is it possible to claim that a piece of literature is devoted to what we may call in the contemporary days, "Public International Law". An exception to this is found in two the works of the hanafiet scholar Imam Muhammad Ibn Abilhasan Al-Shaybanī (d. 189/807): *Kitâb Al-Siyar Al-Saghīr* and *Kitab Al-siyar Al-Kabīr*. These two books are the most renowned major classical works on the matter of *siyar*. The first available version of the book is the commentary dictated by another leading Hanfi scholar, Imam Sarakhsī (d. 483/1101), who authored the *Sharh Al-Siyar Al-Kabīr* (Commentary on Al-Siyar Al-Kabīr).

It is Sarakhsī not Shaybanī who defined to us what the term *siyar*, exactly, means when he said:

> Siyar is the plural of Sira. It describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, whom may have been temporarily (*musta'mīn*) or permanently (*dhimmis*) in Islamic land; with apostates, who were the worst of the unbelievers, since they adjured after they accepted Islam; and with rebels (*baghi*), who were not counted as unbelievers, though they were ignorant and their understanding of Islam was false[147]

After Shaybanī, many authors wrote on this topic. *Sahih Muslim* devotes a complete chapter titled *Bab Al-Siyar*. Al-Mawardī's book *Al-Ahkâm Al-Sultâniya Wal-Wilâyât Al-Diniya* and Ibn Taymiay's *Al-siyasah Al-Shariyah Fi Islah Al-ra'ī Wal-Ra'eiyah* are also amongst the most well known books on this subject. Both touch on the classification of the political status of States in the context of their relationship with the State of Islam. The first Islamic sociologist, Ibn Khaldûn addressed it in his famous introduction known as *Muqadimat Ibn Khaldûn* on the same matter. Despite the fact that these books, as well as other famous books like Ibn Rushd's *Bedayat Al-Mugtahid Wa Nihayat Al-Muqtasid*, elaborated on the question of the relationship between the Islamic State and the other States, they differ from Al-Shaybanī's manuscripts in the extent which their discussions are devoted to the matter of *siyar*.

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[147] L. A. Bsoul, "*What Is Islamic Law of Nations About?*" (January, 2000) [unpublished], received by courtesy of the author.

However, it is possible to conclude that all of these books discuss the status of the relationship between the State of Islam and other States and their inhabitants in connection with the availability or otherwise of a treaty with these states.

As established in section 1.2 above, paradigms of analysis can differ dramatically based on jurists' interpretation of basic terms. This is never better demonstrated than in the effort to identify Islamic Public International Law. Indeed, the range and degree of differentiation between the varying paradigms of some western scholars and actual Islamic rulings pertaining to Public International Law is further magnified when the term *gihad* is involved. The dichotomy may be as severe as the one adopted by Samuel Huntington in his famous article which became a book, *The Clash of Civilizations*[148] where he asserts that "Islam has bloody borders". Similarly severe misconceptions are adopted by some other prominent authors on Islamic politics, such as Bernard Lewis who takes the issue in the same direction as Huntington describing the relationship between Islam and the West in the following words:

> This is no less than a clash of civilizations – the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present and the worldwide expansion of both.[149]

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[148] S.P. Huntington, "The Clash of Civilizations?" Foreign Affairs 72:3 (Summer 1993): 22-49. See also *The Clash of Civilizations and the Remaking of World Order* (London: Simon & Shuster, 1997). One might add that recent pronouncements of Pope Benedict XVI quoting a mediaeval Christian account of *ğihad* are in a similar vein: see Benedict XVI, "Faith, Reason and the University: Memories and Reflections" University of Regensburg, September 12, 2006, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/15_09_06_pope.pdf (accessed September 16, 2006).

[149] B. Lewis, "The Roots of Muslim Rage" The Atlantic Monthly 266 (September 1990) 60.

But such misconceptions are not necessarily limited to the western authors. Majid Khaduri also perceives, in his commentary on the Shaybanī's *siyar*, that "there is an obligatory state of war between Muslims and the rest of the world".

Such a misconception is inevitable of the misinterpretation of the Islamic terminology offered by the source books written by our Islamic ancestors on the issue of public international law and the vivid state of war in the Middle East and some other dramatic incidents such as the events of September 11th, 2001.

A thorough investigation of the matter would result in opinions like those adopted by John Kelsay and Hilmi Zawati, who concentrate on Islamic principles governing the state of war and the state of peace. They concentrate on the fact that the segregation of the world into the State of Islam (*dar al-islam*) and the State of disbelievers (*dar al-harb*) is descriptive. They reflect on the actual situation between the Islamic State and the other States. Such segregation does not exist today in the same understanding.

In this thesis, the illustrations of treaties from the perspective of Islamic *Sharī'a*, take into consideration the two different schools of thought. The author formulates his own opinion on the grounds of the separation between *Sharī'a*, *fiqh* and *law*. However, this approach will take into consideration the chronological evolution of the Islamic State in the Prophet's era, when it started as a small group of people in Mecca and transformed into a powerful State in Medinna.

3.2 The Prophet's State

The Prophet started his missionary as a single person. The first person ever to believe in him was his wife Khadiga. He started gaining followers subsequently but in small numbers. It is narrated that until he left Mecca for Medina, Muslims were as few as seventy five people. It may not be appropriate to describe this number as a State. This number however had increased very rapidly to ten thousand companions eight years later.

A very big difference between the status of the Prophet (PBUH) and his companion is observed between Mecca and Medina. It is even observed in the nature of the revelations to the Prophet (PBUH). In Mecca, most of the revelations were concerned with the establishment of the Islamic creed and faith. They talk about God's attributes, the day of Judgment, angles, and refer to previous Prophets like Adam, Abraham, Moses and Jesus.

In Medina, the situation was completely different. There was a State led by the Prophet. The *Qur'ân*ic revelations in Medina were concerned with the State in general. Only after migration to Medina did the Prophet receive the verses stipulating consultation with the community, some of the rules of peace and warfare, and the criminal rules.

This section will elaborate further on the two eras and try to address the political and legal differences between them.

3.2.1 In Mecca

At the time of the birth of Muhammad, the Prophet of Islam (PBUH), in Mecca on the 20th or 22nd of April 571 A.D, [150] the Arabian Peninsula (Arabia) was at the heart of the Old World. To the north were the Byzantines and to the east were the Persians who ruled also Yemen (the southern area of Arabia).

The tribe of Quraysh, Muhammad's tribe, was the leader of Arabia. They lived in Mecca, where the holy shrine (Ka'baa) is located. Because of Ka'baa, which Arabs believe was built by Abraham, and its holiness for them, the people of Quraysh, as the servants of the Ka'baa, had a very special status in the whole region. They had a very safe path of commerce to the north in summers and to the south in winters whereas tribes would not dare to invade the guardians of the holy shrine in Mecca.

> For the protection of Quraysh: their protection in their summer and winter journeying. Therefore let them worship the Lord of this House (Ka'aba) who fed them in days of famine and shielded them from all peril[151].

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[150] See S. Al-Mubarakpuri, *The Sealed Nectar: Biography of the Noble Prophet* (Maktaba Dar-us-salam) at 56.

[151] The Holy *Qur'ān*, (106 : 1-4).

This unique combination of sacredness, trade and the desert land, in which none of the great nations at that point of time had any interest,[152] gave Quryash and its people the freedom to contact the civilizations around Arabia and to benefit from them without being exposed to any danger.[153]

Muhammad was raised in this society. He was the grandson of Abdulmutalib, the leader of Quraysh.

At this same time the Romans had just established the positivist method of Justinian (527 – 565A.D.). In Persia, the Jundishapur educational center, where the various schools of the then known world met and interacted with each other, was at its peak under the rule of the great Kisra Anu Shairwan (The Just Anu Shairwan) (531 – 579A.D.)[154]. Najran, the region to the north of Yemen was an independent Christian region.

Compared to the Persian and Roman empires, the Meccans had a less developed written culture. Indeed, according to the Islamic tradition, Mohammed (PBUH) himself was illiterate, which renders his own emphasis upon reading and the written word all the more remarkable:

> Those who follow the Messenger, the Prophet who can neither read nor write (i.e. Muhammad PBUH) whom they find written with them in the Taurât (Torah) (Deut, xviii 15) and the Injeel (Gospel) (John xiv, 16), — he

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[152] See K. Armstrong, *supra* note 16 at 55.

[153] See S. Al-Mubarakpuri, *supra* note 150 at 15.

[154] See S. W. Husaini, *Al-fikr Al-Islamī Fī Nahḍat Wa Ghalabat Al-thaqāfah Al-Islamiyah: 'Ibar Min Tarīkh Maṣāder Almiyāh Wa Al-ṭāqah* (Fussilat Lilderasat waltarjamah Walnashr 1998) at 46.

commands them for *Al-Ma'rûf* (i.e. Islâmic Monotheism and all that Islâm has ordained); and forbids them from *Al-Munkar* (i.e. disbelief, polytheism of all kinds, and all that Islâm has forbidden); he allows them as lawful *At-Tayyibât* (i.e. all good and lawful as regards things, deeds, beliefs, persons, foods), and prohibits them as unlawful *Al-Khabâ'ith* (i.e. all evil and unlawful as regards things, deeds, beliefs, persons and foods), he releases them from their heavy burdens (of Allâh's Covenant with the children of Israel), and from the fetters (bindings) that were upon them. So those who believe in him (Muhammad PBUH), honour him, help him, and follow the light (the Qur'ân) which has been sent down with him, it is they who will be successful [155]

Say (O Muhammad PBUH): O mankind! Verily, I am sent to you all as the Messenger of Allâh — to Whom belongs the dominion of the heavens and the earth. *Lâ ilâha illa Huwa* (none has the right to be worshipped but He). It is He Who gives life and causes death. So believe in Allâh and His Messenger (Muhammad PBUH), the Prophet who can neither read nor write (i.e. Muhammad PBUH), who believes in Allâh and His Words [(this Qur'ân), the Taurât (Torah) and the Injeel (Gospel) and also Allâh's Word: "Be!" — and he was, i.e. 'Îsâ (Jesus) son of Maryam (Mary) and follow him so that you may be guided[156]

Muhammad came with new notions for Arabs. The first revelation he received was:

Read! In the Name of your Lord Who has created (all that exists). He has created man from a clot (a piece of thick coagulated blood). Read! And your Lord is the Most Generous. Who has taught (the writing) by the pen. He has taught man that which he knew not.[157]

It is extremely remarkable that an illiterate person came with such charming words calling upon the mostly illiterate people of Quraysh to "read" and informing them that the Lord taught humans by "the pen".

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[155] The Holy *Qur'ān*, (7:157).

[156] The Holy *Qur'ān*, (7:158).

[157] The Holly *Qur'ān*, (1-5:96).

This illiteracy of the Meccans did not, however, prevent them from having agreements on the national level with other tribes or States. They, for instance, had the practice of hanging the most perfect poetry of Arabs on the walls of Ka'baa to declare the honor and dignity of both the poet and poetry. There were only ten Arabs poets to have this honor.

Whereas the loot of invasion between each other was the main source of income in Arabia. The Arab tribes, including Quraysh, concluded a convention to declare four months of the lunar calendar as sacred months during which invasion was prohibited. Unfortunately, there are no documents to explore the means through which this convention was concluded.[158] Another example is the Fudûl Pact (*Hilf Al-fudûl*), which Quraysh concluded to aid and protect any inhabitant of, or visitor to Mecca when subjected to injustice and to support him against his suppressor until restoring his rights.

These conventions became norms to the Arabs which they could never breach. Some were adopted by Islam after dominating Arabia. It is reported that the Prophet (PBUH) declared to his companions that he attended the *Fudûl* Pact before Islam and approved it to be in conformity with the Islamic principles. The *Qur'ân* has, also, adopted the glorification of the four sacred months.

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[158] See Y. Istanbuli, *Diplomacy and Diplomatic Practice in the Early Islamic Era* (Oxford 2001) at 9.

When the Prophet (PBUH) received the revelation, however, a new community within Mecca was created. The opposition by the people of Qraysh to the Prophet (PBUH) and his followers and their deviation from the theological traditions of their ancestors created a community, whose leader was Muhammad, within the community of Quraysh. While in Mecca, Muhammad and his followers were not rebellions. They kept on respecting the political orders and conventions ordained by Quraysh who could be described as the state leader at that point of time. He, nevertheless, started trying to contact the leaders of other tribes to conclude a convention of protection against the oppression he and his followers were facing from Quraysh. The author describes this as an early form of asylum.[159] After thirteen years of oppression in Mecca, he finally achieved such a convention with the people of Medina, which would become the first manifestation of the establishment of the Islamic State in Medina[160]. The author views this agreement (*Bay'atul 'Aqaba*) as the first convention in Islam which involved most of the established characteristics of modern conventions, except for the fact that it was not in writing. There was an offer from the Prophet (PBUH) and discussion and acceptance from the people of Medina. This convention, however, was concluded between Muslims. There was no non-Islamic element to the convention.

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[159] The Author suggests that these values should be taught to Muslim minorities in non-Muslim states to show them how much respect the Prophet paid to citizenship and nation despite the amount of oppression he received.

[160] See Y. Istanbuli, *supra* note 158 at 23-27.

Before the conclusion of Bay'atul 'Aqaba, the Prophet (PBUH) ordered a group of his most oppressed companions to migrate to Abyssinia. He appointed Ja'far Ibn Abi talib [161] as the leader of the migrants. J'afar acted as the migrants' representative before the Christian Negus or the king of Abyssinia. He is the one who appealed before the King when Quraysh sent a delegation to get them back and he is the one who concluded the agreement with the Negus for their settlement in Abyssinia. This agreement may be considered as the first convention with a non-Islamic State despite the fact that the Negus have since embraced Islam. There is no evidence, nevertheless, that this agreement was concluded in writing.

The history of the Prophet (PBUH) in Mecca may be taken as a good resource for the conduct of the sovereign at the time of weakness and oppression. The Prophet's companions, in spite of the oppression they encountered, were prevented from having any armoured action against Quryash. They were also completing commercial transactions with the non-Muslims without restrictions.

3.2.2 In Medina

Characteristics of the social life in Medina were slightly different from how it was in Mecca. In Medina, which at that point of time was called Yathrib, the two polytheist cousin tribes of Aws and Khazraj were settled. They were in the middle

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[161] This may be regarded as the first diplomatic mission in Islam.

of a long era of hostility and warfare with each other. In their neighborhood various Jewish tribes settled, amongst which were the three tribes of Bani Qynuqa', Bani Annadhir and Bani Qurayzah.

Upon the settlement of the Prophet (PBUH) in *Yathrib*, its name was changed to *Al-Medina Al-Munawara* (the enlightened city) or Madinnat Al-Rasûl (The City of the Prophet). Such a change in the name of the whole city may be considered as an implicit declaration of the rise of a new independent state. The Prophet, being the leader of Medina, concluded a written agreement (Sahifat Al-Medina) between the various inhabitants of Medina; namely The Jews, Aws, Khazarj and the Meccan migrants. The main purpose of this agreement was to present order and to organize the relationship between the various groups inhabiting Medina. This document is considered by some prominent scholars as the first treaty entered into by the Islamic State, while some other prominent scholars consider it as the constitution of the Islamic State of Medina. Hilmi Zawati asserts that this is neither a treaty in its established form nor a Constitution.[162] This is because, for Zawati, the Sahifa was dictated by the Prophet (PBUH) as the leader of the community without interference from the other parties who adhered to it. Zawati asserts that the Sahifa may, nonetheless, be considered as a constitutional charter to organize the life in Medina between the Muslims and the Jews.

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[162] H.M. Zawati, *Is Jihad A Just War: War, Peace, and Human Rights Under Islamic and Public International Law* (The Edwin Mellen 2001) at 56.

While in Medina, the Islamic State encountered various instances of war and concluded various peace treaties with Quraysh and the neighbouring states and tribes. Among the most famous treaties are the treaty of Hudaybiyah (named after the geographic place where it was concluded) and the treaty with the people of Najran.

3.2.3 After The Prophet

Through the first fifty years following the Prophet's death, the Islamic State was ruled by five of his companions. The ruler after the Prophet, Abu Bakr, took the title of Caliphat Rasul Al-Allah (the successor of the Prophet (PBUH) of God). In the reign of Omar Ibn Al-Khattab, the second caliph, the title of Amir Al-Mo'meneen (the commander of the faithful) was brought into existence instead of calling him Caliphat Calipaht Rasul Allah (the successor of the successor of the Prophet (PBUH) of God). The title Caliphat Rasul Allah was abbreviated, afterward, to Al-calipha (the successor), which meant the successor of the successor and so forth. This title was used interchangeably with the other title Amir Al-Mu'meneen. This title continued to exist with the same high level of authority in the Islamic world until the fall of the Ottoman Empire in 1924. By the death of the Prophet, the foundational text was complete and no additions were possible. The election of Abu Bakr, Abu Bakr's appointment of Omar as his successor, Omar's nomination of six companions of the Prophet (PBUH) for the

people to elect one among them, and the title were all based on Igtihad and Ijamaa' of the companions.[163]

Afterward, when Mu'awiyah (a companion of the Prophet) became the Islamic caliph, he transformed the caliphate to monarchy and established the Umayyades[164] caliphate. After the Umayyades, the Abasieds[165] took over. The most notable Absied Caliph was Harun Al-Rasheed in whose reign the Islamic state reached its peak of advancement and expansion. Many of the provinces under the rule of the Abbasieds were ruled independently by their own rulers who named themselves as kings or princes and kept their political links to the Abasied rule in a unique confederal style.

As a direct result of the very rapid expansion of the Islamic State through the years of these caliphates, many treaties and conventions on various issues were concluded between the Islamic State and other Monarchies all over the world, some of which will be reflected upon later in this chapter.

3.3 Reflections on the Concept of Treaties and Convention in Sahrī'a

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[163] For more on these incidents see generally S. Al-Mubarakpuri, *supra* note 150.

[164] Mo'awiya is a descendent of Umaiyah family from Quraysh. It is therefore the monarchy he established was nominated after his family.

[165] It was established by Abul Abbas Al-Saffah who is a descendent of the Al-Abbas Ibn Abdulmuttalib the Prophet's uncle. This monarchy is called Abbasied after the name Prophet's uncle.

As illustrated previously, for the very reason that the Islamic State did not rise in isolation from the world, it had to enter into treaties and conventions with other States in a manner that adhered to the Islamic teachings and corresponds to the needs, benefit and welfare of the *Ummah* (the Nation).

The treaties concluded in the early days of the Islamic State in Medina were, basically, pertaining to the establishment of order within the State and the conclusion of peace with tribes in war with Medina. The treaties later developed different characteristics as the State was concerned with freeing the roads of trade from hostilities.

It is advisable however, before further exploring some of the treaties concluded by the Islamic State, to reflect upon the permissibility and concept of treaties in *Sharī'a* .

3.4 Concept of treaties under Sharī'a

The word treaty corresponds to the Islamic term *Mo'ahada* (Pl. *Mo'ahadat).* The term *mo'ahada* in Islamic terminology is an agreement between two parties containing specific terms and conditions to which each of the parties should adhere.[166] This understanding has developed in the contemporary Islamic legal

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[166] O.J. Dhumayriyah, *Al-Mo'āhadāt Al-Dowaliyah Fī Fiqh Al-Imam Muhammad Ibn Al-Ḥasan Al-Shaybanī* (Rabiṭat Al-'Alem Al-Islamī, 1417-1997) at 136.

terminology to mean an agreement between two or more States to regulate the relationship between the parties thereto.[167]

Islamic teachings and the foundational text of *Sharī'a* admit the possibility of entering into a convention or a treaty with non-Muslims and stress the obligation of abiding by treaties even during warfare, whereas the *Qur'ân* in the course of warning the remaining polytheists in Mecca, who were at warfare with Muslims, stipulates the following exception:

> Except those of polytheist with whom you have a treaty, and who have not subsequently failed you in aught, nor have supported anyone against you. So, fulfill their treaty to them for the end of their term. Surely ALLAH (GOD) loves Almuttakeen (pious)[168].

A subsequent verse of the same chapter provides "...save those with whom you have treaties at the Sacred Mosque. So long as they keep straight with you, keep straight with them"[169]

The *Qur'ân* goes further by not permitting Muslims to aid other Muslims against Non-Muslims with whom they have concluded a peace treaty "...But if they seek your aid in the cause of the true faith, it is your duty to assist them, except against a people with whom you have a treaty..."[170]

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[167] *Ibid. at 26.*

[168] The Holy *Qur'ān*, (9:4).

[169] The Holy *Qur'ān*, (9:7).

[170] The Holy *Qur'ān*, (8:72).

The Prophet (PBUH), moreover, on behalf of the Islamic community (*Ummah*), entered into the very famous treaty of *Sulh Al-Hudaybeyah* with the non-Muslim polytheist of the tribe of Quraysh.

Thus, the concept of treaties in general, and treaties with non-Muslims specifically is explicitly permitted by the Holy *Qur'ân* and Sunna . However, such treaties should adhere to the Islamic rules and intentions including the attainment of the interests and welfare of the community and avoidance of blights. Consequently, the ratification by a State of a specific treaty or convention does not mean an automatic implementation by the courts of that State, which under the rules of Islam have complete independence, unless proven to be fully compatible with *Sharī'a* .[171]

The structure of modern international law is based on the European model established in the colonization era.[172] Such a structure, in the absence of any significant participation of Islamic states, makes it quite obvious and reasonable that some major treaties do not take, fully or partially, into consideration compliance with *Sharī'a* .

A treaty should fulfill certain conditions to be valid under *Sharī'a* . A treaty should firstly not contradict *Sharī'a* . This absence of contradiction, nevertheless, does

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[171] See *Sharekat Maktabat Al-khadamat Al-Hadīthath* vs. *Saudi Arabian Airlines* [20/d/a/9 year 1414 09th circuit/ Bureau of Grievances/ Saudi Arabia].

[172] Most of the existing treaties are traced to the second half of the 19th century and the first half of the 20th century. The Warsaw Convention was opened for signature on October 12th, 1929.

not mean adherence to specific provisions. All it means is the consideration of the explicit provisions of Shar'eea and the interest of the nation (*Maslaha*).[173]

Parties should have the capacity to enter into treaties. Capacity on a State level is multifold. The state itself should have the capacity to act on the international level and ratification of the treaty should be conducted by the authorized body and in accordance with the laws of the State.

Like contracts, treaties signed under coercion are consequently not valid. Coercion, nevertheless, does not mean being compelled to sign a treaty to which a State does not agree in full, the Prophet (PBUH) signed the treaty of Al-Hudaybiayh even though some of its provisions were completely one-sided in favour of Qraysh. It also does not mean a situation where a party is weaker than the other. For a situation to qualify as coercion on state level, the State should be expecting a serious danger that may expose its inhabitants to abolishment or mass destruction which it is unable to avoid or defend. Accordingly, to render a treaty invalid on the grounds of coercion, the State must prove that it would have not signed the treaty had the coercion not taken place.

Treaties may, moreover, have to comply with certain formalities in order to be valid. The Prophet, for instance, made almost all of his treaties in writing and had

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[173] See Ibn Al-Qayim, *Al-Ṭuruq Al-Hukmyah Fī Al-Syasah Al-Shar'eyah* (Al-Maktaba Al-Tejaryah 1416-1996) at 21.

them all sealed. *Sharī'a*, as such, welcomes the contemporary formalities for ratification of treaties.

There are various types of *mu'aahadat* (treaties) in Islamic-*fiqh* literature. Such classification is based on the subject matter or the conclusion of the treaty. For instance if a treaty is concluded between the Islamic State and another State for the safe conduct of the States towards the inhabitants of the other State it would be called *ahd aman* (Treaty for safe conduct). In such a treaty, the inhabitants of the States which have ratified the treaty have safe presence in the territory of the other State. If the treaty is concluded to resolve a dispute then it is *sulh* (settlement). Amongst the very early terms prescribed by the Prophet (PBUH) in relation to treaties is *dhimmah*, this is a declaration made by the Prophet (PBUH) to keep safe and treat well the people of the book (Jews and Christians) who reside permanently in the Islamic State. The Prophet (PBUH) decreed that against whoever amongst the Muslims aggravates a *dhimi* (a Jew or a Christian permanently living in the Islamic state), the Prophet (PBUH) will be his opponent on the Day of Judgment.

In general, it would not be wrong to conclude that *Sharī'a* and the contemporary international laws of treaties are similar in their pragmatic nature pertaining to the conclusion of treaties and conventions.

3.5 Some of the Most Significant Treaties in Islamic History

As explained above, the *Qur'ân* is very permissive with regard to treaties. It encourages the respect of treaties and ranks it as a religious obligation. The practices of the Prophet (PBUH) in relation to the treaties he concluded through his life are the first authentic references usually discussed in this regard. It proves in general to be, as is the *Qur'ân*, very permissive. He honored his treaties and expected his fellow men to honor them to the same extent. It is debatable, however, as to which one of the pacts the Prophet had with other tribes or States is the first treaty in the contemporary understanding. Sulh Al-Hudaybiyah is usually referred to as such. Some would refer to the pact of Medina. The author is of the view that the agreement concluded between the Prophet and the people of Medina known historically as *Bya'ta Al-Aqaba* constitutes this first treaty. This is so because it was concluded between the Prophet on the one hand and the people of Medina on the other. They discussed the provisions which were concluded in the form of an allegiance (*bay'aa*). The people of Medina were represented by the leader of their tribes (*noqaba'*). The people would accept and follow whatever their leader decided Another pact the Prophet made is the one concluded through his representative to the Negus of Abyssinia which resulted in giving Muslims the right of residency in his State. Regardless of which came first chronologically, Medina and Hudaybiyah are still the most important, from the authors point of view, as far as the legal reflections they imply are concerned.

3.5.1 The Charter of Islamic Alliance in Medina (Sahifat Al-Medina)

As soon as the Prophet (PBUH) reached Medina, he concluded Sahifat Al-Medina, a charter of Islamic alliance between the new migrants (*almuhâjerûn*) and the original inhabitants of Medina who embraced Islam, the helpers (*alansâr*). It is also a Co-operation and Non-Aggression Pact with the non-Muslim tribes which inhabited Medina at this point of time. This Charter sought to rule out all pre-Islamic rancor and feuds[174] and to establish a state of welfare and peace with the Jewish tribes residing therein.

Among the provisions of the Charter are:

> *Almuhajeroon* and *alansar* are one nation to the exclusion of other people.
> Believers shall not leave anyone destitute among them by not paying his redemption money or blood money in kind (*diyah*).
> Whosoever of the Jews follows us shall have aid and succor; they shall not be injured, nor any enemy be aided against them.
> The peace of the believers is indivisible. No separate peace shall be made when believers are fighting in the way of God. Conditions must be fair and equitable to all.
> Whenever you differ about a matter, it must be referred to God and to Muhammad.
> The Jews of Bani Awf are one community with the believers. The Jews will profess their religion and the Muslims theirs. Other Jewish tribes shall have similar rights to those of Bani Awf.
> The Jews shall be responsible for their expenditure, and the Muslims for theirs.
> If attacked by a third party, each shall come to the assistance of the other.
> Each party shall hold counsel with the other. Mutual relations shall be founded on righteousness; sin is totally excluded.
> Neither shall commit sins to the prejudice of the other.
> The wronged party shall be aided.
> The Jews shall contribute to the cost of war so long as they are fighting alongside the believers.

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[174] S. Al-Mubarakpuri, *supra* note 150 at 189.

> Medina shall remain sacred and inviolable for all that join this treaty.
> Should any disagreement arise between the signatories to this treaty, then God the All-High and His Messenger shall settle the dispute.
> The signatories to this treaty shall boycott Quraysh commercially; they shall also abstain from extending any support to them.

This Charter (*sahifa*) acted as the basic constitution of the new State of Medina. It focussed on diluting the strong t*ribâl* loyalty and creating superceding rules of relations among the diverse combination of people in the State. The *sahifa* included a Co-operation and Non-Aggression Pact with the Jews neighbouring Medina drawing a framework for the relationship between the new State and the neighbouring tribes which were mostly Jewish.

The *Sahifa* is however not considered by some Islamic scholars as a treaty. Hilmi Zawati asserts that this Sahifa was not negotiated by the Jews. The author does not agree with Zawati's assertion. A thorough investigation of the Sahifa shows that it refers more than once to the discretion of entering into it and adhering to its rule. Moreover, the *sahifa* was an open treaty as it provides more than once that "Whoever enters into this treaty shall...".

The author rather asserts that the *Sahifa* adopted many of the formalities still admitted by the contemporary international law of conventions. It was laid down in writing and signed by the representatives of each of the parties to the treaty. It also reflected upon what we currently know as the conflict of laws whereby the treaty provides that upon disagreement, jurisdiction shall be granted to the

Prophet (PBUH) as the leader of Medina. The treaty, nevertheless, was not drafted in articles as illustrated here.

The matter of negotiation and the style of drafting shall not affect the status of the *Sahifa* as a treaty.

3.5.2 The Treaty of Hudaybia

After a long history of conflicts and hostility between the Islamic State in Medina and Quraysh in Mecca, they jointly concluded the peace Treaty of Hudaybia. This treaty was concluded in the 6th year of *Hijrah* (migration to Medina) when the Prophet (PBUH) tried to visit Mecca and perform Umrah.[175] Quraysh did not permit the Prophet (PBUH) to enter into Mecca and after the exchange of envoys and delegations; the Prophet (PBUH) and Quraysh concluded Sulh al-Hudaybiah or the Agreement or Treaty of Hudayabiah. The Treaty provided as follows:

> The Muslims shall return this time and come back next year, but they shall not stay in Mecca for more than three days.
> Muslims shall not come back armed but can bring with them swords only sheathed in scabbards and these shall be kept in bags.
> War activities shall be suspended for ten years, during which both parties will live in full security and neither will raise sword against the other.
> If anyone from Quraysh goes over to Muhammad PBUH without his guardian's permission, he should be sent back to Quraysh, but should any of Muhammad's followers return to Quraysh, he shall not be sent back.
> Whosoever wishes to join Muhammad, or enter into treaty with him, should have the liberty to do so; and likewise whosoever wishes to join Quraysh, or enter into a treaty with them should be allowed to do so.

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[175] *Umrah* is some times referred to as *Al-Haj Al-Asghar* (The minor pilgrimage) as it has sermonies similar to those prescribed for *Haj* but with major exception.

On the conclusion of the treaty, two copies were sealed by the Prophet (PBUH) and Quraysh's representative, Suhail Ibn Amr. [176]

Despite the importance of this treaty of Hudaybiah on the political level, the author submits that it also has a remarkable importance on the legal front. Concerning voting, there was serious opposition from the second Minister or Secretary of the Prophet, Omar Ibn Al-Khattab, against the conclusion of this treaty which was faced by full agreement from the first Minister, Abu Bakr. This was sort of one to one voting which was balanced by the vote of the chief, the Prophet, in favour of signing and ratifying the treaty.

The treaty was made of two signed and sealed copies with each party keeping one copy.

This treaty introduced the authority of the leader to enter into treaties on the grounds of *maslaha*, (the interest of the nation).

This treaty was closed to the parties thereto.

It was a bilateral treaty as compared to the multilateral treaty with the Jews neighbouring Medina.

The treaty introduced pragmatism as the basis for concluding treaties with others.

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[176] See Y. Istanbuli, *supra* note 158 at 44.

Moreover, the treaty of the Alhudaybiyah did not constitute a settlement of the dispute and hostility between Medina and Mecca, it was rather a *hudna* (armistice) between the two parties who agreed to put down for 10 years the warfare they had continued to have in the last 19 years preceding the conclusion of the treaty.

3.5.3 Other Examples of Treaties Entered into by The Islamic State with Non-Islamic States.

At the conquer[177] of *Ilyae* or Jerusalem by the second righteous Caliph, Omar Bin Al-Khattab, he concluded a treaty with the Christian inhabitants of the city that provides:

> In the name of God, the most gracious, the Merciful. This is what *abdullah* (servant of God) Omar bin al-Khattab, commander of the believers, has conferred protection on the inhabitants of Ilyae. He offered them safety over their persons, their properties, their Churches and their crosses, over all the inhabitants, the healthy and the sick. Their Churches would not be inhabited, or demolished or decreased in area, neither their crosses nor would properties be damaged. They would not be forced to reject their faith, and none of them would be treated unjustly. Not one of the Jews would be allowed to dwell in *Ilyae.*[178] The people of *Ilyae* would pay the *jizyah* according to tha same terms the *jizyah* being paid by the people of Al-Midenna. They should deport the Romans from their city. Those who depart would be safeguarded, together with their properties until they reach their safe destination. Those who stay would be protected, and they would have to pay what the people of *Ilyae* have to pay off as djizyah...

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[177] In Islamic perspective.

[178] Upon the request of the Christian inhabitants of the city.

The importance of this treaty from the legal point of view is the practices it established for Islamic states for concluding treaties while in a superior position.[179] To apply the rules of the treaty, it is reported that Omar refused to pray in the main Church of Jerusalem, stating that Muslims after him would want to follow his deed by praying in the same place. This would disturb the Christians and may lead to a de facto breach of the treaty. Moreover, this treaty introduces in writing the concept of *jiziyah* (a form of tax).. It is called *jiziyah* to differentiate it from the zakat (alms) which Muslim citizens have to pay. This is not to assert that the notion of *jiziyah* was introduced by this treaty, as it was introduced by the Prophet.

Another famous treaty is the one concluded between Mu'awiyah Ibn AbiSufyan, the 1st Umayyed Caliph, and the Byzantine Emperor at the time of the war between Ali Ibn AbiTalib, the 4th righteous caliph, and Mu'awiyah. This treaty was concluded to protect the Islamic State from any attacks by the Byzantines in exchange for an annual amount paid by Mu'awiyah to the Byzantine emperor. This type of conventions resulted in different points of view amongst the Islamic jurists. Some, such as Al-Shaybani accepted it only when it was a matter of necessity, while Al-Shafi'ī advised against its validity.[180]

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[179] See generally K. Armstrong, *Holy War: The Crusades and Their Impact on Today's World* (Anchor, 2nd edition 2001) at 46-47.

[180] H.M. Zawati, *supra* note 162 at 57.

During the reign of Harun Al-Rasheed, the 5th Abbasid caliph, the Islamic State was at its peak of power and prosperity. Such prosperity and power did not, however, prevent him from concluding a peace treaty with Charlemange, with whom they exchanged war prisoners. It was the geographic location of both which convinced them to conclude the treaty as each would protect and act as a barrier for the other against his enemies.

Saladin (Salahuddin Al-Ayoubi), the great hero of Muslims also concluded various treaties and conventions with the Christian Crusaders led by the English King, Richard the Lionheart in 1192, during which they exchanged war prisoners and had a peace period of five years. Karen Armstrong contends that Richard The Lionheart entered into these treaties on secular grounds in opposition to the Church. She asserts that Salahuddin likewise entered into these treaties on secular grounds. The author does not agree with Armstrong's conclusion. Salahuddin was the leader of the community in whose hands lay the religious responsibility to lead it away from blights and to bring to it welfare and prosperity. The treaties were in line with such religious fulfillment. It is the author's opinion that Salahudin's decision was ordained by Sahree'aa. Karen Armstrong may have established her opinion on her Christian background as a former nun, it is relevant that the Church and the King used to be two independent and competing powers.

Despite the content of these treaties, they prove that Islamic *Sharī'a* is very practical when it comes to the conclusion of treaties and conventions with other

nations, be they Muslim or not. This practicality should, however, achieve the goal of serving the interest of the nation, but not its rulers, and should also prevent its affliction.

Conclusion:

The main concept the author wanted to reflect upon in this part of the thesis is that Islamic Law is not *Sharī'a* , and these two are not *Islamic-fiqh*. Each of these terms has its own distinct meaning. *Sharī'a* covers three aspects of human life. It gos into great detail within its foundational text, the creed (*'Aqīdah*) of Muslims. Such details do not leave any room for further human intellectual reasoning. Another aspect *Sharī'a* includes within its foundational text is the acts of humans. These acts are categorized into acts of worship (*'ibadât*) and acts of transactions (*mo'amalat*), which the author considers the third aspect. Although acts of worship are prescribed in detail in the foundational text of *Sharī'a* , it still needs the interference of human reasoning. Acts of transaction as well need the interference of human reasoning. The reasoning of Islamic jurists in relation to the acts of humans, and the opinions they would offer is termed as *fiqh* which is laid down in a countless number of manuscripts on such topics. The main difference, however, between the handling of acts of worship and acts of transaction is the basic principle in accordance to which the conclusion is reached. Acts of worship are forbidden unless prescribed by a foundational text and actions of transaction are permissible unless forbidden by a foundational text. In other words, humans cannot create a new action of worship that was not

prescribed the foundational text of *Sharī'a* while they cannot restrict an action of transaction that accords with the spirit of Sahree'aa and does not conflict with its foundational text.

Jurists' opinions in relation to acts of worship may never become a law. Concurrently, their opinions in relation to actions of transaction will never become law unless adopted and legislated by the State as law. The author believes that this freedom, as given to legislators by *Sharī'a* would overcome the need to secularize laws and separate them from *Sharī'a* .

Consequently, contrary to the prominent perception in the west, Islamic Law is not termed as such because it is the Religious Law of Muslims. The author suggests that the term Islamic Law should rather refer to those laws whether constitutional, civil, commercial or otherwise which accord with the spirit of *Sharī'a* and do not contradict its foundational text.

Through such understanding the State does, indeed, have the freedom to conclude bilateral or multilateral agreements, treaties and conventions so long as it finds them to be in line with its main duties towards its people. The Warsaw System and the Montreal Convention may as such be seen as Islamic unless they are found to be in contradiction with the foundational text of *Sharī'a* or deviating from its spirit.

Part I also addressed in details the matter of *diyah* as an Islamic principle introduced by the foundational text of *Sharī'a* to rule on liability in cases of personal injury and death. The principle of *diyah* rules over contractual and extracontractual liabilities. Although it does not need to be stipulated in a contract, parties may stipulate in their agreement to increase the limits of *diyah* as stated in the relevant law. They, however, may never agree before the injury or death to decrease it. This, nonetheless, does not mean that the injured or their heirs do not have the right to agree to decrease or even waive it after the occurrence of the injury. Such unique status of *diyah* is the core of the 3rd dimension through which the thesis will conduct the comparison between the Warsaw System and the Montreal Convention; from the perspective of Islamic-*fiqh*.

The next part of this thesis will try to elaborate on the current liability regime for air carriers, and investigate whether it contradicts the foundational text of Sahree'aa. Then it will suggest how such a regime would have developed if the dimension of *Sharī'a* were to have been taken into consideration while developing the various international instruments.

PART 2: THE INTERPLAY OF DIYAH WITH THE WARSAW SYSTEM AND MONTREAL AND ROME CONVENTIONS

Chapter IV Introduction to Air Carriers' Contractual and Extra-Contractual Liability

4.1 Introduction

The previous part of the thesis has elaborated on major concepts regarding *Sharī'a*, Islamic-*fiqh* and Islamic law, paving the grounds for a concrete understanding of the subject matter of the thesis. With such an introduction, the reader shall be able to overcome the intellectual challenge of understanding and applying the methodology of Islamic-*fiqh* while analyzing the provisions of the Rome Convention, the Warsaw System and the Montreal Convention. Having established this, this part of the thesis will try to elaborate on the subject of air carriers' liability towards persons onboard as well as those on the ground in contrast with the 3rd dimension of *Sharī'a* .

The air carriers' liability regime can be put into two categories; contractual and extra-contractual. Such segregation of the liability regime has taken place since the Paris Conference of 1925, where CITEJA's[181] agenda included "Damages caused by aircraft to goods and persons on the ground" as an independent agenda item. Separating this subject from others in such a manner reflects implicitly that the Conference had the intention of treating them differently.

[181] Comité International Technique d'Experts Juridiques Aériens.

CITEJA was concerned with protecting air carriers from overwhelming liabilities that may be an obstacle to the advancement of the aviation industry. It was furthermore trying to avoid any exaggerated liability litigation either by virtue of contract or tort.

This part of the thesis will follow such classification and categorization. It will therefore, discuss the Rome Convention independently from the Warsaw System and the Montreal Convention in different chapters. This part will, therefore, address the rules each of these instruments have established to regulate and unify air carriers' liability pertaining to injury or death of persons. It will, as well, reflect on such rulings from the perspective of Islamic *Sharī'a* and then suggest how it would have evolved if the dimension of Islamic *Sharī'a* had been taken into consideration at the outset.

The Rome Convention, Warsaw System and the Montreal Convention evolved in a pure common and civil law environment without taking into consideration the principle of *diyah* adopted by *Sharī'a* which asserts that wrongdoers' liability is limited but may be raised by virtue of agreement or penalty. This 3rd dimension of *Sharī'a*, the author contends, is a middle line between the Rome and Warsaw lower limits and the unlimited liability agreed in Montreal. As will be discussed through this part of the thesis, because of the fact that *diyah* does not rely on contract in limiting liability, it would have had an immense impact on the drafting of Warsaw Convention. The resulting legal framework would not have evolved in

the way it has to today. The comparison with Islamic *Sharī'a* does not mean, and is not intended to mean that the Rome Convention, the Warsaw System and the Montreal Convention are, at the outset, in conflict with the principles of Islamic *Sharī'a* and, consequently, may not be seen as Islamic laws or Islamic coherent law. Rather, with such analysis, the author is trying to come up with suggestions based on grounds that were not taken into consideration at the time of adopting the existing regimes.

It is noteworthy to point out that matters in relation to private international law are, in general devastatingly complicated. This is true especially when it comes to determining laws to be applied and the courts having jurisdiction over transnational incidents. After the advent of the aviation industry, these matters would become even further complicated without establishing a uniform law that all nations of the world would agree upon and apply. It is so not only because of the speed with which aircraft pass territories and borders but also due to the great number of transnational factors associated with almost every international flight. For example, the carrier may belong to a State, the passenger may belong to another, the contract of carriage itself may have been concluded in a third and an incident or accident may happen over a fourth State. Such complications in addition to others, forced a number of States to gather with the aim of trying to create a unified international liability regime.

Great efforts were exerted until the end of the 3rd decade of the 20th century, when the Warsaw Convention was signed at Warsaw declaring the birth of the 1st legal instrument in connection with the Private International Air Law. The Convention aimed to unify the legal regime governing the international carriage by air of passengers, baggage and cargo covering two specific objectives: (1) to establish a uniform scheme of dealing with claims arising out of international transportation; and (2) to limit potential air carriers liability in the event that damages resulted from a related accident.[182]

Notwithstanding the fact that the authors of the Warsaw Convention demonstrated their farsightedness and intellectual skills by drafting a document of such complexity and sophistication, the Convention has been and continues to be a battlefield for different paradoxical opinions and interpretations. These controversies, which have spanned the entire life of the Convention, have resulted in the construction of a body of different interrelated instruments collectively referred to as the Warsaw System.

The most recent product of these differences is the Montreal Convention, which entered into force between States party to it as of November 4th, 2003 and intends to unify the private international air law especially in the area of air carriers' liability after decades of contentions and disagreement.

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[182] J.B. Alldredge, "Continuing Questions in Aviation Liability Law: Should Article 17 of the Warsaw Convention Be Construed to Encompass Physical Manifestations of Emotional and Mental Distress?" (Fall 2002) 67:4 Journal Air Law and Commerce 1345 at 1347.

Throughout this Part of the thesis, the author will try to elaborate on the Rome Convention, the Warsaw System and the Montreal Convention of 1999 and investigate all of the various aspects and interpretations of these. The thesis will only focus on the matter of air carriers' liability in relation to the carriage of passengers by air. There may, indeed, be some reflections in relation to cargo and luggage wherever it is necessary, but they will, nonetheless, be outside of the scope of the focus of this thesis. Of course, the discussion will take place in contrast with the relevant perspectives of Islamic *Sharī'a*.

Chapter IV of this part will elaborate on the evolution of the air carriers' liability regime since inception to the present. This will include a brief elaboration on the Rome Convention, which is meant to unify the rules pertaining to extra-contractual liability of air carriers towards persons and objects on the surface, and a comparison with the Islamic *Sharī'a* perspective. Subsequently, Chapter V will discuss the evolution of the Warsaw System with a brief account of each of the instruments composing it. That Chapter will also include a brief introduction to the Montreal Convention of 1999. These two Chapters will clearly introduce the readers to the Conventions, in preparation for embarking on the core subject matter of the thesis. Chapter VI will be devoted to further discussion of the Rome Convention and the extra-contractual liability of air carriers with attention to the relevant dispositions of Islamic *Sharī'a*. Chapter VI will address the contract of

carriage, as an introduction to Chapter VII which will discuss the Warsaw System and the Montreal Convention in comparison with Islamic *Sharī'a*.

4.2 Historical Background

When the Montgolfier Brothers flew their balloon for the first time, they provoked the earliest known Directive in relation to aviation. The police authorities of Paris issued a Directive on April 23rd 1784 to the effect that flights were not to take place without prior authorization.[183] Balloons in France also brought about the issuance of the first Regulation pertaining to the safety of aerial navigation in 1819.[184] The first reported common law case of a tort committed in the course of aviation activity – loss of control by the pilot – was decided by the courts of the United States in 1822. [185] The first reported case of damage caused by aviation was litigated in the United Kingdom in 1889.[186] On July 29th 1899 an international treaty entitled the International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons was concluded between several States.

Balloons were also the cause of the first international conference on aviation law between France and Germany in Paris. The conference was conducted in 1910 to resolve the problem of German balloons crossing the French border while

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[183] I. H. Diederiks- Verschoor, *An Introduction of Air Law*, 6th ed. (Netherlands, Kluwer: 1997) at 2.

[184] P.B. Keenan, A. Lester and P. Martin, *Shawcross and Beaumont On Air Law*, 3rd ed. (London, Butterworths:1966) at 3 [hereinafter *Shawcross*].

[185] *Guille* v. *Swan* (1822), 19 Johns. (N. Y.) 381; U.S. Av. R. 53.

[186] *Scot's Trustees* v. *Moss* (1889), 17 R. (Ct. of Sess.) 32.

flying.[187] Although, the conference did not conclude in a treaty, it introduced the need to resolve issues in relation to flying objects on an international level.

On February 8, 1919 France and the United Kingdom operated the first scheduled air service between Paris and London.[188] This took place nineteen years after the first engine powered flight by the Wright brothers at Kitty Hawk. Indeed, with the post World War I mentality in relation to sovereignty, such an operation called for various meetings and conferences on the international level, amongst these was the one conducted in Paris in 1919.

Despite the fact that all of these conferences and conventions were concerned with the public international law aspects of aviation, such as sovereignty and the denotation of airdromes, they attracted the attention of the international community to the need for a similar uniform regime governing private international air law. The first step towards such a regime was taken by the French government in June 1923, when a bill was submitted to the National Assembly regarding the liability of carriers in air transport.[189] Thereupon, the French government invited a number of States to an international conference to draw up a convention on the liability of air carriers. Accordingly, the first international conference on private air law was held in Paris between October 27 and November 6, 1925 and was attended by the official representatives of forty

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[187] I. H. Diederiks-Verschoor, *supra* note 183 at 2.

[188] *Ibid.*

[189] P. H. Sand, J. Freitas & G.N. Pratt, "An Historical Survey of International Air Law" (1960) 7 McGill L.J. 24 at 27.

four States as well as observers from Hungary, Japan and the United States. The conference resulted in the creation of a committee of experts, to be known as CITEJA.[190] Within the period between May 17, 1926, when the CITEJA members met for the first time in Paris, and the beginning of World War II, there were four conventions and a protocol created by CITEJA and opened for signature. The most important of these conventions is the Warsaw Convention of 1929, which was submitted by CITEJA to the conference between October 4th to 12th, 1929. The Convention was the result of CITEJA's perusal of the questions raised in the Paris conferences of 1925 and 1926. It was opened for signature at the conclusion of the conference, which was attended by the representatives of thirty-three States. Two other documents were submitted to the conference held in Rome between May 9th and 29th, 1933. The first convention relates to the precautionary attachment of aircraft and the second was for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface.[191] The latter was designed to govern air carriers' extra-contractual liability for fatalities caused by an aircraft, in contrast with the contractual liability governed by the Warsaw Convention. Neither of these two latter conventions entered into force because they did not achieve the required number of ratifications. A fourth document was submitted at the Brussels Conference of 1938. It related to aviation insurance and was not ratified by any State. World War II disrupted the remarkable progress of CITEJA, which subsequently ceased to exist.

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[190] *Ibid.*

[191] *Ibid.*

The International Civil Aviation Organization, ICAO, was created as a result of the Chicago Convention of 1944.[192] The legal committee of ICAO took over CITEJA's responsibilities and was successful in creating many other conventions and protocols. Amongst these are the Tokyo Convention of 1963,[193] all the protocols and convention comprising the Warsaw System, the Rome Convention and its amending Protocol[194] and the Montreal Convention of 1999.

As a landmark advancement of the aviation industry in general, and the liability regime specifically, one can not ignore the creation of the International Air Traffic Association in 1919 by the principal companies operating international air services in Europe, which was meant to establish a single regime governing in the operation of airlines.[195] Again, the outbreak of the World War II interrupted the progress of this association, which was then liquidated in 1945 and replaced by the International Air Transport Association, which we all now know as IATA.[196] The objective of the Association is to promote safe, regular and economical air transport for the benefit of the people of the world, to foster air commerce, and to study the problems connected therewith; to provide means for collaboration

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[192] *Convention on International Civil Aviation,* 7 December 1944, ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

[193] *Convention on Offences and Certain Other Acts Committed on Board Aircraft,* 14 September 1963, ICAO Doc. 8364 [hereinafter *Tokyo Convention*]..

[194] *Protocol to Amend the Convention on the Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, on 7 October 1952,* 23 September 1978, ICAO Doc. 9257 [hereinafter *Montreal Protocol 1978*].

[195] Shawcross, *supra* note 184 at 74.

[196] *Ibid.*

among the air transport enterprises engaged directly or indirectly in international air transport services; to co-operate with the International Civil Aviation Organization and other international organizations.

The International Air Traffic Association drew up the Uniform Conditions of Carriage in 1927, which were framed so as to relieve a carrier from any liability (except where such liability was compulsory and imposed by national laws) to those with whom it had entered into a contract of carriage, either for injury or death of the passenger or for the loss of or damage to cargo.[197] After the enactment of the Warsaw Convention, conditions of carriage were amended to comply with its requirements.[198] IATA continued to play a major role in the advancement of the aviation industry in general and aviation regulations in specific. In the field of air carriers' liability, some IATA members agonized in 1995 over the unlimited strict liability concept. As a result, the IATA Inter-carrier Agreement (IIA) was approved and adopted unanimously by a Resolution of the 51st Annual General Meeting of IATA in Kuala Lumpur, Malaysia on October 31, 1995.[199]

Under this agreement, the airlines agreed to waive the limits of liability in respect of claims under Article 17 of the Warsaw Convention for death or bodily injury of

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[197] *Ibid.* at 75.

[198] *Ibid.* at 77.

[199] D.H. Kim, "The System of the Warsaw Convention Liability in International Carriage by Air" (1997) 1: 2 Boletim da Faculdade de Direito 55 at 70.

passengers as provided in Article 22 of the Warsaw Convention.[200] The regime introduced by the IIA imposed strict liability upon carriers for claims not exceeding 100,000 SDR. For amounts claimed in excess of 100,000 SDR, the agreement retained all of the defences available under the Warsaw Convention to be invoked by the carriers. To implement the principles of the Inter-carrier Agreement, airlines under the auspices of IATA adopted Measures to Implement the IATA Inter-carrier Agreement (MIA).

This action taken by IATA and its members has played a major role in two respects: i) it disrupted the Warsaw System as it introduced changed limits; and ii) it paved the way for the new Montreal Convention. Indeed, the Montreal Convention reflected the rules adopted by the IIA and MIIA.

The next Chapter will elaborate on the evolution of the Warsaw System by addressing each of its components.

[200] The IATA Inter-carrier Agreement 1995 (IIA) came into force on 14th February 1997.

Chapter V: Air Carriers' Extra-contractual Liability

National laws would usually take different approaches to liabilities arising out of bodily injury or death to persons on the surface and those arising out of trespass and nuisance. This is so because trespass and nuisance are torts related to the ownership or occupation of land, while the causation of bodily injury or death of a person on the surface is not. Despite such differences in nature, they were both treated similarly on the international level under one convention. The only reason for treating both in the Rome Convention was, the author presumes, that both are extra-contractual liabilities dealing with third parties with whom the carrier has no contract.

Whereas this thesis addresses carrier liability arising out of injury or death of persons, whether aboard an aircraft or on surface; and whereas it also tries to elaborate on the *diyah* methodology which combines contractual and extra-contractual liability, the author finds it necessary to elaborate on the Rome Convention and its implications in relation to air carriers' liability in general. This is done so as to set the Rome Convention appropriately in context for the subsequent discussion. However, the thesis will concentrate on the part of the Convention relating to injury and death of persons on the surface to avoid deviation from its main subject mater.

5.1 The Rome Convention

The Rome Convention is concerned with unifying the rules pertaining to extra-contractual liability of air carriers for damages they may cause to third parties. It is composed of 6 chapters and 39 articles. It came into force on the 4th February 1958 which was the 19th day after the date of the deposit of the 5th instrument of ratification. The Rome Convention was introduced in order to improve the provisions of the Rome Convention 1933 on the same subject. The 1952 Convention, therefore, supersedes the 1933 Convention. However, to the present day, the Rome Convention has yet to be widely ratified. There are various reasons usually given for the reluctance of states to ratify the Convention, including that the provisions of the Convention linking the limits of liability to the weight of the aircraft, which may sometimes lead to unreasonable results.[201] Another reason is the very low limits of liability adopted by the Convention. To increase the likelihood of further ratifications, the Convention was amended by the Montreal Protocol of 1978 according to which the limits of liability in respect of personal injury or loss of life were increased to 125,000 SDRs.[202] In the following sections, the thesis will elaborate further on the various provisions of the Rome Convention and the amending Montreal Protocol of 1978.

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[201] Shawcross, *supra* note 184 at 522.

[202] Montreal Protocol of 1978, *supra* note 194 Art. III.

5.2 Principles of Liability

Articles 1 through 10 articulate the principles of liability adopted by the Rome Convention. In order to define the scope of the Convention, Article 1(1) provides that:

> Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

According to this Article, a person who suffers damage caused by an aircraft in flight is entitled to compensation. Such entitlement however is subject to the following conditions:

- The aircraft causing the damage has to be in flight. Article 1(2) stipulates that "[f]or the purpose of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression "in flight" relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto"; and

- Damage should be suffered by a person. Such damages shall include damages to property and personal injuries or death.

Reading this Article in conjunction with Articles 5, 6, 23, 24, 25 and 26, there shall be no right to compensation under the Rome Convention in the following circumstances:

- If the damage is the direct consequence of armed conflict or civil disturbance;[203]

- If it is proved that the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage or of the latter's servants or agents. Nevertheless there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority;[204]

- If the damage is not a direct consequence of the incident giving rise thereto;[205]

- If the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations;

- If damage is not caused in the territory of a Contracting State by an aircraft registered in the territory of another Contracting State;[206]

- If damage is caused to an aircraft in flight, or to persons or goods on board such aircraft;[207]

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[203] Rome Convention, *supra* note 4 Art. 5.

[204] *Ibid.* Art. 6 (1).

[205] *Ibid.* Art. 23.

[206] *Ibid.* Art. 23 (1).

[207] *Ibid.* Art. 24.

- If damage is on the surface while liability for such damage is regulated either by a contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by the law relating to workmen's compensation applicable to a contract of employment between such persons;[208] or

- If damage is caused by military, customs or police aircraft.[209]

Articles 2, 3 and 4 of the Convention define who shall be liable on the occurrence of damage. Article 2 (1) provides that

> The liability for compensation contemplated by Article 1 of this Convention shall attach to the operator of the aircraft.

Articles 2(2) through 4 define the term operator. These articles provide that the operator of the aircraft, upon the realisation of damage, is not necessarily the owner of the aircraft in whose name it is registered. Nonetheless, the owner of the aircraft is presumed to be the operator unless in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party to the proceedings.[210] The operator may rather be another person with the following characteristics:

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[208] *Ibid.* Art. 25.

[209] *Ibid.* Art. 26.

[210] *Ibid.* Art. 2 (3).

- the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator[211]; or

- A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.[212]

The owner of the aircraft or the person from whom rights are derived and the operator shall, however, be jointly and severally liable in the following circumstances:

- If the person who was the operator at the time the damage was caused did not have the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right to use commenced; or[213]
- If a person makes use of an aircraft without the consent of the person entitled to its navigational control, unless he proves that he has exercised due care to prevent such use.[214]

Article 7 adds to the previous stipulations that if the damage on the surface is an outcome of the collision of two aircraft, then the operators of each of the aircraft

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[211] *Ibid.* Art. 2(2/a).

[212] *Ibid.* Art. 2(2/b).

[213] *Ibid.* Art. 3.

[214] *Ibid.* Art. 4.

concerned shall be considered to have caused the damage and the operator of each aircraft shall be liable, each of them being bound under the provisions and within the limits of liability of the Convention.

5.3 Extent of Liability and Related Securities

Articles 11 through 14 delineate the extent or limit of liability under the Rome Convention. Article 11 links the liability of the operator to the weight of the aircraft causing the damage. This somewhat arbitrary method for determining the limits of liability is, indeed, one of the major obstacles preventing wide ratification of the Convention.[215] Paragraph (1) of Article 11 specifies the limits of liability for each aircraft and incident in respect of all persons liable under the Rome Convention, as follows:

- 500,000 francs for aircraft weighing 1,000 kilograms or less;
- 500,000 francs plus 400 francs per kilogram over 1,000 kilograms for aircraft weighing more than 1,000 but not exceeding 6,000 kilograms;
- 2,500,000 francs plus 250 francs per kilogram over 6,000 kilograms for aircraft weighing more than 6,000 but not exceeding 20,000 kilograms;
- 6,000,000 francs plus 150 francs per kilogram over 20,000 kilograms for aircraft weighing more than 20,000 but not exceeding 50,000 kilograms;

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[215] Shawcross, *supra* note 184 at 522.

- 10,500,000 francs plus 100 francs per kilogram over 50,000 kilograms for aircraft weighing more than 50,000 kilograms.

Paragraph 2 of the Article provides that the liability in respect of loss of life or personal injury shall not exceed 500,000 francs per person killed or injured. These two paragraphs of Article 11 are to be interpreted in conjunction with Article 14, which provides that if the total amount of the claims established exceeds the limit of liability applicable under the provisions of the Convention, the following rules shall apply, taking into account the provisions of paragraph 2 of Article 11:

- If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts;

- If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned.

- The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.

Article 12 of the Convention stipulates that the limits of liability shall not apply if the person who suffers damages proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage.

The Convention permits the Contracting States to require that the operator of an aircraft registered in another Contracting State be insured in respect of his liability. It also elaborates on the conditions and security Contracting States may require from operators. [216]

5.4 Rules of Procedure and Limitation of Actions[217]

Article 19 specifies that all claimants are to bring their claims to court within 6 months of the date of the incident which caused the damage in order to be among those to gain a proportionate share of the compensation as per Article 14. Article 20 seeks to unify rules in relation to jurisdiction, notification of proceedings, consolidation of cases and enforceability and execution of judgements. Article 21 provides that actions under the Convention shall be subject to a limitation period of two years from the date of the incident which caused the damage.

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[216] Rome Convention, *supra* note 4 Chapter III, articles 15 – 18.

[217] *Ibid.* Chapter IV, articles 19 – 22.

5.5 Application of the Convention and General Provisions[218]

Articles 24, 25 and 26, which set out the key exceptions to the application of the Convention, have already been touched upon above. Subsequent articles address the issues of; facilitation of payments,[219] legislative measures,[220] effect of the Convention with regard to the Rome Convention of 1933[221] and the definition of key terms.[222]

Articles 31 through 39 of the Convention address the ratification deposition,[223] coming into force, [224] denunciation, [225] application of the Convention and reservations.[226]

5.6 Evaluating the Rome Convention

The Rome Convention has not yet gained more than 46 ratifications, and three of these have subsequently denounced. It is therefore all but obsolete. Indeed, the limits of liability, as defined by the Rome Convention, are unrealistically low and arbitrary, favouring the interest of the air carrier over the interest of the third party

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[218] *Ibid.* Chapter V, articles 23 – 30.

[219] *Ibid.* Art. 27.

[220] *Ibid.* Art. 28.

[221] *Ibid.* Art. 29.

[222] *Ibid.* Art. 30.

[223] *Ibid.* Art. 32.

[224] *Ibid.* Arts. 33 and 34.

[225] *Ibid.* Art. 35.

[226] *Ibid.* Arts. 36 – 39.

suffering damage. The mathematical equation of proportionate reduction of liability is not as easy to apply as it sounds. Such a proportionate reduction methodology followed by the Convention implies that all cases in relation to a specific accident should first be resolved, and then actual amounts of compensation to each affected person on the surface are to be decided. This is an unrealistic approach. Although the Convention tried to address this issue in Article 20 (3) by obliging the courts of Contracting States, so far as possible, to ensure that all actions arising from a single incident are consolidated in a single proceeding before the same court, this may not indeed always be possible. The Convention, therefore, accepts this fact without envisaging a solution. In particular, when cases in relation to one incident are not consolidated before the same court, the Convention does not address the issue as to which court shall have the right to decide the proportionate amounts to be paid by the carrier to each affected person since the amounts are decided for each of them on individual bases.

Surprisingly, the low limits of liability of the Rome Convention were adopted at the same time as there was a struggle under way to produce higher limits in the Warsaw Convention. The Rome Convention actually entered into force three years after the adoption of the Hague Protocol. Whereas liability arises under contract in Warsaw and under tort in the Rome Convention, this does not provide any reason, in the author's view, for establishing the limits of compensation in cases of injuries and death differently. Such a disparity between what an injured

or dead person on the ground would receive, and what a victim would receive when suffering the same injury or death on board is intuitively unacceptable, and implies that the Rome Convention was drafted in complete isolation from the Warsaw System, and with no link whatsoever to the Montreal Convention of 1999.

The protocol adopted at Montreal in 1978 to amend the Rome Convention did not receive its fifth ratification required for it to enter into force until July, 2002. This shows that the whole system adopted by the Convention requires improvement not only the limits of liability. The need to revisit the Rome Convention to address the whole liability regime towards things and persons on the surface was underlined after the dramatic catastrophe which occurred on the 11th of September 2001. There is now both a legal and mainly a political conflict over who shall bear the risk of terrorist attacks such as those of the 11th of September, the government or the carrier? Both are now lobbying to burden the other with this risk. ICAO has accordingly set up a special Secretariat Study Group (SSG) to revisit the legal regime created by the Rome Convention and the amending Montreal Protocol.[227] The intention behind this study is to extend the liability regime for surface damage so as to expressly encompass terrorist acts.[228] The new draft to be proposed by the SSG will link the new Rome Convention with the

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[227] Barlow Lyed & Gelbert, BLG Aviation News Issue 15, "The Rome Convention Re-visited – A Cap on the Price of Terror" Winter 2003/2004 at 1.

[228] *Ibid.*

regime adopted by the new Montreal Convention of 1999 under which a two tier liability regime is advanced.

As will be discussed in more detail below, the author suggests that both air carriers' contractual and extra-contractual liability should be governed by the same Convention or by two Conventions directly linked to each other. Third parties on the ground and passengers onboard affected by an accident caused by an aircraft should not be dealt with differently. However, this argument will require elaboration upon the Warsaw Convention and on the contract of carriage. Before taking up that discussion, however, it is first of essence to the thesis to compare the current Rome Convention with the Islamic methodology of *diyah.*

5.7 Comparison with Diayh

In comparison with the principles and methodology of Islamic-*fiqh,* especially those related to *diyah*, the Rome Convention presents various points of agreement and disagreement.

At the outset they both focus on compensating the harmed person and not penalizing the carrier, which is presumed to have caused the damage unintentionally. Where the damage is caused intentionally, nevertheless, they both penalize the carrier but using different methodologies. The Rome Convention penalizes the carrier by returning it to the original status of unlimited

liability,[229] while the *diyah* system would increase the limits to double or even more but would always preserve some limit.

Rome and *diyah* base compensation on the link between damages and causation. Both place the burden of proof of this link on the harmed persons or their heirs.[230] The Rome Convention however goes to the extreme opposite end of the scale by ruling that the harmed person shall have no compensation if the damage is not directly caused by the carrier. The *diyah* system, on the other hand, would instead reduce the liability of the carrier by a proportionate percentage to its contribution to the damage.

For compensation to be due, Rome requires that aircraft be in flight, which starts from the moment when power is applied to the aircraft, or for aircraft lighter than air, from the moment it becomes detached from the surface. This is a procedural provision with which the *diyah* system would not conflict. This is due to it being assumed that when power is not applied to the aircraft, it is in a place where people affected by it would be in a position to bring suit under various types of contracts or the ordinary regime of extra-contractual liability. Moreover, it should not always be the responsibility of the operator in such a situation to take care of others, as the aircraft may not be under his control.

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[229] See Rome Convention, *supra* note 4, Art. 12.

[230] See *Ibid.* Art. 1.

Rome, moreover, in Articles 5, 6, 23, 24, 25 and 26 lists situations in which carriers bear no liability towards injured persons. Included on the list is the case of force majeure.[231] Similarly, Islamic *diyah* would not consider the carrier liable in such circumstances. The list also includes the case of proving that damages were caused solely through the negligence or other wrongful act or omission of the person who suffers the damage. This, likewise, accords with the principle of *diyah* that liability is divided proportionally to the contribution of the wrongdoer to the damage. Furthermore, Islamic-*fiqh* never allows a person to benefit from his own wrongdoing.

As will be shown while discussing contractual liability, Rome and *diyah* are also in coherence with each other when Rome states that there shall be no exoneration or reduction in the case of the negligence or other wrongful act or omission of a servant or agent, if the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority.[232] In such a case, *diyah* would make the servant or agent together with the carrier liable to the person who suffers the damage in proportion to the contribution of each. *Diyah* would not however, require a proof that the agent was *acting outside the scope of his authority.*

In addition, the list excludes carriers' liability if damage is caused to an aircraft in flight or to persons or goods on board such aircraft. Such an exclusion may

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[231] *Ibid.* Art. 5.

[232] *Ibid.* Art. 6 (1).

theoretically be acceptable where the victim would have the right to compensation under contract from the carrier on board whose flight the injury occurred. As for *diyah*, in the case of a collision, both carriers are jointly and severally liable towards the injured person on the grounds of their contribution to the damage.

The Rome Convention attributes liability to the operator. It details who shall be deemed the operator. The owner of the aircraft is usually presumed to be the operator unless it is proven that some other persons were the operators of the aircraft. This, of course, is in agreement with *diyah*.

The limits or extent of liability as enumerated in the Rome Convention is a point of divergence from the *diyah* system. This is because of the methodology of calculation, which may result in dramatic variation in compensation within the Rome Convention on arbitrary weight-based grounds. Rome's methodology of compensation addresses the carrier rather than the harmed person. It therefore appears to limit liability or to some extent even relieve the carrier from liability in detriment to the victims. *Diyah*, on the other hand, would concentrate on compensating the victims within a unified limit to liability. According to *diyah*, all suffering persons shall be compensated equivalently. Each claim under *diyah*, however, shall not exceed the limits enumerated for each person. The only variation in quantum would result from variation in damages. Such a methodology, had it been applied under the Rome Convention, might have

convinced States to ratify, since it avoids two of the concerns that now confront the Convention. Firstly. it fixes the amount of compensation to be paid to the victim regardless of any variation in the make, model and weight of the aircraft causing damage and regardless of the number of persons harmed. Secondly, depending upon how its limits of liability are interpreted in contemporary context, *diyah* may provide a basis for raising the limits of liability under the Rome Convention.

Indeed, one problem with the *diyah* system as elaborated upon in Part 1 of the thesis is the methodology of calculating the quantum that suffering persons should receive. In Part 1, the author suggested that *diyah* may be calculated on the basis of three years income of a middle class family of six. This methodology could result in compensating persons in the United States of America, for example, differently from persons in a developing nation, where the aggregate annual income of middle class families is much lower than in the USA. This methodology might further result in compensating persons differently in accordance to the statistics of each year. It, moreover, may not be able to respond to the case of a visitor who suffers damages on the surface of another contracting party which has higher or lower aggregate annual income than in his/her own country. The author, therefore, suggests that consideration of the limits should be based on the aggregate annual income of the State having the highest record as per the United Nations statistics, which however should be

reviewed periodically. This methodology does not contradict Islamic principles in relation to *diyah* and, simultaneously, would avoid low limits of liability.

Articles 19 and 21 of the Rome Convention create time bars for claims. Article 19 provides that claimants must bring their claims to court within six months of the date of the incident that has caused the damage to be among those due a proportionate share of the compensation under Article 14. Article 21 dictates that actions under the Rome Convention are subject to a limitation period of two years from the date of the incident which caused the damage. Under Islamic-*fiqh*, monetary rights, in principle, are not extinguished by passage of time, but legislators may set up a prescription period for courts not to accept any claims after the passage of a certain time.

In conclusion, the only point of the Rome Convention that present a major inconsistency with the *diyah* system is the methodology of fixing limits of liability. *Diyah* is not unique in this point of disagreement; rather it is in accordance with most of the other systems of law in States which did not ratify the Convention.

The thesis will go on to discuss how taking account of the *diyah* system could help to solve the problems associated with the Rome Convention and link the Warsaw and the Montreal Conventions with the Rome provisions. We turn next, therefore, to an exploration of these other Conventions.

Chapter VI: The Contract of International Carriage of Passengers

Air carriers' liability towards passengers is based on the contract of carriage, which can be of two types, domestic or international. A contract of domestic carriage is usually subject to the national laws of the State in which the carriage is performed. A contract of international carriage, on the other hand, is subject to international treaties between States.

By referring to contractual liability, the author means liability under the Warsaw System and the Montreal Convention. These two instruments address the various aspects of the contract of carriage including documentation, limits of liability and jurisdiction. This chapter will concentrate on the formation, parties and terms of the contract of carriage and the conditions of carriage. To elaborate on, and to address the matter of air carriers' contractual liability, the thesis will go through the articles of the various documents comprising the Warsaw System as well as the corresponding provisions of the Montreal Convention. Before doing so, however, this chapter will outline the various instruments comprising the Warsaw System. It will subsequently elaborate on the various aspects of the contract of carriage.

6.1 Knowing the Warsaw System

Notwithstanding the fact that the Warsaw Convention intended to unify the laws and rules pertaining to air carriers' liability, it actually had, to a certain extent, the

diametrically opposed effect. Soon after it entered into force, litigants began to debate the limits of liability in order to attempt to overcome or circumvent them, while defendants, usually air carriers, were trying to ensure their application.[233]To accommodate such variations and cope with the rapid development of case law, ICAO adopted various instruments to amend the Warsaw Convention. These instruments are collectively called the Warsaw System, which is comprised of the following documents:

6.1.1 Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 [234]

As is discussed above, the Warsaw Convention was the result of two international conferences organized by CITEJA.[235]

The Warsaw Convention is composed of 5 chapters and 41 Articles addressing the contractual liability of air carriers in international carriage of cargo, passengers and their luggage. It is one of the most widely ratified instruments in private international law, having at the time of writing 151 signatories.[236] Subsequent sections of the next two chapters will elaborate further on the provisions of the Warsaw Convention.

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[233] See *Grein* v. *Imperial Airways Ltd.*, [1937] 1. K. B. 50; 1 Avi 622 [hereinafter *Grein v. Imperial Airways*].
[234] *Supra* note 1.
[235] See Section 4.2 above.
[236] See Homepage of Internationl Civil Aviation Organization <http://www.icao.int/icao/en/leb/wc-hp.pdf> (date accessed 14/09/2006).

6.1.2 Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, done at the Hague on 28 September 1955[237]

The first amendment to the Warsaw Convention was made by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, known as the Hague Protocol of the 28th September 1955. Despite the fact that the Hague Protocol did not change the basis of air carriers' liability, it introduced very important amendments aimed at solving the legal and economic issues that arose during the application of the Warsaw Convention since its coming into force.[238] The most important amendment it introduced concerned the limits of liability.

After lengthy debates, Article XI of the Hague Protocol amended the provisions of Article 22 of the Warsaw Convention and doubled the limit of liability of carriers for death, wounding or other bodily injury of each passenger to 250,000 Poincare francs.[239]

The Protocol, moreover, introduced a new provision in relation to loss, damage or delay of part of registered baggage or cargo where the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is

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[237] ICAO Doc. 7632. [hereinafter *the Hague Protocol*].

[238] G. Miller, *Liability in International Air Transport* (The Netherlands: Kluwer, 1977) at 68.

[239] US Dollars 16,600.

the total weight of the package or packages concerned.[240] In addition, these limits were made applicable to air carrier's servants and agents.[241]

Another important addition saw the introduction by the Hague Protocol of a provision which foresees that the Court may, in accordance with its own law, award court costs and other expenses incurred through litigation to the plaintiff. However, this could be done only where the damages awarded do not exceed the sum offered by the carrier to the claimants in writing within six months of the date of the event causing the damage.[242]

Finally, in place of the wilful misconduct rules under Article 25 of Warsaw, Article XIII of the Hague Protocol introduced the following text:

> The limits of liability specified in Article 22 shall not apply if it is proved that damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such an act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.[243]

The Hague Protocol is composed of 3 chapters and 27 Articles and entered into force on 13 August 1963. It has been ratified by 136 States.[244]

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[240] The Hague Protocol, *supra* note 237Art. IX 2 (b).

[241] *Ibid.* Art. XIV.

[242] *Ibid.* Art. XI (4).

[243] *Ibid.* Art. XIII.

[244] The United States of America have ratified the Hague Protocol implicitly through ratification of the Montreal Protocol No4.

6.1.3 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, signed in Guadalajara, on 18 September 1961[245]

As the aviation industry continued to develop and evolve, new practices not covered by the Warsaw Convention or its amendments in the Hague Protocol began to arise. Some of these practices created a situation in which the carrier might not be contractually linked to the passenger under the terms of the Warsaw Convention, such as the case of lease or charter. ICAO, therefore, convened a conference on September 18, 1961 in Guadalajara City. This conference resulted in the adoption of the Guadalajara Convention. This Convention in its 18 articles recognizes the distinction between the contracting and the actual carrier. It applies or extends the rules of the Warsaw Convention or the Convention as amended by the Hague Protocol to the carrier performing the carriage on behalf of the carrier who contracted with the passenger for the performance of carriage. According to Article I(b) of the Convention, the contracting carrier is the person who as principal, makes an agreement for carriage governed by the Warsaw Convention with a passenger or a consignor, or with a person acting on behalf of the passenger or consignor. Article I(c) defines actual carrier in contrast to contracting carrier as a person, stipulating that "the actual carrier is 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)

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[245] ICAO Doc. 8181. [hereinafter *Guadalajara Convnetion*]

but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention.". Despite the fact that the United States of America did not ratify it, the Guadalajara Convention has 84 signatories.[246]

6.1.4 Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955, signed at Guatemala City, on 8 March 1971[247]

The Guatemala City Protocol adopted provisions that would have solved many paradoxical interpretations of the Warsaw Conventions and its amendments. However it has never entered into force.

Instead of concentrating on the limits of liability alone, this Protocol attempted to reshape the whole of the Warsaw Convention.

The Guatemala City Protocol established a regime of strict liability of the carrier in the case of death, wounding or other bodily injury of passengers and also for the destruction, loss or damage of baggage, "checked or unchecked". Article IV (1) of the Protocol, intended as a replacement for Article 17 of the Warsaw Convention, states,

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[246] See International Civil Aviation Organization http://www.icao.int/icao/en/leb/guadalajara.pdf (date accessed 14/09/2006).
[247] ICAO Doc. 8932. [hereinafter *Guatemala City Protocol*].

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event that which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger

Compared to Article 17 of the Warsaw Convention, it may be noted that the term "accident" had been replaced by the term "event". More significantly, the term "bodily injury" used in Article 17 was replaced by the term "personal injury". Such replacements sought to cover a wider subject matter than originally covered by the Warsaw Convention.[248] Personal injury for instance would include mental injury whereas bodily injury would not. Article IV (2) extends the legal regime of strict liability to include the transportation of baggage.

Furthermore, the Protocol attempted to increase the limits of liability to levels that reflected changes in the global economy. The limit of liability was increased to 1,500,000[249] francs in the case of death or injury of a passenger.[250] However it is specified that this limit may not be exceeded under any circumstances. Thus, unlike the new Montreal Convention of 1999, the Protocol attempted to raise the limits of liability while retaining the principle of limited liability.

Another important advance that the Protocol tried to introduce was the creation of a more practical system of documentation. The purpose was to prevent the

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[248] M. Milde, "Warsaw requiem or unfinished symphony? (From Warsaw to The Hague, Guatemala, Montreal, Kuala Lumpur and to ....?)" [1996] The Aviation Quarterly 37 at 40.

[249] Equivalent to US$ 100,000.

[250] Guatemala City Protocol, *supra* note 247 Art. VIII(1)(a).

formalities of documentation from having any impact on the liability regime. If ratified, such an approach would have solved the object of much litigation.

Unfortunately, this Protocol is not and never will be in force. The Protocol fell victim to its own Article XX which required that it be ratified by the five States whose airlines represent at least 40% of total scheduled international air traffic.

Despite this lack of success of the Guatemala City Protocol, it can be argued that this Protocol was the Godfather of the Montreal Convention.

6.1.5 Additional Protocols to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, signed at Montreal, on 25 September 1975 (Montreal Protocol No.1,[251]2,[252]3[253] and 4[254]).

These 4 Montreal Protocols are among the best examples of how the paths of economics, politics and law are inextricably linked.

After gold was demonetized in the early 1970's, the Warsaw Convention and its supplementary instruments were found to be beset with a monetary anachronism. All of these documents expressed the limits of liability in terms of French gold francs consisting of 65 ½ milligrams of gold at the standard fineness

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[251] ICAO Doc. 9145. [hereinafter *Montreal Protocol No.1*]
[252] ICAO Doc. 9146. [hereinafter *Montreal Protocol No.2*]
[253] ICAO Doc. 9147. [hereinafter *Montreal Protocol No.3*]
[254] ICAO Doc. 9148. [hereinafter *Montreal Protocol No.4*]

of nine hundred thousands. Such provisions relied on gold to be the basic monetary yardstick. As soon as gold was demonetized and became a subject of the market rules of supply and demand, these provisions needed to be changed.[255]

Montreal Protocols No. 1, 2 and 3 of 1975 adopted a new yardstick applied by the International Monetary Fund called Special Drawing Rights. Each of these 3 Protocols was concerned with one of instruments comprising the Warsaw System at that point of time. More precisely, Montreal Protocol No.1 addressed the Warsaw Convention itself, while Montreal Protocol No. 2 addressed the Convention as amended by the Hague Protocol. Montreal Protocol No. 3 addressed the Guatemala City Protocol.

Since both ICAO and IATA considered that due to growth in international business a parallel regime should be adopted with respect to the liability of the carrier for cargo, the Montreal Additional Protocol No. 4 restated the rules relating to the carriage of cargo by air.[256]

Montreal Additional Protocols Nos.1, 2 & 3 did not alter the limits of liability adopted by the original instruments. Rather, they kept the same limits in the SDR format. Accordingly, Montreal Additional Protocol No.1 provided a passenger

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[255] See T. A. Weigand, "Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention" (2001) 16 Am. U. Int'l L. Rev. 891at 906.

[256] D. H. Kim, *supra* note 199 at 63.

liability limit of 8,300 SDRs, a registered baggage limit of 17 SDRs per kilogram, and a 332 SDR limit per passenger for objects which the passenger takes charge of himself. [257] In accordance with the Hague Protocol, Montreal Additional Protocol No. 2 doubled the passenger liability limit to 16,600 SDRs and retained all the other limits established by Protocol No. 1.[258] Montreal Additional Protocol No. 3 raised the limits to the level of those contained in the Guatemala City Protocol, namely 100,000 SDRs per passenger for passenger liability, 4150 SDRs per passenger for delay, 1000 SDRs per passenger for loss, damage, destruction or delay to baggage, and 17 SDRs per kilogram for cargo.[259]

Montreal Additional Protocols No. 1, 2, and 4 have secured the required number of ratifications and have since entered into force. However, Montreal Additional Protocol No. 3 has not entered into force yet, due to its relationship to the Guatemala City Protocol. The gold currency unit may be retained by States which are not members of the International Monetary Fund and whose law does not permit the use of SDRs.[260]

6.1.6 Inter-carrier Agreements

Despite the fact that the following instruments are not treaties or Conventions adopted by governments, they have had an immense impact on the liability

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[257] Montreal Additional Protocol No. 1, *supra* note 251 Art. II.

[258] Montreal Additional Protocol No. 2, *supra* note 252Art. II.

[259] Montreal Additional Protocol No. 3, *supra* note 253 Art. II.

[260] Montreal Additional Protocol No. 1, *supra* note 251 Art. II.

regime as adopted by the Warsaw System. Moreover, they contributed to the advent of the Montreal Convention. It is important, therefore, to elaborate briefly on these documents as an integral part of the Warsaw System though they may not be deemed as such on a purely legal basis.

6.1.6.1 The Montreal Agreement 1966

This agreement was the result of the denunciation of the Warsaw Convention filed by the United States of America on the 18th October 1965 as a consequence of the low limits of liability adopted by the Convention. Before such denunciation took effect, ICAO took the initiative and held a conference in Montreal Canada in February 1966 to try to solve the problem.[261]

Two days before the denunciation could take effect, the Montreal Agreement was signed and the denunciation was retracted.[262] This accord is a private agreement signed by several air carriers operating to, from or through the territory of the United States. By virtue of this special contract,[263] air carriers agreed to raise the limits of liability adopted by the Warsaw Convention to USD 75000 inclusive of attorney's fees and costs. In the Montreal Agreement, air carriers also waive their right to the defences available under Article 20(1) of the Warsaw Convention,

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[261] According to Article 39 of the Warsaw Convention "denunciation shall take effect six month after notification".

[262] P. Dempsey & M.Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Montreal: McGill University, 2005) at 30.

[263] Warsaw Convention, *supra* note 1 Article 32.

thereby subjecting themselves to strict liability. Accordingly, harmed passengers or their heirs would only need to prove damage up to USD 75000.

6.1.6.2 IATA Intercarrier Agreement (IIA); Measures to Apply IATA International Agreement (MIIA)

The limits of liability adopted by the Warsaw Convention and its supplementary instruments were taken by air carriers as a safeguard against the jungle of paradoxical laws. This safeguard began to deteriorate owing to economic inflation which rendered the limits of liability adopted by Warsaw derisory. This situation created a problematic situation for air carriers, which started to believe that if they did not take the initiative, the Warsaw Convention would soon be denounced by major States.[264] In fact, this situation had already been faced in 1965 when the United States filed for denunciation. The failure to obtain the ratification of the Guatemala City Protocol was another concern in this area. In 1974, an informal consortium of European governments encouraged their flag carriers to adopt higher limits of liability.[265] This resulted in the Malta Agreement of 1974. The Italian Constitutional Court found, in 1985, that the domestic law implementing the Warsaw/Hague limitations of liability was void as it conflicted with Articles 2 and 3 of the Italian Constitution.[266] This decision subjected Italian carriers to unlimited liability until 1988 when the Italian government enacted Law

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[264] See P. Dempsey & M.Milde, *supra* note 262 at 33.

[265] *Ibid.* at 31.

[266] *Ibid.*

No. 274 providing for strict carrier liability up to 100,000 SDRs and imposed a requirement of compulsory insurance.[267]

In 1995, after gaining IATA antirust immunity from the U.S. Department of Transportation (DOT), IATA carriers gathered at the Washington Conference preparing the way for what is now collectively known as the IATA "Intercarrier Agreements on Passenger Liability".[268]

The agreements consist of the IATA Intercarrier Agreement on Passenger Liability (IIA), signed in Kuala Lumpur, Malaysia, on 21 October 1995, and the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement (MIIA), opened for signature in May 1996. For convenience, the agreements are hereafter referred to collectively as the Intercarrier Agreements.

According to these Agreements, the airlines who signed them voluntarily undertook to waive Article 22(1) limits in respect of claims for "recoverable compensatory damages" under the Warsaw regime as well as any Article 20(1) defences up to 100,000 SDRs.

6.2 The Contract of Carriage

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[267] *Ibid.*

[268] L. S. Clark, "European Council Regulation (EC)No.2027/97: Will the Warsaw Convention Bite Back?" (2001) vol. xxvi/3Air & Space Law 137 at 138.

The explicit reference to the contract of carriage throughout the articles of the Warsaw Convention, its subsequent amendments and the Montreal Convention of 1999, implies that these instruments assume the existence of a contract of carriage between the carrier and the passenger. None of them, nevertheless, contains a definition of the term contract of carriage.[269] This term has therefore never received unanimous treatment.

CITEJA defined the contract of carriage as an "[a]rrangement to carry by air made between a carrier and a passenger or consignor"[270] The author suggests that although this definition addresses perfectly the parties to the contract of carriage, it is not helpful with regard to the nature of the contract of carriage nor does it solve the problems of how, where and when it is formed.

Some other definitions provide that "a contract of carriage is formed when one party is bound to carry by aircraft the other party from one place to another and the other party is bound to pay the price"[271] According to this definition, payment by the passenger is an essential element of the contract of carriage. Gratuitous carriage would, consequently, be outside of the scope of this definition. This does not comport with the provisions of Article 1(1) of Warsaw and Montreal Conventions, which recognize gratuitous carriage as a valid contract of carriage

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[269] See A. M. Briant, "International Carriage of Cargo: A comparative study of the liability of the carrier in Maritime and Air Transport Law" (1993) XVIII:I Annals of Air and Space Law 50.

[270] See S. Tsai, *The Legal Status of Passenger Ticket For International Carriage by Air* (LL.M. Thesis, Institute of Air And Space Law, McGill University 1968) [unpublished] at 17.

[271] See Storm van's Gravesande, J. W. E. "Flight examiner on duty" (1984) VIII:2 Air Law 115.

that the "payment" definition attempts to introduce the element of consideration as found in common law. Thus, for example, in *Bates Block et al.* v. *Compagnie Nationale Air France* a U.S. court held:[272]

> It is also clear that by referring to a contract, the Convention does not intend to establish the prerequisite that consideration, in a common law sense, must flow both ways between the two parties before their relationship can come under the Convention's control. Even if the passenger should make no promise to pay there would still be a contract of transportation, supported by cause, in a civilian sense. Article 1(1) explicitly declares that the Convention shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise

Accordingly, all that is needed to establish the contract of carriage is a promise or an undertaking on the part of the carrier to transport the passenger, and the consent of the passenger. In the case of *Robert M. Boyar et al.* v. *Korean Air Lines,*[273] the court held that "[t]he mutual consent necessary to the formation of the contract occurred in Seoul, and the United States was, therefore, not an appropriate jurisdiction to hear the action" It held further that "the passenger ticket was not the contract, but its issuance evidenced the contractual relationship between (the parties)." Thus, in *Block* v. *Air France* and *Boyar* v. *Korean Air Lines*, the existence of the contract of carriage depends only on the mutual consent of both the carrier and the passenger in a manner that reflects the intentions of the parties and does not depend on the payment of consideration.

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[272] (1967) 386 F.2d 323 (CA-5) , 10 Avi 17,518 [hereinafter *Block* v. *Air France*].

[273] (1987) 664 F. Supp. 1481 (D.C. Cir), 20 Avi 18,467 [hereinafter *Boyar* v. *Korean Airlines*].

In conformity with these two judgments, the contract of carriage may be defined as "an agreement whereby the carrier binds himself by contract to perform the carriage of goods or persons by air."[274]

The definition of the contract of carriage by air under Islamic-*fiqh* is likely consistent with the approach just described, although of course it was not explicitly discussed in the traditional sources. This conclusion is reached based on the various definitions available for the contract of carriage by sea, which is discussed thoroughly in the source works. Using the technique of analogy, we may conclude that the contract of carriage is "a consensual contract that is formed at the exchange of the mutual consents of the parties whereby the carrier undertakes to perform the carriage whether gratuitously or for compensation."

The contract of carriage is, as such, formed on the exchange of offer and acceptance between the passenger and the carrier. The next section will discuss in more detail the formation of the contract of carriage.

6.2.1 Formation of the Contract Of Carriage

As previously established, the existence of the contract of carriage relies on the exchange of offer and acceptance by the parties.

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[274] See A. M. Brian, *supra* note 269 at 50.

Airlines usually issue timetables or tariffs that contain conditions of carriage under which a passenger makes his reservation. The author suggests two possible scenarios for understanding the function of tariffs and timetables of airlines.

In the first scenario, timetables may be considered as a continuous offer by the carrier to the public, to which a person may assent simply by making a reservation or by buying a ticket or, in a second scenario, timetables may be considered as an invitation to treat which allows passengers to manifest their offer by making a reservation or buying a ticket. Airlines either accept or reject offers, made by clients, by either making or refusing the reservation or by the issuance or otherwise of a ticket.

In general, the classification of an invitation to treat would mean that the airline is inviting the public to manifest their offers, and repeating the conditions of contract and carriage. It also means that the offeror would be able to bargain over the price and is fully aware of the conditions of contract and conditions of the carriage at the conclusion of the contract. Such a presumption would result in the dismissal of any contention by the passenger that he/she was not aware of those conditions. It is also at odds with the actual interplay in the contracting process between the air carrier and the passenger.

Thus air carriers are always the offerors and passengers are always the offerees.[275] Offers are sufficiently definite manifestations of an intention to sell a ticket. Offers contain dates, departure and arrival times, prices, aircraft types, and even information about meals offered onboard. A person wanting to fly with the airline on a specific flight may accept the offer and conclude a contract by buying a ticket, making a reservation or by any other acceptable means via which he/she can communicate the acceptance.

Hence, the contract of carriage is affirmed and concluded upon the communication of acceptance by the passenger or by a third party on his/her behalf.

In Islamic-*fiqh*, the notion of "invitation to treat" is very well established and analyzed. However there are some differences of regime that arise under the title "*Baay' Man Yazīd*" (auctions), which are not relevent to the ticketing context.

In the modern style of timetable and indeed in the case of internet ticket sales, the air carrier offers his services to the public under the terms and conditions found in the tariffs, and in accordance with the timetable and seats available. The passenger manifests his/her acceptance of the offer by applying for a reservation or by buying a ticket. Thus, Islamic-*fiqh* would definitely consider the carrier as

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[275] See Heinonen, J., "The Warsaw Convention Jurisdiction and The Internet" (2000) 65:3 Journal of Air Law and Commerce 453 at 462.

the party manifesting *ijâb* (offer), and the passenger as the one manifesting *kubûl* (acceptance).

As established in Chapter II above, *'aqd* (contract) is concluded once the *ijâb* and *qabûl* are consistently communicated within the *majlis al-'aqd* (meeting session).

Majlis al-'aqd, in the context of timetables, is assessed at two levels. The first is the whole period during which the carrier maintains his offer, *e.g.* a season or the whole year. The second is the period within which the *'aqd* is being negotiated with the customer where the *majlis* shall be concluded at the end of the phone call or the meeting. Within either frame of reference, one can readily conclude in the usual circumstance that when a ticket is issued, the *'aqd* was concluded within the *majlis al-'aqd*. Thus, the principles in relation to the formation of the contract of carriage are almost identical in Islamic-*fiqh* and the established rules of the western schools of law.

Offer and acceptance are usually exchanged between the carrier and the passenger. The next section will therefore elaborate on who the carrier and the passenger are.

6.2.2 Parties to the Contract Of Carriage

Unfortunately, this point is not as clear as it may appear. The parties to the contract of carriage are in essence the air carrier and the passenger. Nevertheless, there are instances in which things are more complicated, such as

the case of carriage by a person other than the contracting carrier, and carriage of minors and employees. However, these complications could be understood and analyzed by connecting them to the two basic parties, namely the carrier and the passenger.

6.2.2.1 The Carrier

In *Charles Kapar* v. *Kuwait Airways Corporation, et al.,*[276] the court held that "an air carrier, in the sense of the Convention, is someone who performs a carriage by air". This definition presumes that the contracting carrier is always the actual carrier.[277] This may be in line with the Warsaw Convention, but it contradicts the actual practice within the industry, for the carrier, in whose name the contract is concluded, is not always the person who performs the carriage.

Article I(b & c) of The Guadalajara Convention identified two different types of carrier; namely; the **"Contracting Carrier"** and the **"Actual Carrier"**. The former is defined as "a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or a consignor or with a

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[276] (1988) 845 F.2d 1100 (CA DC), 21 Avi 17,336 [hereinafter *Kapar* v. *Kuwait Airways*].

[277] The United States did not ratify the Guadalajara Convention. In *Stanford* v. *Kuwait Airlines* (1989) AL 278 No.29, 21 Avi 18,097, the court held that a carrier that issues a ticket, but does not take part in the actual carriage, is merely an agent of the actual carrier.

person acting on behalf of the passenger or the consignor"[278] The latter is defined as follows:[279]

> [T]he person, other than the contracting carrier, who by virtue of authority from the contracting carrier performs the whole or part of 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

Moreover, Article II of the Guadalajara Convention provides *inter alia* that

> 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 he performs.

Article III provides that "the acts and omissions of the actual carrier shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the Contracting carrier".

In its Chapter V, the Montreal Convention also differentiates between the contracting and the actual carrier. In very simple and practical language, Article 39 of the Montreal Convention stipulates that the contracting carrier is he who "as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor." The same article foresees that the actual carrier is the carrier that "performs by virtue of authority from the contracting carrier."

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[278] Guadalajara Convention, *supra* note 245Article I(b).

[279] *Ibid.* Article I(c).

The question becomes, is the actual carrier a party to the contract of carriage? If not, on what grounds is it liable to the passenger? And if it is liable, how can this be reconciled with the principle of privity of contracts?

From the author's perspective, this may not be an issue under the Montreal Convention, for its stipulations incorporate the actual carrier into the contract of carriage by virtue of Article 40, which states:

> If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

On the other hand, for carriage under the Warsaw Convention, there may be more than one scenario. The contract of carriage may clearly stipulate that all or part of the carriage may, at the discretion of the carrier, be performed by another carrier. Such a reference could be construed to incorporate the actual carrier into the contract of carriage, and thus it may be sued under the contract to which it is party. Article 1 of the General Conditions of Carriage adopted by IATA provides that the term 'carrier' includes "the air carrier issuing the ticket and all air carriers that carry or undertake to carry the passenger and or his baggage hereunder"[280] However, the author suggests that it is yet to be determined whether this

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[280] IATA General Conditions of Carriage (recommended Practice), IATA resolution No. 1724.

constitutes a definite incorporation of the actual carrier into the contract of carriage. This is because the General Conditions of Carriage recommended by IATA do not expressly incorporate the Guadalajara Convention into the contract of carriage, although they do incorporate the Warsaw Convention and the Hague Protocol. This may render the above definition of the carrier applicable to the case of successive carriers, not actual carriers.

The situation varies, of course, where States with jurisdiction over the carriage performed by the actual carrier have incorporated the Guadalajara Convention into national law. In this case, by virtue of law, the actual carrier shall be deemed a party to the contract of carriage. In such a case, it would not matter whether there is a reference to the actual carrier in the contract itself.

Finally, we may face cases where neither the contract of carriage nor the national laws consider the position of the actual carrier. In such a scenario, the matter will be based on the national laws of the State of jurisdiction. However, the author is of the opinion that in such situations the passenger would be a covered "passenger" for the purposes of the Warsaw Convention, but the absence of a contract of carriage with the actual carrier means that it cannot rely upon limits of liability.

From the author's point of view, the Montreal Convention is coherent with Islamic-*fiqh* with regard to this matter because Islamic-*fiqh* would not consider the actual carrier a party to the contract of carriage, unless provisions incorporated in the conditions of carriage foresaw this. Thus, the contracting carrier would be liable under contract, while the liability of the actual carrier is extra-contractual. In the case of death or injury of the passenger, the actual carrier may be jointly liable with the contracting carrier towards the passenger by virtue of *diyah*. However, in the case of agreeing with the contracting carrier on limits higher than *diyah*, the contracting carrier will be considered as *dâmin*[281] for the actual carrier for that margin of difference.

However, the discussion above does not preclude the right of either carrier to have recourse against the other under the terms of contract between them.

6.2.2.2 The passenger

Once more, neither the Montreal nor the Warsaw Convention provides any clear definition of the term "passenger" although it is obvious that there is a distinction between the passenger in the sense of the Montreal and the Warsaw Conventions, and other persons onboard the aircraft that are not passengers.

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[281] *Ḍamin* is a person who undertakes to makeup a specific obligation (mostly monetary) that other persons fail to do.

The General Conditions of Carriage adopted by IATA stipulate that "[p]assenger means any person, except members of the crew, carried or to be carried in an aircraft with the consent of carrier". According to this definition, a passenger excludes members of the crew and those who are onboard an aircraft without the consent of the carrier, such as stowaways. This definition does not cover those who are onboard with the consent of the carrier, but who are not transported under a contract of carriage and who are not members of the crew, such as flight examiners who may not be treated as regular passengers.

A better definition for the purposes of the Convention would be that "[a] passenger within the meaning of the Warsaw Convention is a person who is carried by aircraft by virtue of a contract of carriage."[282] This definition combines two very important criteria to distinguish a passenger from other persons onboard an aircraft:

- Performance of carriage by the air carrier; and
- Carriage is based on a contract of carriage.

The definition mentioned above raises the issue of the validity of the contract concluded between a carrier and a guardian of a minor for the transport of a minor. The minor does not have the legal capacity to conclude such a contract with the carrier, but would that be taken as grounds for repudiating the contract?

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[282] J. W. E. Storm van's Gravesande, *supra* note 271 at 115.

In *Braughton* v *United Air Lines, Inc.* (1960, DC Mo) 189 F.Supp 137, a father, who was an airline employee, brought an action for the wrongful death of his two children who were killed in an airline crash. The two children, with their mother, were traveling under a gratuitous pass issued to airline employees. The pass contained a clause providing that "the airline would not be liable for injury or death whether caused by negligence or otherwise"[283] The father contended that by bringing the present action, any contract between the airline and the infant victims was repudiated and, thus, that the infant victims were not bound by the limitation of liability. The court held that the mother was, at most, a gratuitous licensee on the airplane and that the children, being in her custody at the time in question, could only occupy the same legal status as that occupied by their mother. As a consequence, for the court, even though the infants' contracts with the airline might be considered repudiated by the father, the undisputed fact was that the children remained gratuitous licensees of the airline. Thus, the only legal duty owed to the children by the airline was not to wilfully injure them while they were occupants of its airplane. This case pertains to a domestic contract of carriage, which was not subject to the Warsaw Convention. However it does give an idea of how the Warsaw System may respond to such a case due to it not including any express provisions dealing with it. The author, thus, suggests that despite the possibility of repudiating the contract of carriage, a child with legal documents carried by an air carrier is a passenger within the meaning of the

[283] In *diyah* system such a clause would be void as the carrier cannot exclude its liability for carriage it performs. If the contract of carriage does not put the passenger in a better position in terms of amount of compensation the baseline of compensation shall be the limits defined by *diyah*.

Warsaw Convention. However, it is not certain whether such a ruling would be retained in all jurisdictions.

The Montreal Convention expressly provides for this situation within Article 39, which states that the contract of carriage is usually concluded between the contracting carrier and "a passenger or a consignor or with a person acting on behalf of the passenger or consignor" Such a provision makes clear that the Montreal Convention agrees with the principle adopted in *Braughton* v *United Air Lines* because, in the case of contracting with minors, the contract would be concluded between the carrier and "a person acting on behalf of the passenger," who would in this case be the guardian.

Although the baseline for compensation in the *diyah* system is the same for passengers and other persons, it still may be important to differentiate between passengers and other persons onboard.

Islamic-*fiqh* would not define the passenger differently. The nature of the relationship between a person onboard an aircraft and the carrier depends on the type of contract concluded between them. If he/she is onboard the aircraft by virtue of a contract of international carriage, then he/she is a passenger within the meaning of the Warsaw System and the Montreal Convention. If the person is an operating crew member onboard an aircraft, then their legal relationship shall be subject to the provisions of the contract of employment. The author

suggests that the only difference between Warsaw and Montreal on the one hand, and Islamic-*fiqh* on the other, is the case of stowaways. Although it is true that there is no contract between a stowaway and the carrier, we can not omit the fact that Islamic *Sharī'a* orders Muslims not to endanger the lives of others. As such, although there is no contract between the carrier and the stowaway, the carrier may be held liable extra-contractually for injuries sustained by the stowaway on the condition that the carrier knew that the stowaway was onboard the aircraft and did not strive to save him from sustaining such injuries.

As for the matter of minority and the contract of carriage, Islamic-*fiqh* imposes upon the guardian the burden of protecting the minor from harm and safeguarding his/her goods. Therefore, Islamic-*fiqh* allows the guardian, whether natural or appointed, to handle the affairs of the minor in the manner that is best for him/her. However, Islamic-*fiqh* makes it clear to the guardian that the misuse of his/her privileges with respect to the minor would make him/her liable to the minor before both the court and ALLAH.

It is therefore within the scope of authority of the guardian to conclude a contract of carriage on behalf of the minor, who is then considered a passenger within the meaning of the Warsaw and Montreal Conventions.

6.2.3 Conditions of Contract and Conditions of Carriage

Currently, whenever a passenger wants to travel, he/she receives a paper document from the carrier or his travel agent commonly known as "the ticket". This ticket contains the IATA standard Conditions of Contract[284] which, by reference, attempts to incorporate the Conditions of Carriage.

It also obliges air carriers to make available to the passenger these conditions upon his/her request as otherwise they will not carry their force. Almost every carrier has its own formula of Conditions of Carriage. However they are mainly based on the IATA General Conditions of Carriage, which, unlike the Conditions of Contract, was adopted as a recommended practice. Such a recommended practice is not necessarily accepted by every State, IATA pointed out that: [285]

> [I]n order to increase the prospects that the courts would uphold and enforce the most important provisions of the conditions of carriage which materially affect passengers' rights, it was concluded that they should be highlighted in the Conditions of Contract. However, one member advised that in his jurisdiction, the Conditions of Carriage would not be taken into account by a court of law because they are not provided to passengers with each ticket.

In a perfectly reliable definition of the Conditions of Carriage, the Canadian Transportation Agency states that the terms and conditions of carriage [286]

> are provisions contained in an air carrier's tariff that the carrier applies to all its passengers regardless of the fare paid. They spell out the various

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[284] IATA resolutions 275b and 724.

[285] IATA Document No. (LACPSCWG/1) Montreal 8-9 December 1998.

[286] Canadian Transportation Agency <http://www.cta-otc.gc.ca/cta-otc2000/faqs/terms_carriage_e.html> date accessed (13/11/2000).

benefits and limitations associated with the air transportation service being provided. Terms and conditions of carriage cover a number of things such as: limits or restrictions on the weight or size of baggage, compensation for lost, delayed or damaged luggage, compensation for denied boarding (bumping), and the carrier's rules concerning the carriage of persons with disabilities or minors

Conditions that would have an impact on carriers' liability are usually incorporated within the conditions of contract on the reverse of each ticket. These conditions will be discussed in the following section.

6.2.3.1 The Conditions of Contract

In this section, the author seeks to elaborate very briefly on the IATA Conditions of Contract in order to understand the interplay between them and the provisions of the Warsaw System and the Montreal Convention. The IATA Conditions of Contract are composed of eleven articles, which are discussed sequentially.

1. As used in this contract "ticket" means this passenger ticket and baggage check, or this itinerary/receipt if applicable, in the case of an electronic ticket, of which these conditions and the notices form part, "carriage" is equivalent to "transportation", "carrier" means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage, "electronic ticket" means the Itinerary/Receipt issued by or on behalf of Carrier, the Electronic Coupons and, if applicable, a boarding document. "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at the Hague, 28th September 1955, whichever may be applicable.

This Article sets out the terminology used in the contract. A valid interpretation of the meaning of "any other services incidental to air carriage" includes the case in

which the carrier itself provides transportation from an air terminal to the airport.[287] The new text of these provisions has clearly adopted the concept of electronic ticketing.

Islamic-*fiqh* places a great deal of emphasis on the intentions of the parties to the contract. Therefore, defining the terminology of the contract would be a recommended practice as it clarifies the desired intentions.

> 2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.

This Article provides that the carriage under the contract is subject to the limits of liability established by the Warsaw Convention. It also underlines that if the carriage is not "international" within the meaning of the Warsaw Convention then the limits of liability shall not apply.

Resolutions 275b and 724 require the text of this paragraph to be printed in a bolder type than the other paragraphs.[288] This provision is in line with the notice requirements under Article 3(1) (e) of the Warsaw Convention and Article 3(I) (c) of the Hague Protocol.

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[287] P. Martin, J. McClean, E. Martin, J. Bristow & J. Brooks, *Air Law*, 4th ed., (Butterworth & Co, 1977) at 364.

[288] *Ibid.* at 365.

This Article highlights a core difference between Islamic-*fiqh* and Western Systems. As has been noted, the fundamental basis of liability in Islamic-*fiqh* is *diyah*, with the possibility for the parties to agree on higher limits. However, as for the general rulings of *'aqd* under Islamic-*fiqh*, the actual behaviour of the parties must make clear that the provisions of the contract are in accordance with the actual intention of the parties. Thus, having such a notice written in a bolder type, or in a type that makes it clear for any regular contracting person (passenger) that it is a "must read" provision, is an acceptable method to assert that the intentions of the parties correspond to the provisions of the contract. However, this may not be considered in isolation from other factors such as the positions of the contracting parties, and the validity of the provisions themselves. Thus, if the limit prescribed in the contract is lower than *diyah*, then that provision is void. On the other hand if the limit is higher than Warsaw, then it is in the favour of the passenger and his/her heirs, and thus the question of notice and special typeface may not be relevant.

> 3. To the extent not in conflict with the foregoing, carriage and other services performed by each carrier are subject to:
> (i) provisions contained in the ticket; (ii) applicable tariffs; (iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

This Article seeks to incorporate the Conditions of Carriage and the Applicable Tariffs into the contract of carriage. However, as mentioned above, the General Conditions of Carriage were adopted as a recommended practice for IATA Members. Therefore, there is a very wide spectrum of variation between the

conditions of carriage of different airlines even though they all adopt the General Conditions of IATA as the basic outline for their own conditions of carriage.

An exception is made with regard to transportation between a place in the United States and Canada, and any other place outside of these countries. This is due to the fact that in certain States, the IATA conditions are applicable only after approval by the competent authority.[289]

Indeed, in the case of conflict between any provision of the conditions of carriage and the provisions of the Warsaw Convention, the latter prevails.[290]

> 4. Carriers name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carriers name in the ticket, the agreed stopping places are those places set in this ticket or as shown in carrier's timetables as scheduled stopping places in the passenger's route, carriage to be performed hereunder by several successive carriers is regarded as a single operation.

By articulating that the abbreviation is an indication of the full name of the carrier, this Article satisfies the requirement stipulated in Article 3(1)(d) of Warsaw Convention which provides that tickets should include "[t]he name and address of the carrier or carriers"

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[289] R. H. Mankiewicz, *The Liability Regime of the International Air Carrier* (The Hague: Kluwer Law And Taxation 1987), at 16. The U.S and Canada have filed reservations with regard to resolution 724 to the effect that the tariffs filed with the competent authority shall prevail in the case of conflict with the Conditions of Contract.

[290] Warsaw Convention, *supra* note 1 Article 32.

This Article requires the insertion of the "agreed stopping places" in the ticket, which is an essential factor to consider when determining whether the flight is "international" within the meaning of the Warsaw System and Montreal Convention.

The last paragraph of this Article restates the exact provision of Article 30 of the Warsaw Convention in relation to successive carriage. However, this should not be taken as a redundant statement since it functions independently in instances of non-Warsaw carriage.[291]

This Article, in conjunction with Article 1 above serves and fulfils the extremely important requirements of clarity and transparency of the provisions of the contract under Islamic-*fiqh*

> 5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its agent.

The main purpose of this Article is to protect the carrier issuing a ticket for carriage over the lines of another carrier. This does not include the situation of interline carriage which is considered as "successive carriage", as in this case both of the carriers are contracting parties by virtue of Article (30) of the Warsaw Convention. This Article furthermore does not apply to code-sharing which is an arrangement whereby a passenger would have a contracting carrier and an

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[291] See L. B. Goldhirsch, *The Warsaw Convention Annotated: a Legal Handbook* (Martinus Nijhoff Publishers, 1988) at 377.

actual carrier. It also does not apply to the scenario of an airline selling a travel package and thereby undertaking to perform the carriage. In such a situation it will be considered as a contracting carrier even though carriage is performed by another carrier.[292]

In short, this Article applies where the airline does nothing other than to issue the ticket as if it were a travel agency or a sales agent for the carrier.

> 6. Any exclusion or limitation of liability of the carrier shall apply to and be for the benefit of agents, servants and representatives of the carrier and any person whose aircraft is used by the carrier for carriage and its agents, servants and representatives.

This Article and Article 25a of the Hague Protocol are alike. It is needed to provide uniform rule for incidents that are not subject to the Hague Protocol.

Although this Article sought to solve some problems in relation to the liability of the agents and servants of the carrier, it results in some difficult questions with regard to cases where the carrier unilaterally waives the limits of liability, or where the carrier is deprived of those limits.

With respect to Islamic-*fiqh*, so long as agents (*wakīl* pl. *wokalâ'*) are acting within the limits of their agency (*wakalah*) and are concluding the *'aqd* (contract) on behalf and in the name of the *al-muwakil* (principal), they are never liable for

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[292] See generally D. Grant, "Tour operators, airlines and the Warsaw Convention" [1999] 4 The Aviation Quarterly 231.

the other party. Moreover, servants are usually private hires (*agīr khas*) of the carrier.[293] The relationship between *al- agīr al- khas* and the carrier is governed by the contract of hire (*'aqd al-igârah*) in which the duties of the *agīr* are prescribed. As a general rule *agīr khas* are never held liable to third parties (e.g. passengers) unless they cause harm intentionally or by negligence.[294] Accordingly, the servant is liable to the hirer only, not to the hirer's client.

> 7. Checked baggage will be delivered to the bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing forthwith after discovery of damage and, at the latest, within 7 days from receipt; in case of delay, complaint must be made within 21 days from the date the baggage was delivered. See tariffs or conditions of carriage regarding non- International transportation.

This Article adopts the same time limits prescribed by the Hague Protocol, which are preferable to those prescribed by the Warsaw Convention. Article 32 of the Warsaw Convention does not apply to this Article provided that the passengers are placed in a better situation.

Islamic-*fiqh* does not allow rights to be barred with the passage of time. Whenever rights are attached to persons, they are never extinguished unless they are returned to the claimant or waived by him. Nevertheless, Islamic-*fiqh*, gives the ruler the right to establish a timeframe beyond which the claimant has no right to raise the case before the court.

> 8. This ticket is good for carriage for one year from the date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change

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[293] *Al-Ajeer Al-Khass* is "a hireling whose benefits and services are devoted for the hirer) (*Mujalat Al-Ahkam Al-Shareyah*, Article 522, at 205. Best examples for private hires is fulltime employees.

[294] *Mujalat Al-Ahkam Al-Shareyah*, Article 704 and 705 at 261.

prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

This Article prescribes the standard term of the ticket and notifies the passenger of the possibility of exceptions. However, a question may be raised with regard to the legality of enabling the airlines to unilaterally amend the fares of the carriage after the conclusion of the contract. Another question may be raised with regards to the legality of refusing to carry the passenger on the grounds of a unilateral change in the fares by an airline.

Under Islamic-*fiqh*, the *majlis al-'aqd* (meeting session) will be concluded and *khiyar al-majlis* (The option to withdraw offer or consent) will be over at the moment the *qabûl* (acceptance) is communicated to the offeror. As such, the unilateral change of fares by the airline after the conclusion of the contract of carriage is without effect. Hence airlines are liable if they decide not to carry a passenger after unilaterally changing the fare.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetable or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown in the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

Delay is a major concern for passengers, especially those who are planning to catch an onward connecting flight. The Warsaw Convention recognized this

problem from the beginning and provided that the carrier is liable for any delay.[295] On the other hand, the tariffs provide that the schedules and timetables are approximate and may not be relied upon. This is an important conflict with the provisions of the Warsaw Convention.[296] However, courts tend to apply Article 19 of the Convention very strictly and hold the carrier liable for any delay unless it discharges the burden of proof imposed by Article 20 and 21 of the Warsaw Convention.[297]

Under Islamic-*fiqh*, timetables and airline schedules are part of the *ijâb* (offer), which the carrier must uphold and abide by so long as it was known at the time of receiving the *qabûl* (acceptance) from the passenger. From the author's point of view, Islamic-*fiqh* would apply stringent measures to cases of delay. But Islamic *fiqh* compensates only for actual damages. This means that the passenger should prove the damage sustained as a result of such delay. No compensation for consequential damages shall be applied under Islamic-*fiqh*.

> 10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed early enough to complete departure procedures.

This Article is required to protect the carrier from the sanctions and fines applied by some States against carriers that bring into their territory a passenger without proper travel documents. Moreover, it creates a valid ground, consistent with Islamic-*fiqh* on which a carrier may rely to refuse to perform the carriage.

> 11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

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[295] Warsaw Convention, *supra* note 1 Article19.

[296] See R. H. Mankiewicz, *supra* note 289 at 188.

[297] See *McMurrayvs* v. *Capital International Airways*, 15 Avi 18.087. See also R. H. Mankiewicz, *supra* note 289 at 189.

This Article saves the airlines from any allegation that it has waived any of the conditions of the contract through its agents or servants. Again, it is consistent with Islamic-*fiqh.*

6.2.4 Enforceability of Conditions of Contract and Carriage

It is obvious that the Warsaw Convention and the subsequent amendments do not cover all aspects of the contract of carriage. Therefore, Article 22(1) expressly gives the parties (the carrier and the passenger) the right to agree on higher limits of liability. Nevertheless, Articles 23 and 33 of the Convention consider null and void every agreement between the parties that contradicts the provisions of the Warsaw Convention. Moreover, Article 25 of the Montreal Convention gives the carrier and the passenger the freedom to agree on higher limits. Besides, Article 26 annuls any provisions relieving the carrier from its liability, be the relief total or partial.

Thus, theoretically, the parties to the contract of carriage are granted the privilege to conclude a contract freely with the sole condition that it does not contradict the provisions of either the Warsaw System or the Montreal Convention.

However, this conclusion cannot be taken for granted as it does not exactly correspond to the actual process of issuing tickets. IATA members are obliged to

include the IATA Conditions of Contract, which neither the carrier nor the passenger are permitted to alter. Moreover, the carrier is usually the party who dictates the conditions of carriage, and it is almost never possible for the passenger to negotiate these or to ask for amendments. If this were to occur, it would result in an interesting question with regard to the enforceability of such contracts.

As mentioned previously, the provisions of the contract of carriage are not automatically enforceable. Every case must be considered independently.

Although the general rule is that the party seeking to rely on specific terms and conditions must show that he/she did what was reasonable to give the other party proper notice at or before the conclusion of the contract, it is not always the case for carriers and passengers where the notice and conditions are sometimes delivered to the passenger after the conclusion of the contract. [298]

Thus, the rule should be interpreted liberally with regard to carriage by air. To make the conditions of carriage and conditions of contract enforceable, the carrier must show that it delivered the ticket in a timely manner so as to allow the passenger time to decide his or her position.

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[298] See P. Martin, "Phone in, Turn up, Take-off, a Look at The Legal Implications of Self- services Ticketing" (1995) XX:4/5 Air & Space Law 190 at 192.

Chapter VII: The Liability Regime

The previous chapters of this Part were intended to act as an introduction to this chapter. In essence, this chapter will elaborate on the liability regime of air carriers in international carriage of passengers in three dimensions. It will focus on each element of the contractual liability regime in the context of the Warsaw System, the Montreal Convention and Islamic-*fiqh*.

It will be observed that the sequence of articles as appearing in the Warsaw System and the Montreal Convention is not to be strictly followed through this Chapter. Priority is given to clarity and connectivity of the subjects rather than the sequence of articles. For instance, this Chapter will commence with consideration of the scope of applicability of both the Warsaw System and the Montreal Convention, and the perspective of Islamic-*fiqh* in relation to this. It will then jump directly to the matter of liability before returning to the other subjects of the conventions such as documentation and jurisdiction. This structure is adopted to allow the logical analysis required to make a thorough comparison between Islamic-*fiqh* on the one hand, and the Warsaw System and the Montreal Convention on the other hand.

7.1 Scope of Applicability of the Warsaw System and Montreal Convention

Articles 1, 2 and 34 of the Warsaw Convention adequately define its scope. Article 1 articulates very clearly that "[t]his Convention applies to all international

carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

As discussed in the previous chapter while addressing the contract of carriage, the word person in this Article does not include operating crew members and stowaways or other persons aboard an aircraft who are not being transported under a contract of carriage. This paragraph also confirms that gratuitous carriage is subject to the Convention no differently than carriage for reward, and thus, the contract of carriage does not require the element of consideration, in the common law sense in order for the contract to be valid.[299]

For further clarification, Paragraph 2 of Article 1 defines what international carriage means, stipulating that

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

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[299] *Block* v. *Air France, supra* note 272 ("If the carrier is an air transportation enterprise, the passenger need not have paid or have promised to pay, provided that the carrier has consented to transport the passenger under those conditions.").

As was true in the leading case of *Grein* v. *Imperial Airways*, it is almost always necessary following an air accident for courts to determine whether the carriage falls within the scope of the Convention or not.[300] Owing to the clarity of this provision, courts face minor difficulties in determining whether carriage is international according to the Convention. Such minor difficulties have however arisen is cases such as round trips, where the starting and end points are the same. Difficulties could potentially have arisen in the case of carriage to be performed by several successive air carriers, but for Paragraph 3 of Article 1, which provides that

> A carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

According to Paragraph 3, a break in carriage does not affect the international character of the carriage so long as it is one undivided carriage. As such, an accident in a domestic leg of an international contract would not constitute a break in carriage.[301] In *Grein* v. *Imperial Airways*, the court very clearly stated that "it matters not that the journey is broken. Thus, if the contract were for carriage of a passenger from Paris to Madrid it would make no difference if the

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[300] See generally *Bank N. V.* v. *British Overseas Airways Corp.* (1953, QB), *Stratton* v. *Trans-Canada Airlines* (1962, Brit Col Ct App), *Block* v. *Air France*, *supra* note 272. See also *Grein v. Imperial Airways, supra* note 1233.

[301] *Wyman and Bartlett* v. *Pan American Airways, Inc.* 65 S. Ct. 1029 (U. S. Sup.); 1 Avi 1093.

passenger was entitled under the contract to break his journey at Toulouse; he might be entitled to remain in Toulouse for a week or a month and then resume his journey, the carriage would nonetheless satisfy the definition". The court suggested that, "[t]he reason for this is clear once it is appreciated that the contract is the unit, not the journey." This conclusion is further affirmed by similar rulings in various other jurisdictions such as the Canadian case of *United International Stables Ltd.* v. *Pacific Western Airlines Ltd.*[302]

Another term that Paragraph 3 introduces is the notion of a successive carriage, which is crucial when considering the nature of carriage. Three characteristics must be present at the time when a contract or a series of contracts is made for the carriage to be considered successive:

i. the carriage must have been regarded by the parties as a single operation;
ii. the carriage must have been divided into separate successive stages; and
iii. the parties must have agreed that the carriage was to be performed by several successive carriers.[303]

Thus, a codeshared leg of a trip may not be considered as successive carriage for the purpose of this Convention because the carrier is unilaterally conducting part or all of the carriage on behalf of another carrier. International carriage can

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[302] (1969) 68 W.W.R 317.

[303] Shawcross, *supra* note 184 at 410.

be determined according to the intention of the parties, as expressed in the ticket or contract.[304]

It should be noted that Paragraphs 2 & 3 of Article 1 of the Warsaw Convention were amended by the Hague Protocol as follows:

> 2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.
> 3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

Although this amendment did not make major alterations to the applicable regime, it is noteworthy that by referring to the agreement between the parties instead of the contract between the parties, Paragraph 2 has adopted a more accurate translation of the French phrase "d'après les stipulations des parties". The amendment, moreover, recognized the difficulty of multiple documents regulating

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[304] S. M. Speiser & C. F. Krause, *Aviation Tort Law*, Vol.2 (New York: Lawyer Co-Operative Publishing Co. 1978) at 655.

the international carriage of passengers by air. Under the Hague Protocol "High Contracting Parties" means those who have adopted the Protocol.

Article 2 of the Convention provides that:

> 1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.
> 2. This Convention does not apply to carriage performed under the terms of any international postal Convention.

According to the provisions of this Article, the Convention applies to all carriage falling within the conditions prescribed by Article 1, even if this is carried out by public bodies belonging to States. Paragraph 2 excludes carriage performed under any international postal Convention. This Paragraph as amended by the Hague Protocol provides that "[t]his Convention shall not apply to carriage of mail and postal packages."

In addition to the above, Article 34 of the Warsaw Convention excludes from the application of the Convention:

> 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 does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

This Article was adopted to protect a carrier who, for a benevolent purpose, undertakes a flight which from its inception is to be performed under

"extraordinary circumstances" and therefore falls outside of the normal scope of a carrier's business. An example of this is a rescue flight.[305]

Article 1 of the Montreal Convention does not differ from the rules established by the Warsaw Convention with regard to the scope of application. Rather, Chapter V of the Convention (Articles 39 through 48) incorporates the provisions of the Guadalajara Supplementary Convention of 1961.[306] Moreover, Article 2 of the Montreal Convention adopts the rules of the Montreal Protocol No. 4 regarding the carriage of postal items.[307]

It is clear that the Montreal Convention does not attempt to modify the original scope of application of the Warsaw Convention. It attempts rather to consolidate the provisions relating to the scope of application which had been scattered amongst other instruments. Nonetheless, cases under the new Montreal Convention still have to take into consideration the rule of *Chubb & Son, Inc.* v. *Asian Airlines* in which the court ruled that the United States and Korea were not together bound by treaty because Korea had adopted the Hague Protocol without referring to the Warsaw Convention whereas the United States was party to the Warsaw Convention and the Hague Protocol.[308]

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[305] *Ibid.* at 653.

[306] M. Milde, "New Unification of Private International Air Law – A Rebirth of the Warsaw System?" The Korean Journal of Air and Space Law, Vol.11 1999 at 77.

[307] *Ibid.*

[308] (2d Cir. 2000) 214 F3d 301; 27 Avi. 17,877.

It is important, however, to pinpoint the fact that the Montreal Convention was expected to provide definitions and solutions to some unclear terms included in the Warsaw Convention. An example is the term person, which the Montreal Convention retained whereas it would have been better, the author suggests, to use the term passenger.

Another point one might have to be addressed by the Montreal Convention but in fact was not, is the definition of international carriage. The author is of the view that by keeping the same definition as enunciated by the Warsaw Convention, and adding the fifth jurisdiction rule,[309] the Montreal Convention has magnified the arbitrariness of treatment of passengers. According to the Montreal Convention two passengers who are injured while sitting beside each other may receive extremely different compensation. The introduction of the concept of international flight instead international carriage could have solved the problem. By using flight instead of carriage, formalities and particulars of ticketing would have lost their importance to a great extent. This is owing to the fact that it would suffice to know that the passenger is flying on an international flight without the need to determine whether there was an agreement for international carriage.

Nonetheless, such a concept would have introduced a major change in the case law and given rise to further battles as to whether the contract of carriage is subject to the Montreal Convention or not because of the change in analogy and

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[309] Montreal Convention, *supra* note 3 Article 33.

rationale in defining the term *international*. According to the current concept of international carriage, it is the content of the ticket that determines the nature of the contract of carriage. By contrast, introducing the concept of international flight, the yardstick becomes the path of the flight. This concept, may prove problematic when it comes to accidents on domestic legs of international carriage.

Whereas Islamic-*fiqh* acknowledges the diversity of national laws it would not deviate, the author suggests, from the scope of application adopted by both the Warsaw System and Montreal Convention.

7.2 The Limits of Liability

Almost every text written in relation to the history of the Warsaw System contains a statement to the effect that the Warsaw Convention took into consideration the need to protect the aviation industry which was in its infancy. Such protection was made through the adoption of the *res ipsa loquitur* principle in exchange for fixed limited liability. The manifestation of this principle is found in Articles 17 through 22 and Article 25 of the Convention.

Although these articles were designed and adopted to unify the rules of air carriers' liability, they shortly thereafter posed a dilemma. Almost all of the Conventions and Protocols subsequent to the Warsaw Convention concerned these articles.

The aviation industry evolved very rapidly from its status as an infant industry. Thus, in short order the industry in such a manner was no longer in need of protection. Furthermore, the demonetarisation of gold and the effect of inflation made the limits adopted by the Warsaw Convention unrealistic.

In the following section the thesis will address these articles in detail, taking into consideration the amendments and implications of the new Montreal Convention and Islamic-*fiqh.*

7.2.1 Article 22 Limits of Liability under the Warsaw System

Article 22 is concerned with defining the limits of liability. These limits were expressed by a gold clause to avoid the disadvantages of the super-inflation of currencies in the post- World War I period.[310] The Article reads as follows:

> 1. In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability...
> 4. The sum mentioned above shall be deemed to refer to the French franc consisting of 65½ milligram gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.
> The amount numerated by this article is equivalent to US $8,300, or after the 1969 devaluation of the US dollar, approximately US $10,000.

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[310] See M, Milde, "The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... And the New Non-Warsaw Convention of 28 May 1999" Annals of Air And Space Law Vol. XXIV 155.

These limits of liability were adopted as the counterpart of reversing the burden of proof and limiting the defences available to the carrier, as will be shown later in this thesis.

Only 8 years after the adoption of Warsaw, France abandoned the Franc Poincaré as a unit of currency in 1937.[311] In 1944, the Breton Woods Conference altered the fundamental relationship between national currencies and gold.[312] Moreover, the creation of the Special Drawing Rights in 1974 by the International Monetary Fund (IMF) had its own impact. Due to these fundamental changes in the international monetary system and some other economic factors, these limits have become unsatisfactory and the source of litigation.

As is discussed above,[313] in recognition of the need to amend such limits of liability, the Hague Protocol doubled the monetary limits of liability to 250,000 Francs Poincaré (approximately US $16,600). In addition, the Hague Protocol included a provision allowing litigation expenses to be awarded in accordance with local laws. These amendments were adopted under Article XI of the Protocol which provides that Article 22 of the Warsaw Convention shall be deleted and replaced by the following:

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[311] A. Rueda, "The Warsaw Convention And Electronic Ticketing" (2002) 67:2 Journal of Air Law and Commerce 401 at 413.

[312] *Ibid.*

[313] See Sections 4.2 & 76.1.2

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability...
4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses if the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 25 of the Warsaw Convention provides that

1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case is considered to be equivalent to wilful misconduct.
2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

The importance of Article 25 of the Warsaw Convention stemmed from it being one of the two important means of escape by which claimants can overcome the limitations of liability.

Due to the controversial nature of the term wilful misconduct, as introduced by the English translation of the Convention, and which does not correspond to the

French term "dol" as employed in the original French text,[314] this Article was amended by the Hague Protocol to read as follows:

> The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with the intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

The advantage of this new rule is that the elements of both dol and wilful misconduct are included, while at the same time omission has been included as a ground for unlimited liability.[315]

As previously shown while elaborating on the evolution of the Warsaw System, the limits of liability were the focus of almost all the amendments and supplements to the Warsaw Convention. [316] Even the Montreal Agreement of 1966 and MIIA were concerned with the limits of liability.

The Guatemala City Protocol attempted to include much higher limits than those originally adopted by the Warsaw Convention or by the Convention as amended by the Hague Protocol. It retained the expression in francs but raised the limits up to 1,500,000 francs (USD100,000). The protocol never entered into force, but it paved the grounds for the Montreal Convention to introduce its two tier liability regime.

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[314] See A. Khan, *Air Carrier's Unlimited Liability Under the Warsaw System*, (LL.M Thesis, Institution of Air and Space Law, McGill University 1990) [unpublished] at 2.
[315] *Ibid.* at 91.

[316] See section 6.1 above.

7.2.2 Limits of Liability Under the Montreal Convention

The Montreal Convention divided Warsaw's Article 22 into two articles, Articles 21 and 22. The latter addresses delay, cargo and baggage liability while the former concerns passenger liability, and they provide as follows:

> Article 21 – Compensation in Case of Death or Injury of Passengers:
> 1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
> 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
> (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
> (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.
>
> Article 22 – Limits of Liability in Relation to Delay, Baggage and Cargo
> 1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.
> 5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.
> 6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 21 prescribes a two tier liability regime, under which the carrier is unable to exclude or limit its liability for the first 100,000 SDRs. For claims above 100,000 SDRs the carrier retains the right to defend itself as will be shown in detail at section 7.3 below. Despite the fact that carriers' liability under the second tier of liability is not limited, the quantum of damages has to be proved by the claimant. In addition, determination of such proved damages shall be subject to the *lex fori* principle.[317]

Air carriers' liability as prescribed by Article 21 of Montreal Convention may be understood to be absolute up to the first 100,000 SDRs. This appears to be true if Article 21 is read in isolation from Article 20, which exonerates the carrier's liability in whole or in part even within the boundaries of the first 100,000 SDRs in the case of contributory negligence of the passenger. Consequently, liability up to the first 100,000 SDRs is not purely absolute.

Article 22 of the Montreal Convention limits carriers' liability in case of delay to 4,150 SDRs. This limit would not be applied, however, if it is proven that such damage resulted from an act or omission of the carrier done either with the intent to cause damage or recklessly and with knowledge that damage would probably result. This exception is found in Paragraph 5 of Article 22 and is equivalent to

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[317] P. Dempsey & M.Milde, *supra* note 262 at 183.

the provision concerning wilful misconduct in the Warsaw Convention.[318] The text of the Montreal Convention is similar to the one adopted by Hague Protocol.[319]

The Montreal Convention excluded the wilful misconduct rule of Article 25 of the Warsaw Convention as it does not fit with the approach of strict and unlimited liabilities.

7.2.3 Limits of Liability Under Islamic-*fiqh*

As studied in Part I of the thesis, *diyah* is a source of limited liability. It does not rely on a contract although it may be increased by virtue of a contract. Part I discussed in detail the value and nature of *diyah*. As we have seen, there are two methodologies to calculate the value of *diyah* in the context of the modern monetary system. One approach is to convert the value of *diyah* as enumerated by the Prophet directly into today's terminology. This technique is actually the approach adopted by most of Islamic states applying *diyah*.

The author suggests another approach reliant on the economic value of *diyah*. Under this approach, the sums awarded by the Prophet are taken to be a reference to the economic value of *diyah* in his era. To calculate the value of *diyah* at any given point of time, these quantities have to be given a sense other than their literal meaning.

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[318] Warsaw Convention, *supra* note 1 Article 25.

[319] Hague Protocol, *supra* note 237 Article XIII.

This suggestion was discussed when addressing the subject of *diyah* at section 2.1.1 and the limits of liability under the Rome Convention in section 5.1 above. The same suggestion will now be discussed in the context of contractual liability of the carrier.

The regime for contractual liability in the context of *diyah* is different from the current approach found in the Conventions. The conventional approach begins with the assumption that liability is unlimited. It tried, therefore, to unify the terms of liability by applying a uniform ceiling of liability that may not apply in case of failure to conform to certain formalities and in the case of wilful misconduct. The carrier is left with the limited defences of "contributory negligence" and "all necessary measures". After 70 years, this regime was amended. Now the Montreal Convention applies a two tier regime as shown within this chapter. However there is still the assumption that carriers' liability is unlimited. Both Montreal and Warsaw rely on contract to determine the liability of the carrier.

Accordingly, the problems with the limits of liability adopted by the Warsaw System are:

i. The limits of liability are fixed in numbers which prevented the Warsaw Convention from keeping pace with the economic devaluation of currencies. This mandated the adoption of the supplementary instruments comprising the Warsaw System.

ii. Such limits of liability are linked to the contract of carriage and subject to extremely stringent formalities the absence of which would result in exposing the carriers to unlimited liability.

Although the reaction adopted through Montreal Convention aimed at solving the problems associated with the Warsaw System, the author contends that the new solutions are expected to have their own impeded flows as follows:

i. In reaction to the numerated limits of liability adopted by Warsaw, Montreal adopted a two tier liability regime of which the second is an unlimited. At the same time it adopted the fifth jurisdiction principle which would open the doors widely for litigants to search for courts allowing for higher value of compensation.
ii. Article 24 of the Montreal Convention abstracts from the fact that Montreal liability regime is not limited at the outset. Thus the review of limits adopted by Montreal concerns other limited aspects of the Convention including the first tier.

The author suggests that the *diyah* system shall bring these two extremes of Warsaw system and Montreal Convention to a balanced median point benefiting from the advantages of both and trying to avoid the flaws associated with both.

Diyah departs from the assumption that liability should be limited and determined by virtue of law rather than contract.

In Part I, the author suggested that *diyah* may be calculated on the grounds of three years income of a middle class family of six. This methodology could result in higher compensation for persons in the United States of America than for

persons on the same flight but coming from a developing nation, where the aggregate annual income of middle class families is much lower than in the USA. This methodology could also, result in compensating persons differently according to the statistics for each year. The author suggests, therefore, that consideration of the limits should be based on the aggregate annual income of the state having the highest recorded figure according to the United Nations statistics. Those should be reviewed periodically. This methodology does not contradict the Islamic principles in relation to *diyah* and, simultaneously, would avoid low limits of liability.

While discussing the subject of *diyah* in section 2.1.1 above, the author suggested that *diyah* amount would be US$ 537,396.

However, bearing in mind that the author is trying to present the methodology adopted by *diyah* rather than the theology behind it, it is worth noting that the limits of liability may be designated in any other way that may be seen convenient and satisfactory. The main issue in this regard is that such limits should not be given in numbers to avoid the problems associated with the Warsaw System.

Adopting a dynamic method of calculating damages while keeping them limited to a specific ceiling without reliance on stringent formalities would also prevent the flaws associated with Montreal Convention mentioned above. According to

this methodology litigants will not have an incentive to go forum shopping as the amount of compensation would be the same everywhere it was adopted. Moreover, the amount of uncertainty would be much reduced which may induce positive results as concerns insurance premiums.

7.3 Exoneration

Articles 20, 21 and 22 have always been at the core of all amendments and developments of the Warsaw System. Article 22 will be discussed independently in the next section. This section will be devoted to Articles 20 and 21 of the Warsaw Convention and their corresponding articles in the related protocols and Montreal Convention. While discussing the development of the articles, it will be necessary to elaborate on the impact of the IATA Intercarrier Agreement (IIA) and the measures to apply this agreement (MIIA). This explanation will be divided into the Warsaw Convention and the Montreal Convention (i.e. the IIA and MIIA will not be discussed in an independent section).

7.3.1 Exoneration under Warsaw System

Article 20 (1) of the Warsaw Convention reads as follows:

> The Carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 21 reads:

> If 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.

Drafters of the Warsaw Convention left these two articles as the only two escape routes barely open for carriers. Article 20(1) of Warsaw reverses the burden of proof on the part of the carrier. While passengers are left with the burden to prove the damage and that it took place aboard an aircraft, the air carrier has to prove that it took all necessary measures to prevent such damage or that it was impossible to take such measures. Nevertheless, the burden imposed on air carriers by Article 20(1) is almost insurmountable.[320] Accordingly, from a practical point of view, the Warsaw Convention has almost always become a *defacto* strict liability regime despite the small number of cases that have invoked the of Article 20(1) exception.[321]

According to Harold Caplan [322] and Anthony G. Mercer [323] this Article is interpreted in several jurisdictions as "all reasonably necessary measures". The decision in *Olding* v. *Singapore Airlines* supports this interpretation. [324] In this case, the plaintiff asserted that he suffered injury as a result of swallowing fragments of glass in pineapple juice on an international flight served by the

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[320] S. M. Speiser & C. F. Krause, *supra* note 304 at 704.

[321] See *American Smelting and Refining Company* v. *Philippine Airlines Inc.* June 21, 1954 (N.Y. Sup., N.Y. County); 4 Avi. 17,413, *Jang Sool Known* v. *Singapore Airlines* 9 Avi. 18,184 (N.D. Cal 2003).

[322] H. Caplan, "Novelty in the New Convention" [1999] 4 The Aviation Quarterly 193.

[323] A. Mercer, "The Montreal Protocols and the Japanese Initiative: Can the Warsaw System Survive?" (1994) XIX: 6 Air & Space Law 301.

[324] [2002] 1515 HKCU 1. (quoted from liability report 2004 page 28).

defendant. The court decided that Singapore Airlines presented a good defence under Article 20 by establishing that if there had been glass in the pineapple juice that glass had been present in the can when it had been obtained from the juice manufacturer. The Court held that the risk of finding a foreign body in a canned drink in this day and age was so slight that the airline could not be expected to sieve or individually check drinks for foreign bodies.

Likewise, in *Manufactures Hanover Trust Co.* v. *Alitalia Airlines*,[325] the court defined the term "all necessary measures" as "all reasonable measures", including a regular and proper maintenance schedule for aircraft, the airworthiness of the aircraft, proper certification of the flight crew, or warnings to passengers about the expected dangers.

In *Fleming* v. *Delta Air Lines, Inc.*,[326] the air carrier failed to warn passengers about the possibility of bad weather during the flight. In an action for damages for injury suffered by a passenger, the court held that the air carrier had not taken all necessary measures to avoid the damage and, as such, was liable for damage suffered by the injured passenger.

There is limited, and arguably inadequately definitive, case law pertaining to this Article, since it was completely waived in accordance with the Montreal

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[325] 429 F. Supp. 964 at 967 (D.C.N.Y.1977).; 14 Avi. 17,710.

[326] (1973) 359 F.Supp 339 (DC NY); 12 Avi 18, 122.

Agreement 1966. It was also waived by air carriers signatory to the MIIA for the first 100,000 SDRs.

The text of Article 21, on the other hand, makes it much clearer and easier for the carrier to be exonerated from liability partly or completely.

Unlike the "all necessary measures" defence of Article 20, the defence of "contributory negligence" by the passenger as found in Article 21 survived all the amendments pertaining to the liability regime, including those made in accordance with Article 32 of the Warsaw Convention under the Montreal Agreement of 1966 and the MIIA.

There are few reported cases concerning contributory negligence on the part of passengers. However, the leading case is *Chutter* v. *K.L.M Royal Dutch Airlines et al.,* in which the Court decided that there had been contributory negligence on the part of the passenger.[327] After boarding the aircraft, the passenger went back to the door and stepped out of the airplane while the boarding stairs were being rolled away.

7.3.2 Defence Available under the Montreal Convention

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[327] (1955) 132 F. Supp. 611 (DC-N. Y.); 4 Avi. 17,733. [Hereinafter *Chutter Case*].

The subject of exoneration of carriers' liability is scattered in various Articles of the Montreal Convention.

Article 20 is devoted to exoneration on the grounds of contributory negligence or other wrongful acts or omissions of the passenger. It stipulates that:

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Prima facie, this Article greatly resembles the contributory negligence provision of Warsaw.[328] It states that this defence is available to the carrier even within the first 100,000 SDRs. Nonetheless, this Article is different from Warsaw as it has removed the *lex fori* methodology. The application of this rule is now no longer a matter for the discretion of courts. It is to be applied without discrimination in all courts. The only question becomes whether contribution would bar the liability wholly or partly – there is no inquiry by the Court as to whether this is in accordance with its own law.[329]

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[328] Warsaw Convention, *supra* note 1 Article 21.

[329] See P. Dempsey & M.Milde, *supra* note 262 at 178-180.

The author finds the title given to Article 20, “Exoneration,” misleading. It implies that Article 20 is the only Article concerned with exoneration of liability. This is inaccurate since Articles 19 and 21(2) are concerned with exoneration Article 20.

While Article 19 is concerned with delay, it allows air carriers the Warsaw "all necessary measures defence". Article 19 provides:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

The author suggests that this reformulation of the "all necessary measures" defence into "all measures that could reasonably be required" will need to be litigated in courts before determining whether it is in practice more clear. However, this defence is now limited only to the case of delay. The carrier may not use this defence in any other circumstances.

Finally Article 21(2) articulates methods of exoneration other than those provided in Article 20 for claims above the initial 100,000 SDRs. This Article reads as follows:

> The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

The wording of this Article is to some extent vague. The better interpretation is that exoneration under Article 21 (2) is only available for amounts claimed against the carrier in excess of 100,000 SDR. In particular, the claimant will thus be entitled to recover amounts up to 100,000 SDR from the carrier even if the carrier is exonerated for claims in excess of this 1st tier. Another possible interpretation, however, is that "damages" applies to the amount of the injury suffered rather than the amount claimed. Thus, where the quantum of damages exceeds 100,000 SDR, exoneration under Article 21(2) would extend to the entirety of that amount. The latter interpretation would also cast on advance payment as per Article 28 of the Convention.[330]

The author suggests that the first few cases involving discussions of these points will have to revert to the drafting history of the Convention to overcome the difficulty of interpreting this Article.

The liability regime and defences available under the Montreal Convention were acutely criticized at the Diplomatic Conference held between the 11th and 29th

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[330] Article 28 – Advance Payments: "In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier."

May 1999 for the adoption of the Convention. Most of the criticism emanated from developing nations such as India.[331] A group of 53 states of Africa[332] plus Vietnam[333] provided criticism centred on the fact that the new Convention puts customers in a better position than the carrier. These points focused on the economic aspects of the provision rather than the legal aspects.

According to Article 21(2), the carrier is required to prove that there was no negligence or other wrongful act or omission in the sequence of incidents causing the accident and the damage. Paragraph (b) is dramatically affected by inclusion of the word "solely". It may be very difficult or even impossible for the carrier to prove or attribute the damage solely to third parties.[334] It may be extremely difficult to prove the sole liability of third parties such as manufacturers of aircraft and engines, air traffic controllers and other air carriers. Such a provision also poses the difficult and contentious question of whether terrorists in the case of hijack are third parties, and whether it is their sole wrongful act that has caused injury to passengers.

In conclusion, according to Articles 19, 20 and 21(2), the carrier now has the following defences with regard to the amount of compensation:

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[331] See ICAO DCW Doc No. 18 dated 11/5/1999.

[332] See ICAO DCW Doc No. 21. dated 12/5/1999.

[333] See ICAO DCW Doc No. 24. dated 12/5/1999.

[334] ICAO DCW Doc No. 28. date 13/5/1999 at 4.

i. In case of delay, the carrier shall be exonerated from its liability if it proves that it has taken all necessary measures or it was impossible for it to take such measures.
ii. Contributory negligence on the part of the passenger shall exonerate the carrier from its liability to the extent of the passenger's fault.

In addition to the above, the carrier has the following defences in all claims exceeding 100,000 SDR's:

i. Damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
ii. Damage was solely due to the negligence or other wrongful act or omission of a third party.

In conclusion, the author is of the opinion that the exoneration methodologies adopted by both the Warsaw and Montreal Conventions are extreme, owing to their subjectivity. In 1929, when the Warsaw Convention was adopted, the drafters kept in consideration the need to protect the infant aviation industry. They therefore created what was very soon considered to be unrealistic limits on liability. On the other hand, it bewet air carriers with a reversed burden of proof and limited defences which were difficult to surmount. In practical terms, this methodology turned out to be in effect a form of strict limited liability. This came from the fact that courts tended to apply the rules subjectively in favour of passengers, taking into consideration the fact that whatever the compensation

owed to passengers it was still insufficient when compared to the damage they suffered.

The Montreal Convention took as a starting point the series of efforts undertaken to amend the Warsaw Convention. It adopted a consumer protection point of view, taking into account the Montreal Agreement 1966, the Guatemala City Protocol and the MIIA. Accordingly, the Montreal Convention attempted to encapsulate all of these developments and present in a single Convention. Passengers were to be dealt with differently and discriminately. According to Article 19 of the Convention, whatever the nature of damage the passenger suffers as a result of a delay, the carrier will be able escape its liability on the grounds of the "all necessary measures" defence. Bearing in mind that such damages may be corporal in nature, this would result in a discriminatory treatment compared with those suffering corporal injuries for a reason other than delay.

On the other hand, the provisions of Article 21 uncovered the somewhat veiled intentions of courts to protect consumers at the cost of airlines. It implicitly tells passengers "if you get injured, airlines will compensate you up to 100,000 SDRs even if the damage was caused solely by a third party". It thus imposed on the airlines the role of insurer. In this context the Montreal Convention failed to be fair and balanced even when it tried to do so. By inserting the word "solely" to the third party defence available under Article 21(2), it adopted an all or nothing

methodology. Thus, with the inclusion of such a term the carrier will not be able to exonerate itself or limit liability even if a third party is predominantly involved in the causation of damage. Once more, this impractical defence takes us towards *de facto* strict liability.

The following section of the thesis will elaborate on defences available under Islamic-*fiqh* in the context of air carriage and how these would contrast with those available under the Warsaw System and the Montreal Convention.

7.3.3 Defences available under Islamic-*fiqh*

The basic standard principle of evidence under Islamic Law is:

> البينة على من ادعى واليمين على من أنكر
> The burden of proof is upon the plaintiff and to the denier is the burden of oath.

This self explanatory basic principle of proof is in accordance with natural logic. Islamic jurists have however concluded that this principle cannot apply to some situations, where it may not be possible for the plaintiff to prove his case not merely due to a lack of evidence but rather because of the difficulty of having such proof, such as in medication cases where proof and evidence are very scientific and sophisticated, to the extent that a layman can not follow. Another difficult example is when the patient is under anaesthesia and unconscious. In such cases jurists applied an analogy to the *ḥadīth* of the Prophet:

عن عمرو بن شعيب عن أبيه عن جده أن رسول الله صلى الله عليه وسلم قال: " من تَطبَّبَ ولم يعلم منه طِبٌّ فهو ضامن " رواه أبو داود، وصححه الحاكم والذهبي.

A person performing as a physician while he is not known to be such shall bear liability

According to this tradition of the Prophet, Islamic scholars like Ibnulqayem, Ibn Rushd and Alkhaṭabī concluded that a physician's liability is assumed unless he/she proves that he conducted his work in due diligence and in accordance to the established conventional medical standards.

Islamic jurists have reached a consensus on differentiating between the situation where the aggressor has control of the subject causing the damage, or is at least able to prevent such damage from being caused and the situation where the aggressor does not have such a possibility. According to Abdulqader Auda, to evaluate whether the aggressor is liable for the wrongful damage or death, jurists are applying two doctrines:

i. كل ما يلحق ضررا بالغير يسأل عنه فاعله أو المتسبب فيه إذا كان يمكن التحرز منه ويعتبر أن تحرز إذا لم يهمل أو يقصر في الاحتياط والتبصر فإذا كان لايمكنه التحرز منه إطلاقا فلا مسئولية.

ii. إذا كان الفعل غير مأذون فيه (غير مباح) شرعا واتاه الفاعل دون ضرورة ملجئة فهو تعد من غير ضرورة وما تولد منه يسأل عنه الفاعل سواء كان مما يمكن التحرز عنه أو مما لا يمكن التحرز عنه.[335]

i. Aggressors are liable for all actions which may cause damage to other persons, so long as it was possible for him/her to take necessary precautions to prevent it. The aggressor shall be deemed to have been taking necessary precautions to prevent the damage so long as he/she proves that he/ she was acting cautiously. If, however, it was impossible

[335] See A. Owdah, *supra* note 28 at 104-108.

for the aggressor to avoid the occurrence of the accident, there should be no liability whatsoever on the part of the aggressor.

ii. If the event causing damage is by itself **not** permissible or illegal and the aggressor has acted without necessity. In this case the aggressor is liable for damage resulting from his/her action despite the impossibility of taking precautions to prevent such damage.

Accordingly, jurists have given various examples of what may be considered accidents for which the aggressor is liable or not liable. For instance, if a person is walking in the street carrying a piece of wood and this falls on to someone causing injury, the carrier of the wood shall be liable for the damage because it was possible for him/her to take the necessary precautions to prevent such a fall. But if dust resulting from walking harms the eye of another, the walking person may not be liable for such damage as it is impossible to avoid the dust.[336]

Other examples include liability for parking a cart where it should not be parked if the cart subsequently causes damage to others.

One can argue that the Warsaw Convention is consistent with Isalmic-*fiqh* insofar as it does not directly reverse the burden of proof. Rather, it is a normal consequence of the situation, and of the relationship between the passenger and the carrier which makes the carrier liable once damage is sustained onboard. This is so because the carrier is supposed to carry the passenger to his/her

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[336] See *Ibid.* at 105.

destination safely. Passengers are under the control of the carrier throughout the flight. Everything in the surroundings belongs to or is under the control of the carrier. Therefore, any damage sustained is most probably caused by the carrier or by something or someone supposedly under the control of the carrier. The carrier also is – or ought to be – best informed about the technical details of the flight. Accordingly, it would be unnatural and illogical to presume that damage is caused by someone else but the carrier. This presumption is not absolute for it is possible in some situations to find that the damage is not caused by the carrier. In these cases, damage sustained may be caused by the passenger himself or by a third party. In the flow of logical analysis, it would be more realistic to ask the carrier to prove that the accident happened because of such foreign elements, if any exist, rather than to ask the passenger to prove that it was the carrier and exclusively the carrier. This approach is certainly analogous to the approach taken by Abdulqader Auda.

7.4 Article 17 of the Warsaw Convention

Article 17 of the Warsaw Convention states:

> The carrier is liable for damages 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.

The Hague Protocol did not implement any amendments to the original text of this Article. Therefore it is still in effect, as the original text of the Convention.

The language of Article 17 establishes presumptive carrier liability. Articles 20 and 21 affirm this concept by asserting that the carrier shall bear the burden of proof that someone else has contributed to the damage and that it has taken all necessary measures to prevent such damage.

Article 17 introduces some very controversial terms which need to be addressed in detail, namely "passenger", "bodily injury", "accident", "embarking" and "disembarking".

Whereas the term "passenger" was sufficiently addressed under section 6.2.2.2 of the thesis, this part will concentrate on the remaining terms.

7.4.1 Bodily injury

7.4.1.1 Bodily injury under Warsaw

The term bodily injury in the context of Article 17 of the Warsaw Convention is very contentious. The main issue at stake here is whether the expression "any other bodily injury" includes pure mental trauma such as nervous shock, post traumatic stress disorder, depression and all other kinds of mental distress, psychic and psycho-somatic injuries.

The first significant ruling on the meaning of "other bodily injury" is traced back to 1973 and the case of *Burnett* v. *Trans World Airlines, Inc.,* in which a married couple claimed damages for bodily injuries and mental suffering following the 1970 hijacking in the Dawson Field of the Jordanian desert. [337] The court asserted that:

> Certainly, mental anguish directly resulting from bodily injury is damage sustained in the event of a bodily injury. The delegates (at the Warsaw conference) apparently chose to follow this well-recognized principle of law allowing recovery for mental anguish resulting from the occurrence of a bodily injury, the emotional distress being directly precipitated by the bodily injury itself. Therefore, plaintiffs may recover in this action for any such emotional anxiety that they can demonstrate resulted from a bodily injury suffered as a consequence of the hijacking.

The court further asserted, "By thus restricting recovery to bodily injuries, the inference is strong that the Warsaw Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish..."

Rosman v. *Trans World Airlines Inc.*[338] arose from a similar incident. The court asserted that "only by abandoning the ordinary and natural meaning of the language of Article 17, could we arrive at a meaning of the terms 'wounding' and 'bodily injury' which might comprehend purely mental suffering without physical manifestation." The court then finally and clearly decided that

> Only the damages flowing from the "bodily injury", whatever the causal link, are compensable. We are drawn to these conclusions by the clear import of the terms of Article 17. Those terms in their ordinary meaning, will not

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[337] (1973) 368 F Supp. 1152 (D.C NM); 12 Avi. 18,405.

[338] (1974) 34 NY2d 385 (NY C. App); 13 Avi. 17,231.

> support the plaintiff's claim that psychic trauma alone, or even psychic trauma which caused the bodily injury, is compensable under the Warsaw Convention.

In *Husserl* v. *Swiss Air Transport Co., Ltd.* the court took a different view, it expanded the meaning of bodily injury to include "as many types of injury as are colorably within the ambit of the numerated types. Mental and psychological injuries are colorably within that ambit and are therefore, comprehended by Article 17."[339]

Despite the expansive approach adopted in the Husserl case, most courts have been unwilling to venture beyond the requirement that a passenger must suffer death, physical injury or physical manifestation of injury before recovery against an airline is possible for bodily injury.[340]

This interpretive controversy continued until the United States Supreme Court ruled in 1990 in the landmark case of *Eastern Airlines, Inc.* v. *Floyd et al.*[341] The Court asserted, after a thorough analysis of the original French text of the Warsaw Convention, that:

> even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery. As discussed, neither the language, negotiating

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[339] (1972) 351 FSupp. 702 (DC NY); 12 Avi 12,637.

[340] J. Brent Alldredge, "Continuing Questions in Aviation Liability Law: Should Article 17 of the Warsaw Convention be Construed to Encompass Physical Manefistations of Emotional and Mental Distress?" (2002) 67:4 Journal of Air Law and Commerce 1345.

[341] 499 U.S. 530 (1991); 23 Avi. 17,367. [hereinafter *Floyd*]

history, nor post-enactment interpretations of Article 17 clearly evidences such intent.

Notwithstanding the dismissal of pure mental injury in the Floyd case, it, unfortunately, did not determine very clearly the meaning of manifestation of physical injury. In other words it is still not completely clear whether mental trauma accompanied by bodily injury is recoverable or not.[342] However, until the very recent case of *Ehrlich* v. *American Airlines, Inc.,*[343] subsequent court decisions dismissed claims based on pure mental trauma.

In this regard, British courts have been in line with the majority of the US courts. In the case of *Sidhu* v. *British Airways*, the English Court of Appeal excluded pure mental trauma from the Convention's bodily injury, holding that "[t]he Convention was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available." [344]

The author suggests that it is important to differentiate between two major issues in all of these cases. It is clear from the context of the cases that the learned judges respect and appreciate that mental trauma may ordinarily be recoverable,

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[342] See *Jack* v. *TWA*, 854 F. Supp. 654 (N.D. Cal. 1994), *Longo* v. *Air France* (S.D.N.Y. July 25, 1996); 25 Avi. 629.

[343] 2002 US Dist. LEXIS 21419; 29 Avi. 17,252.

[344] *Sidhu* v. *British Airways*, [1997] AC 430. see also See Morris v. KLM Royal Dutch Airlines [2001] 3 All ER 126, [2002] QB 100 (Ct of Appeal); [2002] 2 All ER 565 (House of Lords) [hereinafter *Morris v.KLM*] and King v. Bristow Helicopters Ltd, 1999 SLT. 919 (Lord Ordinary); 2001. [hereinafter *King v. Bristow*]

but it is not recoverable under the Warsaw Convention. In this regard, it would seem to be the unwelcome clarity rather than ambiguity of the text of Warsaw Convention which has caused such variations and disagreements amongst the courts. Even in the case of *Weaver* v. *Delta Airlines*[345], where it was decided that post traumatic stress disorder is recoverable, the court did not deviate from the original rule of the text of the Warsaw Convention. The court decided that post traumatic stress disorder is recoverable because it is actually a result of the brain injury suffered from the accident.

7.4.1.2 Bodily Injury under the Montreal Convention

At the ICAO Diplomatic Conference in Montreal in May 1999, the matter of pure mental injury was addressed extensively. Some of the delegates tried to suggest the adoption of the Guatemala City Protocol by replacing the term "Bodily Injury" with the term "Personal Injury".[346] However it was contended that this term is very broad and lacking in clarity. The drafting committee, therefore, adopted the idea of inserting the more elaborate term "bodily or mental injury" to resolve the ambiguity of the Warsaw text.[347] Insurance companies criticized this approach which they deemed overly generous and suggested that the word mental should be deleted.[348]

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[345] 56 F. Supp. 2d 1190 (Dist.Ct. Montana 1999).

[346] ICAO DCW Doc. No. 10 dated 4/5/99.

[347] ICAO DCW Doc. No. 11 dated 4/5/99.

[348] ICAO DCW Doc. No. 28 dated 13/5/99, and DCW Doc No. 34 dated 17/5/99.

Article 17 of Montreal Convention, however, adopted the following text:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Montreal Convention, thus adopted almost the exact text of the Warsaw Convention in this regard. Accordingly, in the case of *Ehrlich* v. *Am. Airlines, Inc.* the court followed the Floyd rule and concluded that Montreal Convention allows recovery only for mental injuries caused by bodily injuries. [349]

The author contends that the adoption of Warsaw's provisions in the Montreal Convention, and the decision in the *Ehrlich case* will give rise to considerable litigation.

Indeed, it is likely that courts will be more interventionist in excluding pure mental trauma in cases based on the Montreal Convention. This contention flows form the analysis of the meaning of bodily injury under the Warsaw System. Most of the older cases take us back to the original French text of the Warsaw Convention so as to conclude that the French text intended to exclude pure mental trauma. Besides, the cases of *Morris* v. *KLM*[350] and *King* v. *Bristow*[351] demonstrate that pure mental trauma was not admitted by most courts of the signatory states at that point of time. Accordingly, it may be more accurate to

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[349] 360 F3d 366 (2d Cir. 2004). [hereinafter *Ehrlich*]
[350] *Supra* note 344.
[351] *Supra* note 344.

conclude that Warsaw drafters did not have the intention to include pure mental trauma rather than saying that they intended it to be excluded.

As regard the Montreal Convention, however, the case is completely different. The concept of admitting pure mental trauma had been considered by courts for some thirty years, and therefore no one can allege that it was not taken into consideration by the drafters of the Convention. Rather, documents of the international conference at which the Montreal Convention was adopted show that the matter of including pure mental trauma was addressed extensively without giving rise to a successful amendment to the provisions of Montreal's Article 17. It would be more accurate and precise to conclude, therefore, that the Montreal Convention intended to exclude pure mental trauma.

7.4.1.3 Bodily Injury and Islamic-*fiqh*

As is discussed in Part I above, according to the rules adopted by the foundational text of *Sharī'ā*, an offender causing wrongful death must pay *diyah* to the heirs of the victim. However for bodily injury other than death, there are two other measures, namely *irsh* and *ḥokūmat 'adl*.

Irsh is a predetermined compensation for the loss of one or more organs. Recall that the basic equation or formula for *irsh* is:

> (the lost organ/the number of similar organs in the body) the agreed value of *diyah*.

This is based on various narrations belonging to the Prophet which stated this.[352] In addition, if the function of the concerned organ or group of organs is lost completely then the victim shall deserve full amount of *diyah*.

Some other injuries which do not include loss of organs were described by nature and kind in the Prophet's traditions (foundational texts). These are generally called shiğaj or ğiraḥ. The related *irsh* for these injuries ranges from one twentieth to one third of the agreed value of *diyah*. Shiğaj, however concerns only injuries to the head and to the face.

For other kinds of bodily injury which cannot be calculated in such a way, the judge uses his discretion to justly evaluate the damage and the compensation deserved. This is *hokūmat 'adl* which shall include *inter alia* the loss of damaged organs, for instance the loss of the eye of a blind person. It also includes the weakening of an organ's capability and function, such as vision.

Islamic jurists, generally, admit that pure mental trauma should be compensated.[353] They base this on considering mental activities as a product of appropriate functioning of the mind, which they consider to be an organ. Any defect in the mental capabilities means that the mind is not functioning properly.

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[352] See T. Taha, *Al-ta'wīḍ An Al-Aḍrār Al-Ğasadiyah Fī Ḍaw' Al-Fiqh Wa Qada' Al-Naqḍ Al-Ḥadīth* (Egypt: Dar Al-kutub Al-qanūniyah, 2002) at 191-195.

[353] Ibn Qudama, *Al-Moghnī Ma' Al-sharḥ Al-kabīr* part 9 at 634.

Thus, this defect is treated according to the regular principles of *diyah*. Islamic jurists, moreover, elaborated extensively on the methods of calculating the damages departing from the point that for total loss of the mind the victim shall be paid full amount of *diyah*.

It may therefore unlikely that Islamic jurists would have adopted the principle of limiting the damages to bodily injuries to the exclusion of pure mental trauma.

While analysing the case of *Morris v. KLM*[354] and *King* v. *Bristow*[355] and discussing the various interpretations of the term bodily injury, Anthony Mercer[356] provides that "Lord Steyn identified six factors that would have influenced his interpretation of 'bodily injury', absent a preceding judgement. These included the general absence of liability of air carriers for mental injury under the law of most States in 1929; the type of incidents peculiar to aviation that may cause mental injury today would have been experienced in 1929; 'mental injury' was not expressly provided for in the Convention and the *travaux préparatoires* were silent on the matter; and no claims for mental injury under Warsaw were brought to court until more than 50 years after Warsaw was agreed." Lord Steyn's speech before the House of Lords made use of the historical fact that mental trauma was not admitted as a basis of liability by most of the States which are signatories to the Warsaw Convention in 1929.

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[354] *Supra* note 344.

[355] *Supra* note 344.

[356] A. Mercer, "Liability of Air Carriers for Mental Injury under the Warsaw Convention" (June 2003) xxviii/3Air & Space Law 147.

According to the analysis above, this is untrue for those States applying Islamic *Sharī'a*. However would their governments, had they attended, have agreed to accepting such a rule? An answer may be deduced from the fact that some States applying Islamic *Sharī'a* like Saudi Arabia, Iran and Pakistan have adopted the Warsaw Convention without any reservation in this regard. This may be seen as an indication that these States implicitly accepted the exclusion of compensation for pure mental trauma. Moreover, the ratification of the Montreal Convention by these States without reservations against the provisions of its Article 17 would affirm this conclusion.

Nonetheless, the Saudi *Sharī'a* courts ruled that the ratification of a specific treaty or convention by the State does mean an automatic implementation by the courts of that State, unless it is proven to be fully compatible with *Sharī'a.* [357] Consequently, courts would have to affirm that the exclusion of pure mental injuries by both Warsaw and Montreal does not contradict the rulings of Islamic *Sharī'a* .

From the author's point of view, although the founders of the Warsaw Convention wished to protect the infant aviation industry at that point of time, we cannot conclude that the Montreal Convention retained the same rule for the same reasons. Therefore, the exclusion may be accepted under Warsaw but not

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[357] see *Sharekat Maktabat Al-khadamat Al-Hadīthath* vs. *Saudi Arabian Airlines* [20/d/a/9 year 1414 09th circuit/ Bureau of Grievances/ Saudi Arabia].

Montreal. Moreover, protection may be attained by limiting liability without excluding it entirely. Accordingly, protection of the aviation industry should not be at the cost of passengers. A better approach would be to define the nature of pure mental trauma subject to compensation. The author presumes that with the advancement of psychiatry, this approach would be feasible for both airlines and passengers.

Airlines and consequently insurance companies will not have to face exaggerated claims resulting from the foreseeable risk of unrealistic allegations of mental injuries. Passengers, likewise, will not fear bringing a case with little hope of receiving a just compensation for their injury.

7.4.2 "Accident"

7.4.2.1 "Accident" under Warsaw System:

Article 17 of the Warsaw Convention makes the right of compensation dependant on the condition that the bodily injury results from an accident. It provides that "...if the accident which caused the damage so sustained took place on..." As such it is normal to find this term thoroughly investigated in almost every case to determine whether the incident causing the damage can be qualified as an accident in the context of Warsaw System.

Despite the importance of the term, the Warsaw Convention (System instruments) do not provide any definition of "accident". It is, therefore, important that we revert to case law to trace the interpretation of this term.

It is important to note that the term "accident" as used in the Warsaw context may be different from its regular usage and understanding. In general usage, the term "accident" expresses events that happened without control over them. A good example is the usual apology that a child may give after spilling a full cup of grape juice on a clean white dining table cloth, "Sorry Mom, it was an accident" The word accident in the English language can be used to denote the injury as well as the cause of the injury. The French legal meaning of the term "accident" differs little from the meaning of the term in the UK, USA and Germany. [358]

In the context of the Warsaw System, the situation is different. This is particularly the case since we know that the term accident is used to mean something other than "occurrence". The latter term is used in Article 18 to describe the foundation of liability in relation to baggage and cargo, while the former is used in Article 17 to describe the cause of liability in relation to passengers.

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[358] See generally L. Goldhirsch, "Definition of 'Accident':Revisiting Air France v. Saks." (April 2001) XXVI/2 Air & Space Law 86. See also L. Cobbs, "The Shifting Meaning of Accident under Article 17 of the Warsaw Convention: What did the Airline know and what did it do about it?" (1999) XXIV/3 AIR & Space Law 121 at 122-123.

Courts have adopted vastly different positions with regard to this. Some courts have taken the view that "occurrence of an injury" constitutes an accident in the Warsaw context while others have tried to qualify the term accident.

The leading case in relation to the term "accident" is *Air France* v. *Saks*.[359] The decisions of the 9th Circuit[360] and the Supreme Court in *Saks* represent the two interpretive extremes. The author will therefore discuss them to canvas the range of possible interpretation of the term "accident".

In *Saks*, the plaintiff suffered from partial loss of hearing due to the depressurization usually encountered upon the descent of the flight for landing. The appellate court concluded that the language, history and policy of the Warsaw Convention impose absolute liability on airlines for injuries proximately caused by risks inherent to air travel. The Supreme Court concluded that because depressurization was a normal expected happening on flights, in such a situation and the loss of hearing was merely an internal reaction of the passenger, and thus there was no accident for the purposes of the Warsaw Convention. Consequently, the passenger was not eligible for compensation.

While analysing *Saks* case, we find three major points that have to be taken in consideration. First, the French legal meaning is taken in consideration because the governing text of the Convention is the French version. Second, drafters of

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[359] 470 US 392 (1985), 18 Avi 18.538. [hereinafter *Saks*]
[360] Saks v. Air France, 724 F.2d (9th Cir. 1984) rev'd 470 US 392 (1985).

the Conventions used the term "accident" in Article 17 for passengers' damages while it used the term "occurrence" for destruction or loss of baggage. This demonstrates that the drafters of the Convention understood the word accident to mean something other than the word occurrence. Third, it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone.

On the basis of these three points, the Supreme Court reversed the 9th Circuit Court of Appeals in the same case.

The Circuit Court relied on the notion that the occurrence of injury as a result of the flight is by itself enough to qualify as an accident in the context of Warsaw Convention. But the Supreme Court reversed this conclusion to establish that for an occurrence to qualify as accident, it must be "an unexpected or unusual event or happening that is external to the passenger".

Despite the fact that the *Saks* decision has answered the question of what accident is in principle, there is no specific methodology to be followed to decide whether an incident is an unexpected or unusual event or a happening that is external to the passenger. It is for this reason that we are still experiencing such variation amongst court decisions. For instance, in *Wallace* v. *Korean Airlines*, the Second Circuit decided that the sexual assault of a female passenger by a

male passenger is an accident for which an airline is liable.[361] The court based its decision on the grounds of seating arrangement, darkness of the cabin and failure of flight attendants to attend to the problem. On the other hand, the 9th Circuit of the Federal Court of Appeal, in the recent case of *Rodriguez* v. *Air New Zealand Ltd.* held that deep vein thrombosis (DVT) was not an accident in the context of Warsaw Convention despite the fact that the DVT was caused by the seating arrangements in the aircraft.[362]

The author is of the opinion that both the Circuit Courts and Supreme Court are basing their rulings on a similar principle but emphasizing different words. Both courts took into consideration that defences available under Article 20 are no longer applicable since the Montreal Agreement of 1966. Accordingly, the carrier's liability is almost absolute unless it proves contributory negligence on the part of the passenger.

The author suggests that Warsaw originally intended that the occurrence of the damage by itself should impose liability on the carrier who shall not be relieved unless it proves a defence articulated by Article 20 or 21 of the Convention. Accordingly, loss of hearing due to depressurization is an accident, but it may not be compensated if the airline proves that it was within the limits of the normal depressurization (i.e it had taken all necessary measures). But so long as this

[361] 214 F3d 293 (2d Cir 2000), 27Avi. 17,846.
[362] 383 F3d 914,917 (9th Cir 2004).

defence is not applicable, the carrier is liable for the mere occurrence of an accident.

The author is of the opinion that by admitting the approach of the Supreme Court, that is to say an accident is an unexpected or unusual event or happening that is external to the passenger, means that we are giving additional relief to the carrier to avoid its already limited liability. Depressurization itself, for instance, is not an unexpected or unusual happening of air transportation. Severe depressurization on the other hand, as occurred in the *Saks* case, is unexpected and an unusual occurrence in air travel. According to this methodology, DVT cases which do not involve any event or happening at the outset should in no circumstances be dealt with as accidents.

The author therefore suggests that in future cases, courts should consider the cause of the damage and the defences available separately, instead of integrating both under the term accident.

The Guatemala City Protocol tried to overcome the ambiguity of the term accident by amending the provisions of Article 17 and 20 as follows:

> Article 17/1 The carrier is liable for damages sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

> Article 20/1 In the carriage of passengers and baggage the carrier shall not be liable for damages occasioned by delay if he proves that he and his servants have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

By adopting this text, the Guatemala City Protocol tried to solve the ambiguity by implementing a mild strict liability regime. Article 17 replaced the term accident with the term event. With this change, the Protocol tried to shift from cause of the damage to occurrence of the damage. Stressing this shift, the Protocol also limited the defence available under Article 20 to cases of damage caused by delay.

Unfortunately the Guatemala City Protocol did not play the role it was supposed to play as it has never entered into force.

7.4.3 "Accident" under the Montreal Convention

Under the Montreal Convention, air carriers' liability for death or injury sustained by passengers is stipulated in Article 17 as follows:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Thus, contrary to all expectations, the Montreal Convention kept the term "accident" in its place without any further clarification.

The first draft of the Convention started with the suggestion that the term "accident" be replaced by the word "event".[363] Some of the delegates contended that not changing the term would constitute a biased approach in favour of air carriers allowing them to exclude damages relating to the health of the passenger.[364]

Once again, insurance companies were able to influence the new text by suggesting that the move from accident to event would broaden the scope of claims.[365]

The author suggests that for cases under the Montreal Convention, courts will revert to the history of the drafting of the Convention. This history will demonstrate that drafters of the Convention intended to retain the term "accident" and not to replace it with "event". The author, therefore, predicts that courts will interpret the term "accident", following in the footsteps of *Saks* case to conclude that it means an unexpected or unusual event or happening that is external to the passenger.

7.4.4 "Accident" under Islamic-*fiqh*

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[363] ICAO DCW Doc. No.4. dated 14/5/1999.

[364] ICAO DCW Doc. No.11. dated 25/5/1999.

[365] ICAO DCW Doc. No. 3. dated 13/5/99.

The Arabic version of Article 17 of the Warsaw Convention translates the term "accident" into the Arabic term *ḥadethah* (حادثة). The term "occurrence" as found in Article 18 is translated to Arabic using the term *wāqe'ah* (واقعة).

Unlike the English term, the Arabic *ḥadethah* gives clear reference to the cause of the damage rather than referring to the damage itself. Damage is usually referred to as *ḍarar* (ضرر).

Islamic-*fiqh* compensates against ḍarar rather than compensating against the conduct itself. When *ḍarar* is caused by an *ḥadethah* and the link between *ḍarar* and *ḥadethah* is proven (*'alāqatu-sababeiya*), the aggressor is liable for the ḍarar resulting therefrom.

The question is would Islamic-*fiqh* deal with *ḥadethah* and *wāqe'ah* differently? Or, would it apply the same rules to both indiscriminately?

In Arabic literature, the terms *ḥadethah* and *wāqe'ah* have the same meaning. They both refer to an incident which brings about a new situation.[366] The author, therefore, suggests that, the use of these two terms in itself necessarily does not imply any differences.

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[366] See *Almonjid Fi Allughah Wal-A'alam* (Dar Almashriq Beirut 1986) at 121 and 913.

According to Islamic-*fiqh*, the air carrier is a public hire, *ağīr mushtarak*. Public hire refers to the worker who deserves his pay for his efforts, rather than for the result he achieves. An air carrier's obligation in this context is therefore, to exert its due diligence to carry the passenger safely, rather than an obligation to attain a result. Accordingly, air carriers are requested to exert their best efforts to transport the passenger according to certain standards. Upon its failure to accord with these measures, an air carrier is considered to be performing negligently and, therefore, will be considered a *muta'adī* (aggressor).

Thus, upon the occurrence of the damage due to the negligent performance of the carrier, the carrier would be deemed an aggressor and accordingly shall be liable. This obligation of the carrier is to be considered objectively.[367] Courts, therefore, would evaluate the conduct of the carrier in comparison to the standard norms and measures pertaining to the situation. Consequently, diligent performance of the carrier in accordance with the adopted aviation standards and its conduct as a diligent carrier would result in exoneration from liability the carrier not being liable with regard to the damage sustained by the passenger.

The question becomes, how would Islamic courts deal with cases like *Saks*? Would the courts take the approach followed by the U.S. Supreme Court or would they prefer the approach of the Circuit Court?

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[367] A. Al-Sanhori, *supra* note 28 part 6 at 95.

It is clear that Islamic-*fiqh* bases liability on the regular common and civil law tripartite test of damage, fault and causation. Accordingly, the occurrence of damage in itself does not ensure that the victim will be compensated. Rather, there has to be a proof that the damage is not caused completely or partly by the victim (contributory negligence) or any other foreign element. Moreover, there must be a link between the fault at the source of the harm and the damage itself. This link is the subject of various theories under Islamic-*fiqh*.

Islamic-*fiqh* would nevertheless apply a slightly different approach than either the U.S Supreme Court or the Circuit Court to reach its final conclusion in such cases. An Islamic court would not require that the event or happening be unexpected or unusual. It would rather concentrate on the link between the event and the damage. This link is presumed so long as the passenger is under the custody of the carrier. Nonetheless, such liability under Islamic-*fiqh* is not strict. The carrier still has ways to avoid liability. These will be addressed in detail while discussing Articles 20 and 21 below.

By way of summary, the author is of the opinion that the approach followed by Islamic-*fiqh* would result in finding an intermediate line between the extreme positions adopted by the Court of Appeal and the Supreme Court in the *Saks* case. This intermediate approach would adopt an objective perspective. This objective perspective would guide the court to prevent applying strict liability. It would, on the other hand, not exonerate the carrier from its liability merely

because one passenger has the internal potential to react to an incident more severely than others. Islamic-*fiqh* would always consider the action of the carrier in the context of the accident or event rather than concentrating on the reaction of the passenger as in the Supreme Court approach.

7.5 Embarking and Disembarking

According to Article 17 of Warsaw Convention, for an accident that has caused injury to be actionable, it must be sustained by the passenger on board the aircraft or in the course of any of the operations of embarking or disembarking.

Here too, the terms of Article 17, which are meant to unify the law in relation to damages sustained by passengers, are at the root of vagueness and uncertainty in various court decisions.

In referring to the travaux préparatoires of the Warsaw Convention, courts found that it was not the drafters' intention to widen the scope of application of the Convention so as to start from the moment the passenger entered the aerodrome of departure to the moment they leave the aerodrome of destination. Nor was it the intention of the drafters to limit the applicability of the Convention to accidents occurring onboard the aircraft.[368]

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[368] P. Dempsey & M.Milde, *supra* note 262 at 159.

The seminal case on this issue is *Day* v. *Trans World Airlines, Inc.* Passengers were standing in line to proceed to the aircraft when a terrorist attack took the lives of three of them and caused injuries to more than forty others.[369] The court was of the view that

> the words "in the course of the operation of embarking" do not exclude events transpiring within a terminal building nor do these words set forth any strictures on location. Rather, the drafters of the Convention looked to whether the passenger's actions were a part of the operation or process of embarkation.

The court reached this view after reviewing the drafting history and minutes of the Warsaw Convention. It concluded that the language of Article 17 prompted a case by case inquiry into whether a passenger was in the course of embarkation or disembarkation when the injury arose. To reach its conclusion, the Court adopted a three-part test:

i. Location of the passenger's' activity;
ii. Nature of passenger's' activity; and
iii. Under whose control or at whose direction the passenger was performing it.

This *Day* test was applied subsequently in a number of cases In *Schmidkunz* v. *SAS*, in which the court held that a passenger who was 500 yards away from the aircraft in a common passenger area of the terminal and who had not as yet received her boarding pass and was not under the airline's control, was not in the

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[369] (1975) 393 F.Supp. 217 (DC NY), 13 AVI. 17,647.

course of the operation of embarking.[370] Likewise, in *Martinez Hernandez* v. *Air France,* a passenger was at the immigration control when terrorists attacked.[371] The court applied the *Day* test and refused to hold the air carrier liable because the airline was not in charge of the passenger, and the process of disembarkation had been completed. Article 17 of the Warsaw Convention was therefore not applicable.

Thus, in the case of disembarkation, the *Day* test implies that that the Convention's applicability terminates at the time when a passenger descends from the aircraft and reaches a safe point inside the terminal building.[372]

No further amendments to this paragraph of Article 20 took place through the history of Warsaw System.[373]

The Montreal Convention kept the same text with regard to the operations of embarkation and disembarkation.

Islamic-*fiqh* would not depart from the rulings adopted in the context of the Warsaw Convention. As mentioned when discussing the term "accident" above, an Islamic-*fiqh* court would ask in whose custody the passenger was. It will then

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[370] *Schmidkunz* v. *SAS*, 628 F.2d 1205 (D.C. Cir. 1980).

[371] *Martinez Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir.1976).

[372] *McDonald* v. *Air Canada* 439 F.2d 1042 (1st Cir. 1971).

[373] Paragraph 2 was deleted under Hague Protocol.

consider the matter objectively to determine whether the one in charge took the necessary precautions to protect the passenger from suffering harm.[374]

7.6 Documentation

While revealing the importance of the passenger ticket, Article 3(2) of the Warsaw Convention makes it obvious that the ticket is not the contract of carriage. The contract of carriage is valid irrespective of the invalidity or even non-existence of a passenger ticket, which nonetheless, serves many important functions. It is *prima facie* evidence of the contract of carriage, a medium of communicating the notice of limits of liability, an authorization to travel[375], an accounting document, a receipt and, not least, an important document for the immigration authorities. The following section of the thesis will scrutinize the legal issues arising from the passenger ticket in relation to the contract of carriage within the meaning of the Warsaw System and Montreal Convention.

7.6.1 The Passenger Ticket: Definition and History

The Warsaw Convention provides no definition of the term "ticket". However, the particulars of the ticket prescribed under Article 3 of the Convention reveals that "the ticket is a paper based document that contains certain particulars and

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[374] See section 87.4.2 above.

[375] See R. D. Margo, "Legal Aspects of Electronic Ticketing" (1997) XXII:I, Annals of Air and Space Law 177 at 180.

proves the existence of the contract of carriage".[376] Nevertheless, neither Warsaw nor any of its subsequent amendments stipulate that the ticket must be a paper-based document[377]. Rather, Warsaw and Hague asserted that the ticket should include the particulars prescribed under Article 3. Therefore, it is the author's point of view that it is more proper to say that the Guatemala Protocol of 1971 intended expressly and more transparently to provide that a ticket may be in forms other than paper, rather than that is introduced this concept for the first time.

As a general matter, however, it is often sufficient to adopt the definition provided by IATA in Resolution 724, which provides that 'ticket' is "this passenger ticket and baggage check, of which these conditions and the notices form a part".

Long before the adoption of Resolution 724, the International Air Traffic Association (the fore-runner of IATA) adopted the first uniform Conditions of Carriage at the Vienna Meeting on 18th February 1927.[378] In 1930, these Uniform Conditions of Carriage were amended to comply with the provisions of the then newly inaugurated Warsaw Convention[379]. At the Rio de Janeiro Conference of 1947, the International Air Transport Association adopted new standard passenger tickets and baggage checks incorporating the contract of

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[376] See P. Lyck & B.A. Dornic, "Electronic Ticketing under the Warsaw Convnetion: The Risk Of Going Ticketless on International Flights" (1997) XXII:1 Annals of Air and Space Law 16.

[377] See P. Martin, *supra* note 298 at 190.

[378] See S. Tsai, *supra* note 270 at 36.

[379] *Ibid.*

carriage[380]. This contract was redrafted and revised in Bermuda in 1949, Madrid in 1950 and Honolulu in 1953. Again in Honolulu in 1970, IATA adopted a set of conditions of carriage as recommended practices that were not applicable to travel to, from or via the United States or Canada. IATA members became obliged to use the standard form conditions of contract by virtue of the IATA Resolution 275b which has been amended by resolution 724. However, starting in 1996, the IATA Legal Advisory Council (LAC)[381] took an active role in updating the IATA General Conditions of Carriage for both passengers and baggage.[382] The most recent set of IATA Standard General Conditions of Carriage was adopted in July 1998[383]. These conditions specify *inter alia* that in interline travel, each carrier's conditions will be applicable to its own segment. Moreover, they contain some rules with regard to the situation of restraining or offloading unruly passengers and some conditions pertaining to code-shared flights.[384]

Finally, this latest set of the GCC Pax provides that " 'ticket' means the document entitled 'Passenger Ticket and Baggage Check' or the electronic ticket in each case issued by or on behalf of the airlines concerned and includes the conditions of contract, notice and coupons"[385]. Although this condition is clear in the context

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[380] *Ibid.* at 37.

[381] Previously, the IATA Legal Advisory Group (LAG).

[382] See R. D. Margo, *The Liability report*, 2:1 (Condon & Forsyth in association with IATA, 1999) at 12.

[383] *Ibid.*

[384] *Ibid.*

[385] IATA General Conditions of Carriage for Passengers and Baggage. See also T. Unmack, *Civil Aviation: Standard and Liabilities*, (London: Informa Legal Publishing, 1999) at 327.

of the standard paper-based ticket, it seems to be problematic in the context of electronic ticketing.[386]

7.6.2 Particulars of the Ticket and their Impact on the Contract of Carriage

Article 3 of the Warsaw Convention reads:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
> The place and date of issue;
> The place of departure and destination;
> The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
> The name and address of the carrier or carriers;
> A statement that the transportation is subject to the rules relating to liability established by this Convention.
> (2) The absence, irregularity or the loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Article 3 establishes and emphasizes that the contract of carriage and the passenger ticket are two distinct things. Nevertheless, they are very closely connected and related to each other. This fact is emphasized in the Hague Protocol, in which Article 3(2) has been amended to read:

> The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or the loss of the passenger ticket does not affect the existence or the validity of

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[386] The author's concerns with regard to e-ticketing will be illustrated in section 87.7 below.

> the contract of carriage, which shall none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1c of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

The particulars prescribed in Article 3 are incorporated into the ticket for a number of reasons. The first particular (the place and date of issue) is important for the consideration of the jurisdiction (Article 28). The second and third particulars (place of departure and destination, and the agreed stopping places) determine whether the carriage is within the scope of the Warsaw Convention. It is not unusual to omit the stopping points in the ticket as they are usually mentioned in the tariffs of the carriers.[387] The fourth particular is concerned with notifying the passenger that the transportation is subject to the limits of liability of the Warsaw Convention.

The second part of the Article provides that the absence or irregularity of the passenger ticket does not negate the contract of carriage but it, rather, deprives the carrier of having the privilege of limited liability under Article 22. Thus, the validity of the contract of carriage is never affected by the absence or irregularity of the passenger ticket but only the validity of certain provisions of that contract, namely the limits of liability.

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[387] Article III of the Hague Protocol requires an indication of the places of departure and destination in addition to at least one extraterritorial stopping point, if any, in the case where the points of departure and destination are within the territory of the same state.

The Hague Protocol makes it very clear that failure to submit or deliver a proper notice with regard to the limits of liability shall result in depriving the carrier of those limits. However, this point is not fully clear in the case of the Warsaw Convention. In *Lisi* v. *Alitalia-Linee Aeree Italiane*, it was held by the court that delivery of a ticket containing a statement of applicability of the Convention which was printed in 4-point type was inadequate, and amounted to non-delivery of the ticket for the purposes of Article 3(2).[388]

It was a long time before this judgment was reversed in *Chan* v. *Korean Air Lines, Ltd.*, in which the Supreme Court held that "[n]on-delivery of the ticket cannot be equated with the delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitations. A delivered document does not fail to qualify as a passenger ticket".[389]

The case of *Ludecke* v. *Canadian Pacific Air Lines Ltd.* agrees with the opinion expressed in *Chan*, contra *Lisi* where McIntyre J., writing for the Supreme Court of Canada held that[390]

> The absence, irregularity, or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by Art. 1(e) which is illegible, amounts to

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[388] (1966) 253 FSupp 1002 (DC NY), 9 Avi 18, 374. The *Lisi* case was considered under the rules of Warsaw Convention since the USA did not ratify the Hague protocol.

[389] (1989) 109 S.Ct 1676 (US SC), 21 Avi 18.22.

[390] [1979] 2 S.C.R. 63, 12 Avi 17,191.

> no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier delivered a ticket and thus preserved its right to the limitation.

As expected the Montreal Convention introduced more up to date documentation requirements. Article 3 of the Montreal Convention provides as follows:

> 1. In respect of carriage of passengers an individual or collective document of carriage shall be delivered.
> (a) an indication of the places of departure and destination;
> (b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.
> 2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.
> 3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.
> 4. The passengers shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.
> 5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

The first thing to observe is that, unlike Warsaw, Montreal combines the documentation requirements for passengers and luggage in one article. Paragraph (1) of this Article indicates the particulars to be included in the ticket. The ticket should indicate the places of departure and destination. If the places of departure and destination are within the territory of a single State Party with one or more agreed stopping places in the territory of another State, an indication

of at least one such stopping place shall be included in the ticket. This text seems to be more rigid than Warsaw's as it does not give the carrier the right to change the stopping place. Moreover, it does not require an indication of the place of contract. This potentially undermines the test in Article 33 of the Montreal Convention concerned with the determination of the jurisdiction of claims. One of potential locus of jurisdiction is the place where the carrier has the place of business through which the contract was been made. Thus, without identifying the domicile of the contract, this test may be rendered inapplicable, especially in the e-ticketing era.

Paragraph (2) of this Article is the tool that has paved the way for e-ticketing, which was announced by IATA in 2005 as a goal of international air transportation.[391]

Paragraph (3) replaces Warsaw's luggage ticket with a baggage identification tag and simplifies the process as Montreal does not dictate any information to be included in the luggage ticket. Paragraph (4) of the Article requires that passengers be given written notice to the effect that where this Convention is applicable, it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay. This language means that it is not necessary that such notice be printed on the ticket. The carrier may instead print the provision on a visible poster at its counter to

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[391] P. Dempsey & M.Milde, *supra* note 262 at 88.

satisfy the provisions of this Article. It may also use the internet pop-up notice mechanism for those using electronic ticketing.

As regards Paragraph (5) of this Article, unlike Warsaw, the Montreal combined documentation requirement for passengers and luggage is in a single provision. Accordingly, all requirements indicated in the Article are illustrative rather than mandatory. With such language, Montreal has in essence cleared one of the biggest minefields for litigation under the Warsaw System.

It is beyond doubt that Islamic-*fiqh* will require particulars in order to ensure the clarity of the contract, though not the existence of the contract. As detailed above, Islamic-*fiqh* would not deal with the matter of formalities as stringently as the Warsaw System. [392]In this context Islamic-*fiqh* would deal with the matter of particulars of the ticket in the same manner as the Montreal Convention manner. Islamic-*fiqh* would take another point into consideration, namely the matter of *tadlees* (misrepresentation). As explained in Part I above, *tadlees* has to be of a nature that the contracting party would not have entered had the other had not misled him. It is agreed amongst Islamic scholars that if one party to a contract is misled by the other by the means of *tadlees*, the contract can be void. Accordingly, the matter of effective delivery of a ticket may be considered by Islamic courts from this perspective rather than being considered as a matter of formality.

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[392] See sections 2.2.4.1 above.

Finally, an Islamic court would take into consideration that the provisions of the particulars fall into two categories. One is the notice of limits of liability. The other is the rest of the particulars. The former is required by Warsaw and Hague for the benefit of the passenger with the intention of drawing the attention of the passenger in a way that would leave no doubt that he/she ought to read it or at least notice that it looks different and more important than other contract conditions. Moreover, the notice must be delivered to the passenger in a timely manner so that the passenger has the ability to decide upon reading the notice.[393] Thus, as to this particular, the issues of irregularity and non-delivery would be dealt with without distinction. Both would amount to a failure to notify the passenger of the limits of liability and accordingly a court may decide to deprive the carrier of the limits of liability provided that they are lower than *diyah*.

The other particulars are descriptive and informative in nature and are needed for the clarity of the contract of carriage. As such, they should not be dealt with as stringently as the notice, for they would rarely affect the rights of the passenger. However, the points of departure and destination, in addition to the median stopover points are important with regard to the issue of jurisdiction.

Finally, as a general matter, owing to the fact that the Montreal Convention has basically cancelled Warsaw's limits of liability, Islamic courts may consider the

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[393] See delivery of the ticket at section 87.6.3.

matter of the regulation of tickets with as much flexibility as the Montreal Convention.

7.6.3 Delivery of the Ticket

In Chan v. Korean Airlines Scalia J. stated that:

> a delivered document does not fail to qualify as a 'passenger ticket', and does not cause forfeiture of the damages limitation, merely because it contains a defective notice. When Article 3(2), after making this much clear, continues (in the second sentence) ((Nevertheless, if a carrier accepts a passenger without a passenger ticket having been delivered, etc)) it can only be referring to the carriers failure to deliver any document whatsoever, or to its delivery of a document whose shortcoming are so extensive that it cannot reasonably be described as a ticket.

Despite the various points of possible disagreement with the *Chan* decision, this paragraph exemplifies the unanimous judicial position respecting the non-delivery of the ticket as a valid ground for forfeiting the limits of liability. Article 3(2) of the Hague Protocol makes clear that proper delivery of the ticket to be a condition precedent for airlines to avail themselves of the limits of liability.

However, physical delivery of the ticket does not mean that it has been effectively delivered. In other words, it does not mean that the Conditions of Contracts and consequently the Conditions of Carriage, including the notice of liability limits, will automatically be in effect.

Prior to the case of *Chan* v. *Korean Airlines*, Article 3(2) of the Warsaw Convention was interpreted to the same effect in several cases. For example, in *Mertens* v. *The Flying Tiger Line inc.*, the New York District Court concluded: "[w]e read Article 3(2) to require that the ticket should be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability."[394]

Article 3(2) of the Warsaw Convention expressly deprives the carrier of relying on the provisions regarding limits of liability whenever it accepts a passenger without a ticket.

However, whereas effective delivery is based on the time lag between delivery of the ticket and acceptance of the passenger, we need to know what constitutes acceptance by the carrier.

Varying interpretations are given concerning the time of acceptance, none of which can satisfactorily be applied as a general rule. Practically every case is different from the others and has to be considered independently. The case of frequent fliers may be dealt with in a different way from the case of someone who flies for the first or second time. Similarly, some credit cards companies offer to their holders very high life insurance coverage when the passenger buys the ticket using that credit card. The question is, would the passenger be considered

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[394] (1963) 35 FRD 196 (DC NY) , 9 Avi 17, 475.

to have been aware of the issue of limited liability if, upon reservation, he was not been informed of the carrier's limited liability?

Consider a case in which a passenger is on his way to board the aircraft very shortly after being issued a ticket. Someone whispers into his/her ear that the liability of the carrier is limited for this flight and simultaneously, the passenger calls a life insurance company by his cellular telephone and gets protection against the liability limits. Is this effective delivery despite the fact that the ticket was delivered in a time frame that would not permit a regular passenger without a cellular telephone to take such protective methods? What about the language of the notice? In the case of *Mahmoud* v. *Alitalia Air Lines,* the court held that liability was limited where the ticket stated in Dutch and in English that liability would be limited despite the fact that the passenger read neither language.[395]

The rule established in *Merten* v. *The Flying Tigers Line Inc.* that the passenger should be able to take protective actions against the limits of liability remains a solid test to determine whether the ticket was delivered effectively. Nevertheless, it should be applied to each case independently.

In relation to the matter of delivery, it is important to point out that the ticket is physically delivered to the passenger when submitted, on his behalf, to his

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[395] 17 Avi 17,589. See also T. Unmack, *supra* note 385 at 231.

agent[396] Nevertheless, it is still undetermined whether delivery to a group leader would be a constructive delivery to each passenger.[397]

The aim of most of the litigation on delivery is to overcome the limits of liability, and thus the issue of non-existence or irregularity of a ticket is only a tool for plaintiffs to overcome those limits. Therefore, under Islamic-*fiqh*, the cases of *Lisi* and *Chan* would be looked at differently.

As established previously, the limits under Islamic *diyah* are higher than the limits of Warsaw or Hague. As such, if the cases of *Mertens*, *Lisi* or *Chan* were raised by an Islamic Court, they may not have needed to repudiate the limits of Warsaw as they did in the original cases.

Moreover, while having the presumption that the contract agreed on limits higher than *diyah*, the plaintiffs would have tried to prove the existence of limits rather than denying them as in the original cases. The methodology would be of a different nature. However, if such a higher level did not exist, the contentions of the plaintiffs and the grounds of judgment may be based on whether the passengers were allowed the chance to opt for higher limits of liability.

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[396] See *Ross* v. *Pan American Airways Inc*, 85 NE 2d 880 (1949), 2 Avi. 14,556.
[397] See generally *Manion* v. *Pan American World Airways Inc.*, 55 N.Y.2d 398, 405 (1982) 16 Avi. 17, 473, T. Unmack, supra note 385, at 229-231.

Nevertheless, in some Islamic courts where the Conventions were adopted in full, the author presumes that the courts would follow the lead of *Lisi* v. *Alitalia*. However, this should not be taken in isolation from the circumstances associated with every individual case that may render the result in *Chan* more reasonable.

Finally, under Islamic-*fiqh*, the ticket is deemed to have been physically delivered to the passenger if received, on his behalf, by his agent. In addition, most probably, delivery of the ticket to a group leader would be deemed as a constructive delivery to each passenger. This is so because in Islamic teaching, a group leader is assumed to have been appointed by the group.

By virtue of Article 3(5) of the Montreal Convention, the matter of effective delivery is no longer an issue to be addressed. Accordingly, an Islamic court would not pay as much attention to effective delivery as it would for cases considered under the Warsaw System.

7.7 New Provisions Introduced by Montreal

In addition to trying to close some of the loopholes of Warsaw, Montreal has introduced various new provisions. Some of these provisions were dictated by practices such as insurance, which is now compulsory under the Montreal Convention. Other provisions were inserted for reasons not related to prior practice, such as the fifth jurisdiction provisions.

These provisions will be addressed in brief in this section to the extent that they relate to the subject matter of the thesis.

7.7.1.1 Electronic Ticketing

The Montreal Convention does not introduce explicit provisions with regard to electronic ticketing. But its Article 3, discussed previously, paved the way for a legally sound use of such ticketing system without fear of the possible negative implications of the Warsaw Convention. Electronic ticketing is specifically addressed in this section because there are various aspects relating to Islamic-*fiqh* that need to be considered.

7.7.1.2 What is e-ticketing?

Traditional international paper based-tickets are usually delivered to the passenger in advance of the departure along with various notices and advertisements. In addition, two copies of a flight coupon for every single segment of the travel are included. The ticket usually contains abbreviated details concerning the points of departure and destination, intermediate points, class, fare paid, name of the passenger, permitted number or weight of pieces of checked luggage, date and time of departure and arrival, and so on. Moreover, before the passenger receives the ticket, some other documents and coupons have been produced and detached from the ticket including the audit coupon.[398]

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[398] R.D. Margo, supra note 375 at 178.

In contrast, an electronic ticket is claimed to be a paperless ticket according to which the passenger communicates with the airline by means of internet or otherwise to make a reservation, and purchases the carriage on a specific flight, allegedly without receiving any paper-based document. The passenger will rather receive a number either orally or in an "itinerary receipt". The itinerary receipt is usually received by facsimile or by e-mail or any other similar means of communication. The boarding pass will be issued on the grounds of the itinerary receipt or the orally received number. Thus, the boarding pass will be delivered without having any ticket issued.

7.7.1.3 Islamic-*fiqh* And The Notion of Electronic Contracts

In the case of *Rolling* v. *Willann Investment*, it was held that "[w]here technological advances have been made which facilitate communications and expedite the transmission of documents we see no reason why they should not be utilized..."[399] Islamic-*fiqh*, would agree with this perspective when considering the formation of click wrap contracts. As proposed in the *Qur'ānic* verse of *dayn* quoted previously, contracts have to satisfy three qualities, including that "it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves".[400]

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[399] (1989), 70 O.R. (2d) 578.

[400] *Supra* note 48. See also section 2.2.6 above.

This *Qur'ānic* Verse provides that commercial transactions have to be dealt with in a flexible manner to accord with the nature of the transaction and would keep them trustworthy for it provides "but if it be a transaction which ye carry out on the spot among yourselves there is no blame on you if ye reduce it not to writing"

The notion of *majlis al-'aqd* was introduced by Islamic *Sharī'a* to assure the consistent and instantaneous exchange of the offer and acceptance to accord with the quality of "ye carry out on the spot" in the holy verse.[401] However, for Islamic-*fiqh*, an offer (*Ijāb*) may be withdrawn at any time before acceptance is communicated to the offeror. In other words, for an *'aqd* to be formed, acceptance has to be received by the offeror.

As such, from the point of view of Islamic-*fiqh*, the main point to be investigated when considering the validity of electronic contracts is how to define the electronic *majlis Al-'Aqd*.

From the author's point of view, at the click of the mouse or 'enter' button the acceptance should be deemed to have been delivered despite the practical differences between contracting through e-mails or online or, more accurately, between contracts that are handled manually and others that are handled electronically.

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[401] See section 2.2.4.1.2 above.

The reason behind this approach is that the offeree will be promptly notified if the other party did not receive the acceptance. If such a message does not appear, it is reasonable to presume that the other party has received the assent. Consequently, *majlis Al-Aqd* would be deemed over on the dispatch of the consent and the offerer is not able to withdraw his offer.

Of course, there must be some exceptions to such a rule. Among these exceptions is the case of dispatching the acceptance after the business hours of the recipient (but not for the automatically handled *'aqd*).

7.7.1.4 E-Ticketing And Islamic-*fiqh*

Islamic-*fiqh* adopts the principle that was best expressed in the case of *Rolling* v. *Willann Investment* just mentioned. Of course modern technological usage must accord with the rulings of *Sharī'a*, which mandates that such advances should not expose any person (especially the weaker party in bilateral and multilateral transactions) to harm or put him/her in a position that is worse than the position he/she holds before the development of these advances.

However, as mentioned above, because of the concept of *diyah,* Islamic-*fiqh* would handle the matter of air tickets and its impact on the carriers' liability inversely to the Warsaw System.

As the limits of the basic Islamic liability regime are higher than those provided by the Warsaw Convention and the Hague protocol, Islamic courts would face less pressure to overcome contractually limited liability than the *Lisi* or *Chan* courts, since the latter both focussed on the issue of the validity of the limits of liability. Such cases may arise under the Montreal Agreement of 1966 under which the limits of liability are higher than the limits under *diyah*.

The Montreal Agreement of 1966 provides that[402]

> Each carrier shall, at the time of delivery of the ticket, provide to each passenger whose transportation is governed by the Convention the following notice, which shall be printed in types at least as large as 10 points and in ink contrasting with the stock on (I) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope.

Unlike in the case of *Lisi* v. *Alitalia*, which was decided before the existence of the Montreal Agreement of 1966, the case of *Chan* v. *Korean Airlines* took the agreement into consideration.

Islamic courts, for their part, would look at the Montreal Agreement of 1966 in two possible ways. It could be looked at as an agreement between the airline and the Government of the United States of America, whereby the carrier undertakes to compensate the passenger in the event of bodily injury or death. As such, the passenger would be a *ghayr* (third party) beneficiary of this contract.

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[402] Montreal Agreement of 1966, section 76.1.6.1 above, Article 2.

Consequently, the court could decide to enforce the limits of the Montreal Agreement of 1966 irrespective of whether it was explicitly included in the contract with the passenger.

From another perspective, Islamic Courts may interpret the Montreal Agreement of 1966 as an undertaking to contract with the passenger for a higher limit of liability as per the agreement itself. In such a case, the provisions of the Montreal Convention would have to be included in the Contract of Carriage in order for them to be enforced.[403] However, it is not possible to imagine that an airline would try to deny its adherence to the Montreal Agreement of 1966 due to the economic impact on the airline were it to be prevented from flying to the United States.

However, in neither case should the airline be put in a better position for its mistakes if it did not deliver the notice in accordance with the provisions of the Montreal Agreement of 1966.

Thus, although it is recommended that the carrier should strive to notify passengers of the limitations of liability as detailed in the Montreal Agreement of 1966, the omission of such notice would not harm the passenger as Islamic courts would enforce it so long as the airline is signatory to the Montreal Agreement.

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[403] The IATA resolution No. 724 'C' amended the 'Advice to International Passengers on Limitation of Liability' to include the limits of Montreal Agreement of 1966.

7.7.2 Advance Payments

Article 28 of the Convention provides as follows:

> In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Despite the fact that this Article has adopted the provisions of EU Resolution No. 2027/97, one if left to wonder about the reasoning behind it. It is meaningless to emphasize that it is necessary to obey national law without applying any sanctions to its violation. The concept of advance payment is problematic in itself as there are many questions to be raised with regard to quantum of payment, recipients of payments and means of recourse available to the carrier if the carrier is found not to be liable after such payment.

The only benefit such an article may bring to the Convention is the stipulation that "advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier." This provision may be taken to unify of law especially in cases where the carrier is obliged by its national law to pay such advance payments while the passenger or

her/his heirs are bringing a case against the carrier in a different jurisdiction which does not require such advance payments.

It may be outside of the scope of this thesis to reflect on the Islamic law of inheritance for it is purely local and can not be detached from its theological background. The author would like, however, to emphasize that Islamic inheritance law is well detailed, thus facilitating the application of the article in the case of it being applied by any Islamic state. Although this area of law pays considerable attention to wills, it has a clear vision with regard to determination of ancestors and their shares without any need for testamentary evidence. The author would like to suggest that an independent research should be undertaken in this regard.

7.7.3 Insurance

Although the Warsaw System does not include any provisions in relation to insurance, it remains the key economic issue regarding carriers' liability under Warsaw. Insurance coverage was the main reason for the USA not ratifying the Hague Protocol. It also led to the Warsaw Convention being denounced by the USA in 1965.[404] Moreover, Article 50 of the Montreal Convention dictates that States party to the Convention shall require their carriers to maintain adequate

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[404] See The Law Offices of Countryman & McDaniel Homepage <http://www.cargolaw.com/presentations_montreal_cli.html#montreal_convention> (date accessed 1/7/2003).

insurance. The mandatory nature of insurance poses a number of questions regarding the compatibility between the Montreal Convention and *Sharī'a.* It is necessary, therefore, that the thesis reflect on the subject of insurance.

Insurance is a contractual relationship that has been subjected to thorough studies and investigation by Islamic jurists and has produced a rich pool of research. In brief, the majority of Islamic jurists do not admit the contemporary conventional insurance formula adopted in the West. Some jurists accept it with reservations. However, they have all adopted and created an Islamic insurance formula called *al-ta'mīn al-ta'awoni* (co-operative insurance). The adoption of such a formula of insurance proves that insurance in principle can accord with the intentions of *Sharī'a* and that it is permissible. It is the various practices of insurance and the manner in which the contract of insurance is concluded that is fact concern those Islamic jurists who do not admit the conventional practices. This chapter will shed some light on the matter of insurance from the perspective of Islamic-*fiqh.*

7.7.4 The Nature of Insurance

Textbooks on insurance law usually start with the question as to what exactly insurance is.[405] Although many commentators admit that insurance itself is not usually defined in the various regulatory statutes, they attempt to derive the appropriate definition from case law. Most of the definitions, such as the following, concentrate on the formal elements of the contract of insurance rather than on the substance of the contract prestation.

Insurance is a contract whereby one person, called the "insurer", undertakes in return for the agreed consideration, called the "premium", to pay to another person, called the "insured", a sum of money, or its equivalent, on the happening of a specified event.[406]

This definition accords with the consensus that there are three basic elements of an insurance contract which are; the two parties "the insurer" and "insured", consideration "the premium", and an uncertain happening called "event".

As regards the substance of the prestation, the contract of insurance is defined as a contract to indemnify the person insured for the loss which he might sustain in consequence of the peril insured against. Upon the peril having occurred, it follows, of course, that as it is only a contract of indemnity, *i.e.* it is only to pay

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[405] See generally E. R. H. Ivamy, *General Principles of Insurance Law* (London Butterworth 1970) at 1-5, D. C. Jess, *The Insurance Of Commercial Risks: Law And Practice* (Sweet & Maxwell 2001) 3-9, R. Hodgin, *Insurance Law: text and Materials*, 2nd ed. (Cavendish, 2002) at 1 & 55, J. Birds and N. J. Hird, *Birds' Modern Insurance Law*, 5th ed. (Sweet & Maxwell, 2001) at 1-13.

[406] *Clements* v. *London and North Western Railway Co.*, [1894] 2 Q.B 482, CA.

that loss which the assured may have sustained by reason of the peril that has occurred.[407]

Jess finds this definition of insurance imprecise, and prefers to adopt the concept that insurance is a security contract where one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he will not suffer loss, damage, or prejudice by the happening of the perils specified.[408] Jess asserts that the first attempt at a comprehensive definition of a contract of insurance is the one stipulated in the case of *Prudential Insurance Co* v. *Inland Revenue Commissioners*, where it was determined that there are three elements necessary to constitute a contract of insurance.[409] These three elements were more recently defined in *Medical Defence Union Ltd* v. *Department of Trade*[410] as follows:

i. The contract must provide that the insured will become entitled to something on the occurrence of some event;
ii. The event must be one which involves some element of uncertainty (perhaps with the addition of the words "outside the control of the insurer"); and
iii. The insured must have an insurable interest in the subject matter of the contract.

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[407] *Castellian* v. *Person* [1883] 11Q.B.D. 380 at 386, CA.

[408] D. C. Jess, *supra* note 405 3-4.

[409] [1904] 2 K.B. 658.

[410] (1979) 2 WLR 686. [herinafter *Medical Denfence Union*]

The author finds the definition provided by the Encyclopaedia Britannica very suitable and comprehensive.[411] It defines insurance as a device that has been developed to handle risk. Its primary function is to substitute certainty for uncertainty as regards the economic cost of disastrous events. Insurance may be defined more formally as a system under which the insurer, for a consideration usually agreed upon in advance, promises to reimburse the insured or to render services to the insured in the event that certain accidental occurrences result in losses during a given time period. This definition of insurance does not differ from most of the other generic definitions of insurance.[412]

There are various types of insurance, such as life insurance, property insurance, liability insurance and social insurance. These various types of insurance usually share the same main objectives, though with some differences.

However, because of the wide scope of insurance contracts, and since this thesis is concerned with the liability of air carriers, the author will narrow this cursory investigation to the types of insurance related to aviation. Recall that Article 50 of the Montreal Convention of 1999 stipulates that State Parties shall require their carriers to maintain adequate insurance covering their liability under the Convention. A carrier may be required by the State Party in which it operates to provide evidence that it maintains adequate insurance covering its liability under

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[411] Encyclopedia Britanica Homepage <http://www.britannica.com/eb/article?eu=109291> (date accessed 22/07/2003).

[412] See R. Vardit, *Insurance In The World of Islam: Origins, Problems And Current Practice* (California: University of California, 1985) at 1-2.

the Convention. Aviation insurance is categorised as liability insurance which does not include life insurance.[413]

Insurance is in practice based on risk assessment and actuarial statistics. An insurance company evaluates premiums to be paid for specific coverage on the grounds of the statistics it possesses. Muhammad Nejatullah Siddiqui in his *Insurance in an Islamic Economy* describes this fact as the 'law of large numbers", which Siddiqui links to the theory of probability.[414] According to Siddiqui, although one cannot predict the chances of the actual occurrence of one particular result of an experiment, the relative chances of that particular result arising can be determined from a large number of experiments. This gives the measure of probability of the incidence of a particular result during one experiment.[415] This fact is an asset for assessing the gambling factor proclaimed to be involved in insurance practice, as elaborated below.

From an Islamic-*fiqh* point of view, despite the late evolution of the term *ta'mīn* (cooperative insurance) in the contemporary Arabic and Islamic literature, the three characteristics of insurance outlined in *Medical Defence Union* are found in some Islamic historical practices. Some of these were conducted by the Prophet. Amongst these practices is *ḥilf alfadool* (alfadool pact), which the Prophet (PBUH) engaged in before Islam but mentioned to his companions as a virtue of

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[413] See R.D. Margo, *Aviation Insurance*, 2nd ed. (Butterworths, 1995) at 6.

[414] M.N. Siddiqui, *Insurance In An Islamic Economy* (The Islamic Foundation, 1985) at 17.

[415] *Ibid.*

Islamic nature. This pact was made between the people of Mecca to assist foreigner traders against the Meccans if the latter refused to grant the foreigner his right.[416] This pact represented a sort of public indemnity to traders with Mecca though it was made gratuitously. Traders did not have to pay any amount to get the pact's coverage. Another practice which shares similar values with insurance is *diyah*, especially where the *'āqila* of the aggressor are responsible for paying the blood money on his/her behalf.[417] These two pieces of authentic historical evidence prove that the main intentions behind insurance accord with the principles of Islam. This does not prove, however, that insurance in its contemporary conventional Western form is fully admitted by Islamic jurists.

7.7.5 Insurance in Islamic-*fiqh*

The Hanafi jurist Ibn 'Abidin (d. 1836) is well known as the first Islamic jurist to mention insurance in his *Ḥashiyat Rad Al-Muḥtār Ala Al-dur Al-Mukhtār*.[418] He did not, however, address insurance under its established contemporary Arabic term of *ta'mīn*. He addressed it rather under the term *sukara*, which is believed to be the Arabic transliteration of the Italian term *siguare* and the Turkish *sigorta*.[419] The Turkish Commercial Code of 1860 included the first comment regarding

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[416] See sections 3.4 & 3.5 above.

[417] See section 2.1.5 above.

[418] Ibn Abdidn, Hashiyat Raad Al-MuhtarAla Al-dur Al-Mukhtar, 3 Vol., 3rd ed. (Almatba'aa Al-Ameriaah AlKubrah, 1324-1903) at 275-258.

[419] See R. Vardit, *supra* note 412 at 27.

insurance by an Islamic State.[420] Insurance in its contemporary Arabic term "*ta'mīn*" was not addressed until the 20th century by the Egyptian jurist Muhammed Bakhit, who in 1906 considered it a prohibited transaction.[421] Arabic secular and religious literature on the subject of insurance, however, has evolved and since flourished rapidly, especially as the practice of insurance became established in Arabic states. Amongst the most important religious references in relation thereto, are the works of Mustafa Al-zarka who considers insurance a permissible transaction. Another work that has gained a similar level of importance though in the opposite sense is the work of Shawkat 'Aliyan *Al-Ta'mīn Fi Al-sharī'a Wal-Qanūn*.

Contemporary Islamic jurists usually reflect on the matter of insurance by comparison and analogy with some other well established contracts in Islamic-*fiqh*, such as partnership, profit sharing, agency, guarantee etc. Through such methodology, insurance is usually rejected since it does not fit any of the contracts with which it is compared.[422]

Some scholars, on the other hand would consider insurance as an independent new matter (*nazila*) that has to be considered despite its dissimilarity to such approved transactions. It should be investigated with direct consideration of *Sharī'a* precepts (*Qur'ān* and *Sunna*) and in the light of its underlying objectives

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[420] *Ibid.* at 31.

[421] Mohamoon Homepage <http://www.mohamoon-ksa.com/Subject.asp?DirID=1076&Status=2> (date accessed 24/4/2003).

[422] See M.N. Siddiqui, *supra* note 414 at 7.

purposes. One of the best articles written on the subject is by Mohammed Masum Bellah, in which he concludes that insurance is a stand alone issue that has to be considered separately from any other transaction. [423]

A variation in methodologies and conclusions is observed through the numerous studies and conferences conducted in the second part of the 20th century. The first high level conference concerning insurance took place in Damascus in 1362H (1951), at which the famous Islamic jurist, Mustafa Al-zarka, declared that insurance in its various forms is permitted. This opinion was not in agreement with the majority of scholars attending the conference, amongst whom some declared that there was a prohibition against all the various types of insurance, and another group declared that property insurance was permitted and life insurance prohibited.[424] Three years later the meeting of the Council of Islamic Research in Cairo concluded with the same degree of variation of opinion. The Head of Al-Azhar, Shaikh Ğad Al-Ḥaq, ruled that insurance is prohibited for the *ribā* (usury), *ghara* (speculation) and *qimār* (gambling) it involves. Shaikh Ğad Al-ḥaq further confirmed this ruling in 1980.[425] In 1977, the Council of Senior Uluma of the Kingdom of Saudi Arabia divided insurance practices into two types; collective co-operative insurance (*al-ta'mīn al-t'awunī*) which is permitted, and

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[423] M. Masum Bellah, "Islamic Insurance: Its Origins And Development" (1998) 13:4 Arab Law Quarterly 386.

[424] See Shaikh A. Bin Menai', "Al-Ta'min Bayn Al-Hazr Wal-Ibaḥa" Al-Riyadh Newspaper (issue 12570 date 18/9/1423).

[425] See Mohamoon Homepage <http://www.mohamoon-ksa.com/Subject.asp?DirID=1080&Status=2> (date accessed 24/7/2003).

the regular commercial insurance which is prohibited.[426] This conclusion was agreed with and approved by the decree of the Islamic-*fiqh* Council of the Muslim World League in the same year. These two rulings were further reiterated by the ruling of the International Islamic-*fiqh* Council in 1986. In 1991 the Islamic Audit Council of the Saudi national Al-Rajhi Group for Islamic Banking declared that all types of insurance are permitted.[427]

Despite the variation in their views, a quick overview of the Arabic and Islamic religious literatures about insurance concentrates on four matters in order to verify its permissibility. These four matters are as follows:

i. Consideration of whether insurance involves any usury (*ribā*).
ii. Consideration of whether insurance involves any speculation (*ghara* & *jahala*).
iii. Consideration of whether insurance involves any element of gambling (*qimār*).
iv. For those who ground their rulings pertaining to insurance on analogy, consideration of whether other Islamic transactions share one or more features with insurance.

While this thesis has adopted the basic doctrine that all transactions are permitted unless proscribed otherwise; and while there is no explicit provision of *Sharī'a* in relation to insurance, the author is of the view that the aforementioned

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[426] See Mohamoon Homepage <http://www.mohamoon-ksa.com/Subject.asp?DirID=1091&Status=2> (date accessed 24/4/2003).

[427] See Shaikh A. Bin Menai', *supra* note 424.

constraints ought to be investigated before concluding a final opinion with regard to insurance. Moreover, the author is of the opinion that insurance should be looked at from the angle of the welfare of the community as an obligation to be fulfilled by the Islamic government (*siyasa shar'iya*).

7.7.5.1 Insurance and Interest

Usury is amongst the greatest sins a Muslim can ever commit. It is condemned in various verses of the *Qur'ān*, and indeed usury is equated , to declaring war against the Almighty God and his Messenger. Muslims, therefore, deal with the matter of usury with great caution. The *Qur'ān* never defines what exactly usury is. Even *Sunna* is not very explicit on the definition of usury. After thorough studies, however, jurists have unanimously concluded that usury is of two types: *ribā al-nasī'a* and *ribā al-faḍl*. To avoid the latter the Prophet (PBUH) ordained that the exchange of some specific items like gold, silver and food such as dates, should be conducted simultaneously in similar quantities. Jurists, nonetheless, interpret the provisions in relation to *ribā al-nasi'a* differently. Some jurists like Ibn Ḥazm Al-Andalusi narrow down the scope of *ribā al-nasi'a* to the items and goods mentioned explicitly in the *hadīth*. Other items and goods shall not be a subject of *ribā al-nasi'a.* Others like Imam Abu Hanifa and Shafiʿī include additional items on the ground of *qiyās*.[428]

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[428] See generally A. Al-Sanhori, *supra* note 29.

Ribā al-faḍl is mentioned by the Prophet (PBUH) in his farewell pilgrimage as *ribā al-jahiliyah. Ribā al-faḍl* is nothing other than what we contemporaneously call interest.[429]

The Council of Senior Ulama in Saudi Arabia on 4/4/1397 (1977) decided that all kinds of insurance including life insurance, are prohibited for the main reason that interest is carried with insurance.[430] Insurance companies usually use the amounts they collect from the insured in usurious transactions. The insured is not involved in such transactions unless he/she decides to pay the premium on instalments where an interest rate is charged to cover inflation and administrative expenses.[431]

The fifth ruling of the first session of the Islamic-*fiqh* Council of the Muslim World League declared that insurance involves *ribā* in two ways:

i. If the peril occurs and the insured gets covered then he/she is getting back more than what he/she paid (*rib al-faḍl*).
ii. Because coverage comes after payment of the premium then *ribā al-nasī'a* is involved.

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[429] For further details on the matter of Riba, see the fatwa of Shaikh Al-Azhar dated April 15, 1981 at <http://www.mohamoon-ksa.com/Subject.asp?SearchText=الفضل20%ربا&Page=1&Search=1&DirID=7950&Status=1> (date accessed 24/7/2003).

[430] See the Council of Senior Ulamas in the Kingdom of Saudi Arabia, (10 Session), Decree no. 51, Riyadh on 4/4/1397.

[431] See R. Vardit, *supra* note 412 at 48.

The author is of the view that this ruling may be right if the premium is paid by the insured as a loan to the insurance company (*i.e.* if it is paid with the intention to lend only). There would then not be any service whatsoever expected from the insurance company in exchange for the premium. However, the various legal definitions of insurance postulated in section 3.1 above provide that the premium is consideration for the contract and not a loan. Moreover, none of the *de facto* circumstances associated with the transaction shows that the amount is paid as a loan.

Besides, if the premium is paid to the insurance company as a loan then it should be paid with the condition of returning the exact amount. Further, for *ribā* to exist there should be an interest rate applied to the loan. Insurance companies do not in fact pay back to the insured the money he/she paid. They actually cover the insured for the financial damages he/she may sustain if the peril occurs. Insurance case law, therefore, defines the contract of insurance as an indemnity or security contract. According to Vardit, insurance companies extend to the insured a service, not a loan.[432]

Besides, for *ribā al-nasī'a*, the money paid back to the insured should be paid in exchange for the premium despite the occurrence of the covered risk, which is in fact not true.

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[432] *Ibid.*

The author suggests that it is because of the misinterpretation of the premium as a loan from the insured to the insurance company that some Islamic jurists have concluded that insurance involves *ribā*. Although this may be true in some cases related to life insurance, it should be taken as a general basis for denying the legality of insurance. The author therefore adopts the opinion that insurance does not usually involve usury and should not, at the outset, be rejected on this ground. What should in fact be rejected are the specific practices through which insurance can involve *ribā* rather than insurance as a whole.

7.7.5.2 Insurance and Gambling

Gambling (*qīmār*) or, as named in the *Qur'ān*, (*mayser*) is roundly condemned by *Sharī'a*. The *Qur'ān* treats gambling and intoxication jointly.[433] Gambling involves betting money in a pool for a chance of losing the stake or wining the whole amount bet by others on the occurrence of a specific event. This covers all kinds of luck or risk-based bets like those related to horse races, blackjack, lotteries etc.

Some Islamic jurists are of the view that insurance is a form of gambling whereby the insured in effect bets his/her money (the premium) for an expected loss of the bet or a very much bigger gain on the occurrence of a specific event. In other words, insurance imitates gambling because of the disproportion between the

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[433] The Holy *Qur'ān*, (2:219), (5:90) and (5:91).

amounts paid by the insured (premiums) and the compensation paid back by the insurance company on the occurrence of a peril. For jurists, the likelihood of loss and gain is similar on both sides where the insurance company may lose by paying back a large amount in exchange for a very much smaller amount paid by the insured, or it may, on the other hand gain the premium without any loss on its part.[434]

Another group of jurists headed by Shaikh Mustafa Al-Zarqa and Shaikh 'Abdullah Bin Menai' contest this view by arguing that insurance does not involve gambling. As already noted, he concludes that insurance companies decide the premiums to be paid on the grounds of the "law of large numbers", according to which they conduct periodic thorough investigation and gather statistics on the risks they insure before fixing their premium rates. It is a cost-plus process through which the insurance companiy usually charges an average that covers its probable costs in addition to its profits.[435] Shaikh 'Abdullah bin Menai' provides that for *qīmār* to exist there should be a loser and a winner. In insurance contracts, to the contrary, both parties are gaining. The insurer is gaining the premium and the insured is gaining security.[436] Muhammed Nejatullah Siddiqui asserts that the loss or gain associated with gambling is based on chance and luck only and does not involve any labour, competence or service. He goes on to

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[434] See the resolution of The Islamic Fiqh Council of the Muslim World League date 14/8/1398 A.H (1978) at <http://www.mohamoon-ksa.com/Subject.asp?SearchText=الفضل20%ربا&Page=1&Search=1&DirID=14060&Status=1>
(date accessed 24/7/2003).

[435] See M.N. Siddiqui, *supra* note 414 at 17-18.

[436] See Shaikh A. Bin Menai', *supra* note 424. See *contra* R. Vardit, *supra* note 412 at 57.

argue that by contrast, a redistribution of wealth caused by loss and gain in gambling is a blind distribution, contrary to justice and fair play.[437] *Prima facie*, insurance premiums collected from the insured who do not encounter a peril are transferred to those who encounter an accident and get paid by the insurance company. Siddiqui concludes therefore that the comparison between insurance and gambling is unfounded. The redistribution associated with insurance is actually a redistribution of risk rather than of money. The unpaid insured did not bet and the paid insured did not gain, they both have shared together the financial burden of the peril.

The author is of the view that the subject matter of gambling is money the subject matter of insurance is security or indemnity for consideration. Therefore, the analogy between gambling and insurance is not accurate. However, the link between gambling and insurance is not easy to investigate without analyzing the matter of speculation, which some jurists contend is present in insurance transactions.

7.7.5.3 Insurance and Speculation (Gharar and Jahālah)

The English term speculation combines the meaning of two corresponding Arabic terms. One is *gharar*, which means selling something whose availability is unknown, like selling birds in the air before they are captured or fish in the sea

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[437] M.N. Siddiqui, *supra* note 414 at 33.

before they are caught.[438] *Jahālah* is to sell something that really exists but in an uncertain or unspecified quantity or size. A good example of *jahālah* is to buy a car without knowing its model, type, mileage, condition or year of production. These two terms are, however, usually used interchangeably. According to all Islamic jurists, a contract should be free from speculation to be valid.

Some conservative jurists reject insurance because it involves speculation. Such speculation comes from the fact that the insured and the insurance company do not know the consequences of the contract they are entering into. The insured may end up paying the premium without getting anything in return, and likewise the insurance company may end up paying a huge amount to an insured party who has just started paying the insurance instalments.[439] Such uncertainty at the time of the conclusion of the contract of insurance is, for some jurists, speculation.

Shawkat 'Aliyan, in his valuable book on insurance, provides that the insurance contract is a contract of speculation as the insured and the insurance company are both entering into a contract of uncertainty.

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[438] R. Vardit, R. Vardit, *supra* note 412 at 51.

[439] See the Resolution of The Islamic Fiqh Council of the Muslim World League date 14/8/1398 A.H (1978) at <http://www.mohamoon-ksa.com/Subject.asp?SearchText=الفضل%20ربا&Page=1&Search=1&DirID=14060&Status=1> (date accessed 24/7/2003).

Shaikh Al-zarqa and Sahikh 'Abdullah Bin Menai', on the other hand, contend that insurance contracts in general do not involve speculation. Their contention is based on the fact that insurance companies usually possess databases and statistics on whatever risk they insure against. Such instruments enable them to predict the probability of the occurrence of the peril insured against. Shaikh Al-Zarqa and Shaikh Ben Menai', moreover, provide that insurance is a security and indemnity service which is an intangible product being sold to the insured. This service deserves the premium paid by the insured who is assured and secured (the service) that he/she will either get the insured thing or its value if a peril occurs.

From the author's point of view, both the conservative view and its rebuttal are logical and have reasonable grounds. The difference between them is their perception of the insurance transaction. The conservative opinion denies that the security and indemnity services are valid objects for contracts. Its conclusion, therefore — that insurance involve speculation and gambling – is from that premise to a large extent valid. The opposing opinion, on the other hand, accepts security service as a valid object of value. Hence it finds no speculation involved in insurance. The author, however, accepts security service as a valid object of a contract since the it does provide clear and valuable assistance to those facing perils.

7.7.5.4 Insurance And The Analogical Approach

Jurists holding a conservative view in relation to insurance consider it prohibited by the explicit provisions of *Sharī'a*. They assert that it involves *ribā*, *qīmār* and *jahālah* & *ghara*. *Sharī'a* explicitly considers null and void any contract involving one or all of these factors.[440] This group of jurists (the majority), therefore, does not accept what they call commercial insurance and does not accept any analogy or *iğtihad* on the grounds of the welfare of the community. This is because the Islamic legal methodology (*Usūl-fiqh*), by consensus, does not accept such approaches if there is explicit guidance from the *Qur'ān* and *Sunna* that the action is prohibited or permitted. In other words, all other means of *usūl-fiqh*[441] are to be applied only if the *Qur'ān* and Sunna do not provide an explicit ruling on the subject matter.[442] These jurists, nonetheless, resort to analogy with other similar transactions of *Sharī'a* and *fiqh* for the sake of proving their case against insurance.[443] The most thorough study conducted in this regard is the one made by Shawkat Aliyan in which he compared insurance to ten other Islamic practices to conclude that insurance in general does not fit any of these and therefore shall not be accepted.

The author nevertheless differs from Aliyan on whether insurance can be rejected on the grounds of its dissimilarity to the other ten practices. Dissimilarity

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[440] See section 2.2.4 above.

[441] See section 1.5.1.5 above.

[442] See the Resolution of The Islamic Fiqh Council of the Muslim World League date 14/8/1398 A.H (1978) at <http://www.mohamoon-ksa.com/Subject.asp?SearchText=الفضل20%ربا&Page=1&Search=1&DirID=14060&Status=1>

(Date accessed 24/7/2003).

[443] See generally S. Aliyan, Al-Ta'min Fi Al-Sharī'ā Wal-quanūn, 2nd ed.(Riaydh: Dar Al-Rashīd, 1981).

should conclude in further investigation of the subject matter as a new independent occurrence (*nazila*) instead of rejecting it. This is particularly the case when the jurist does not see the involvement of usury, speculation or gambling with insurance.

7.7.5.5 Cooperative insurance (Al-Ta'mīn Al-Ta'āwunī)

Although conservative jurists reject the contemporary Western practice of insurance as a prohibited transaction, they did, on the other hand, appreciate its importance, especially in certain industries such as aviation and they therefore came up with what they call "co-operative insurance" (*al-ta'mīn al-ta'āwunī*).

The basic idea behind co-operative insurance is to create a framework to operate like regular commercial insurance but without the involvement of usury, speculation and gambling. This concept was adopted for the first time by the Council of Senior Ulama of the Kingdom of Saudi Arabia through its Resolution number 51 dated 4/4/1397A.H (1997).

Co-operative insurance in its ideal form, as envisaged by Muslim scholars, is formed by a group of people each contributing a fixed amount to a general fund for a fixed time period. If calamity befalls any of those who contributed to the fund, the fund will indemnify them. If the fund runs out of capital, the deficit will be covered by additional equal sums collected from all members. If the fund ends

the year with a surplus, it will distribute this surplus, in equal shares, among its members.[444]

To avoid usury, members are perceived as either donors who do not expect profits or as shareholders. The members are, therefore, the insured and the insurer at the same time. Moreover the insurance company does not invest the money it collects from the donors or the shareholders in any usurious transaction. Collective insurance thus has some analogy to what is known as "mutual insurance" in the West.

The uncertainty associated with this type of insurance is not addressed as speculation where the premium is paid at the outset as a donation i.e. the insured is not paying the amount for an uncertain probable exchange. This type of insurance is, therefore, free from speculation and gambling as well as usury. Managers of such co-operative insurance companies may elect do so for reward.

Cooperative insurance had been put into practice in Saudi Arabia until the Council of Senior Ulama of Saudi Arabia decided very recently that current co-operative insurance companies have deviated from the idealistic theory adopted in the past. They are therefore prohibited, for the same reasons as the prohibition of commercial insurance. Subsequently these companies have been requested

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[444] R. Vardit, *supra* note 412 at 108.

to reform their practices so as to be in accordance with what had been decreed before.[445]

Shaikh Mustaf Al-Zarqa characterized the differentiation between regular commercial insurance and cooperative insurance as a mystery. Shaikh 'Abdullah Bin Menai' also argues that commercial insurance is no different from co-operative insurance. The theory of co-operative insurance proclaims that the insured are paying the premiums as donations with the intention to cooperate with their fellow insured. For Bin Menai', this is not true. The insured are paying the amounts because they need to be insured. It is beyond doubt that the overall result of such a payment is co-operation, but a less overt form of co-operation is also the case for commercial insurance. As Shaikh Bin Menai' asserts, it is untrue that the premiums are paid as donations, since donors should have the right to decide the value of their donation, which is not the case in the so-called co-operative insurance. They should have the right, furthermore, to stop giving the donation at any time. However, if the insured does so, his/her insurance coverage will be terminated. This means that it is not a donation.

Shaikh Bin Menai' adds that profit (as opposed to interest) is not prohibited by Islam. Therefore, the claim that co-operative insurance companies do not seek profit and are therefore Islamic is not valid. Shaikh Bin Menai' concludes a long discussion dismissing the differences between the commercial and co-operative

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[445] See Shaikh A. Bin Menai', *supra* note 424.

insurance with the assertion that insurance is either permitted or prohibited without discrimination between the two types.

The author stands by the opinion adopted by Shaikh Bin Menai' and further asserts that insurance should be seen as a service of value. In fact, if the insurance company is not providing any service other than the creation of a base where the premiums are collected and the management of compensation, it would still deserve any profit it makes out of such a service. Insurance in general ought to be viewed as an acceptable practice consistent with Islamic-*fiqh*. Nevertheless, the author still agrees with the conservative point of view that there are some insurance practices that may not be accepted by *Sharī'a* . For instance, as gambling is prohibited by *Sharī'a*, an insurance company should not accept the provision of any coverage to gambling houses. Insurance companies also should not invest their money in prohibited fields or in a manner that involves usury. There may indeed be life insurance policies taken out on the lives of persons unrelated to the payer of premiums as a matter of pure speculation.

However, more to the point of the thesis, the author is of the opinion that it would have been almost impossible for the aviation industry to evolve in the way it has done without insurance. This is so for the very basic reason that the huge liabilities an airline may be faced with following damage caused by an aircraft or damage done to it would overburden individual carriers if they could not spread risk. In addition, aviation insurance is a liability insurance, which does not, by

definition, fall into the contentious life insurance category. The author thus concludes that aviation insurance is an acceptable form of insurance consistent with Islamic-*fiqh*, provided that it does not include any prohibited transaction.

Conclusion

The main contribution to legal knowledge that this thesis has sought to make is to apply the methodology associated with Islamic *Sharī'a* to the context of the well known and established international Conventions on air carrier liability. The key constellation of applicable Islamic concepts is found in the *diyah* system, which addresses civil liability with regard to personal injury and death under Islamic *Sharī'a*. As described in Chapter II of the thesis, *diyah* is in principle a limited liability extra-contractual system which can be enhanced or altered by contractual terms. In other words, according to *diyah*, limited liability is a default rule which can be changed by virtue of contract. In the Islamic context, the limits of *diyah* are defined by virtue of *hadīth* to the effect that the value of *diyah* is one hundred camels. At first blush, this measure of compensation may seem far removed from anything that could be relevant to air carrier liability. Indeed, in the current Islamic legal systems adopted by Islamic states such as Saudi Arabia and Kuwait, the limits of *diyah* are calculated in a superficial, mechanical manner: the value of a camel according to the current value of currency multiplied by one hundred. The author suggests in the thesis that the value of *diyah* should be considered on the basis of the economic value of camels at the time of *diyah*'s inception. This would result in translating *diyah* into a much higher, and much more relevant, currency value. As detailed in Chapter II, if *diyah* is taken on grounds of the economic value of camels at the time of the Prophet, it would equal to a three years' income of a middle class family composed of 6 people. The GDP as reported by the United Nations provides a rule of thumb for such calculations. In practical

terms, this would currently set a limit of approximately five hundred thousand US Dollars if upper income countries serve as the benchmark. While an international Convention to which Islamic and non-Islamic countries were all parties would not be based on *diyah* explicitly, this thesis proposes establishing a methodology similar to and consistent with *diyah*. Most industrialized countries keep statistics on family income – something unavailable at the time of the Prophet (PBUH). For example, Statistics Canada reports census information on income of couple families with children. Three times the top quintile average family income of a top GPD country would provide a high and automatically adjusting limit which airlines could choose to exceed in their own contracts. If Canada were taken as a benchmark, that would have been $432,000 in 2000.[446] Although this is not precisely a methodology yet adopted by any of the Islamic states or by Islamic scholars, the author suggests such a detachment of *diyah* from its specific historical background as an alternative to the methodologies adopted by the air carrier liability Conventions.

Part 2 of the thesis explores the various aspects of the interplay between the *diyah* system and the air carrier liability Conventions. Chapter VI analyses air carrier extra-contractual liability as prescribed by the Rome Convention and shows that there are no major points of conflict with the basic principles of Islamic-*fiqh*. However, the Rome Convention has major problems which make states reluctant to ratify it. The first is the low compensation limits prescribed by

[446] See <http://www.ccsd.ca/pr/2003/censusincome.htm,> (date accessed August 31, 2006).

the Convention. The second is the methodology of distribution of compensation as it gathers all plaintiffs in a pool and distributes the limited compensation accordingly. Finally, in an attempt to overcome the uncertainty that may result from an unexpected number of claims, the Rome Convention fixes the liability at certain arbitrary weight limits despite the number of fatalities and whatever the nature of injuries sustained by survivors. This methodology unnecessarily discriminates between those injured onboard an aircraft and those injured in the same accident on the ground.

The author suggests that applying a methodology derived from the *diyah* system would enhance the Rome Convention in several ways. To begin with, recourse to a *diyah* methodology is appropriate since the Rome Convention is also premised on fixing limited but absolute liability. However, while the Rome Convention does this by erring on the side of protecting the carrier against claimants, *diyah* seeks to strike a balance more favourable to the claimant. It has nothing of arbitrary methodology adopted under the Rome Convention, which fixes liability on the grounds of weight of aircraft whatever the number and nature of causalities. By contrast, *diyah* would mandate the air carrier to compensate for each of the casualties of an accident whatever the weight of the aircraft or the number of causalities. All that really matters while determining the amount of compensation is the nature of the injury actually sustained by the person on ground. The limits of such extra-contractual liability as proposed through the *diyah* system are equal to the limits proposed by *diyah* for contractual liability. Thus *diyah* provides no

basis for any discriminatory treatment as between those injured on the ground and those injured onboard.

As to air carrier contractual liability towards passengers on board, in Chapter VII the thesis examines the various aspects of the Warsaw System and Montreal Convention covering contractual formalities and compares them to the general principles of Islamic-*fiqh*. The Warsaw System has adopted a stringent rule of formalities according to which if a ticket fails to contain certain contents or to have been delivered in a prescribed manner, the carrier shall be deprived of limits of liability. This rule adopted by the Warsaw System created a battlefield for litigants. Plaintiffs sought to use the matter of formalities as an escape hatch against low liability limits while air carriers did their utmost to preserve the limits. Plaintiffs' arguments would usually be around not adhering to the formalities of the ticket or not delivering the ticket in timely manner. The author suggests that main problem in this regard is not only the stringency of formalities but also the conditional nature of limited liability, which can turn to the other extreme of unlimited liability if formalities are unfulfilled. This has created unnecessary constraints on business practice. Despite the fact that technologies have long been available for e-ticketing, the link between limits to liability and adherence to contractual formalities delayed its introduction markedly.

The Montreal Convention has successfully solved this problem by not linking the limits of liability to formalities of the ticket. Unfortunately, however, there is no

initial liability limit. Moreover, it is going to take some more time before airlines will be eager to implement electronic ticketing in full as there are still states which have not ratified the Montreal Convention.

A *diyah*-inspired regime could overcome these difficulties. To begin with, its liability limits do not turn on adherence to formalities. With this proposition claimants would have no incentive to challenge contractual formalities. On the contrary, in cases where the air carrier agrees to a contractual stipulation providing compensation beyond ordinary liability limits, liability claimants would want to prove the existence of the agreement. The author argues such an approach, if generally applied, would encourage air carriers to adopt electronic ticketing and indeed whatever form of ticket made most business sense. In short, Islamic-*fiqh* would not only admit and adopt the concept of electronic contracts and electronic ticketing, but in fact could help in spreading the practice.

Chapter VIII addresses the central issue for the thesis, namely what light *diyah* can shed on the key controversy besetting the Warsaw System and Montreal Convention: limited vs. unlimited liability. The Warsaw Convention adopted the *res ipsa loquitur* principle in lieu of a fault standard but in exchange limited the liability of air carriers. This methodology did exactly what was intended by preserving air carriers from being exposed to uncertain liability burdens when the aviation sector was still an infant industry and subject to a very high factor of risk. Limited liability helped air carriers to evolve and allowed the industry to grow to

its current economic significance. Nevertheless, what was salutary for the 1950s faced obsolescence after a relatively short period of time since the Warsaw Convention could not keep pace with the devaluation of currencies, which rendered the monetary limits as prescribed by the Warsaw Convention unacceptable. The true reason why Warsaw has become unacceptable is that Article 22 of the Convention fixed the liability limits in numbers rather than in a formula.

After some seventy years of struggle against the limits of liability adopted by the Warsaw System, the Montreal Convention went to the other extreme. It adopted the so called a two tier liability regime, which in its totality results in unlimited liability. The solution that *diyah* may provide to overcome problems of these two extremes of Warsaw and Montreal is that it suggests a limited liability regime according to which limits are described by formula rather than numbers. This means that air carriers would not be exposed to the uncertainty that may result from the unlimited liability regime adopted by the Montreal Convention. In other words, they would not be subject to the whims of particular juries and the expense of mercenary litigation. Simultaneously, the formula system as provided by *diyah* would also have enabled the Warsaw Convention to keep pace with economic fluctuations in a manner that would always keep the liability regime within a generous but acceptable level of compensation.

If one takes together the arguments presented in this thesis about the interaction of *diyah* with air carrier liability Conventions, the result could be a single, integrated instrument regulating contractual and extra-contractual liability. Through the application of a *diyah* methodology, contractual and extra-contractual liability towards persons would be placed on a parallel footing. For both, the same level of default liability would apply. In both situations, there would be no exposure to unlimited liability unless contracted for. The principal difference between contexts is that the limits of *diyah* can be raised by virtue of a contract. But on a practical level, the author presumes it would be difficult for the air carrier to offer this without asking the passenger to pay for the difference through a premium. This actually applies currently to cases where passengers declare special value of luggage. Additionally, the integration of the two aspects of liability in a single integral instrument would relieve air carriers from the uncertainty associated with the adoption of two different regimes.

In addition to the above, the author would like to note, finally, that the interplay between the principles of *diyah* and the air carrier liability Conventions discussed in this thesis constitutes but one example of how *Sharī'a* can interact with other legal traditions including Common Law and Civil Law traditions. It also reflects how Islamic states applying *Sharī'a* can benefit from the norms and principles adopted within other legal traditions which are not contradictory to *Sharī'a* in principle. There are many other subjects that could be addressed through what could be called, using somewhat diplomatic language, a constructive dialogue

among legal traditions – a dialogue in which *Sharī'a* has a notable part to play. For example, the thesis itself points to further work on the subjects of insurance claims based on air carrier liability and to how the Islamic law of inheritance would apply to the advanced payment adopted under Article 28 of the Montreal Convention.

Of course, most of the views and contentions concerning *Sharī'a* and *fiqh* provided throughout this thesis reflect the author's point of view. The thesis should therefore be read and understood as "a" perspective on *Sharī'a*; it does not and cannot claim to be "the" perspective on *Sharī'a*. It is thus acknowledged that the specific conclusions drawn here about how air carrier liability Conventions can benefit from an Islamic-*fiqh* methodology could fail to gain endorsement among either Islamic or non-Islamic scholars and experts. Nevertheless, the deepest ambition of the thesis is to show that a constructive dialogue among legal traditions, to which *Sharī'a* makes significant contribution, is possible and practicable. Those who disagree with the conclusions of the thesis are thus invited to offer better accounts of the interplay between Islamic-*fiqh* and international law and not to turn their backs on that endeavour.

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