REMEDIES FOR PASSENGERS FOR FLIGHT DELAYS CAUSED BY *FORCE MAJEURE:*

PERSPECTIVES FROM TAIWAN FOR A HARMONIZED SOLUTION

BY

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I dedicate this thesis to Patricia M Cheong

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ABSTRACT

This thesis intends to justify the necessity to propose an alternative remedy mechanism to current air carriers' obligations in offering complimentary services to passengers in *force majeure* delays. This mechanism mitigates disputes arising from passengers' dissatisfaction with air carriers' services. The proposal is the result of extensive research arising from a fundamental question: Who should be responsible for damages and/or inconvenience resulting from flight delays caused by *force majeure*?

The source of information for this thesis stems from a combination of the analysis of case law and statutes on one hand, and experience drawn from professional practice and cultural context on the other. This thesis discusses the intersection of international conventions, national legislation, and the practice and expectations of air carriers and their passengers. The thesis specifically examines and highlights the inadequacies of relying on existing international conventions to provide a harmonized solution for flight delay claims. In terms of national remedy mechanisms, research and analysis have been focused on the advanced aviation markets in the West, such as the US and the EU, and on the emerging markets in the East, such as Mainland China and Taiwan. The research and analyses reveal how national laws, which are deeply influenced by socio-economic, political and cultural factors, trigger distinct conflicts of interest between air carriers and passengers.

During the course of reviewing the legal jigsaw and uncertainties in current legal practice, the findings revealed more issues. In brief, making more laws cannot guarantee an effective solution for flight delay claims, especially in different jurisdictions. Accordingly, the findings support that a novel solution, free from the uncertainties and complexities in the current legal framework, is needed to resolve passengers' claims or expectations resulting from *force majeure* delays.

Essentially, this novel solution is to form an alternative remedy mechanism that includes a fund and codes of conduct. The fund will implement a risk-sharing function among stakeholders that will include passengers, air carriers and airport managing entities. To mitigate disputes, the proposed codes of conduct will include guidelines to operate the fund with the aim of mutual respect between passengers and air carriers. In so doing, the remedy mechanism will provide equitable answers to the question: "Who should be responsible for damages and/or inconvenience resulting from flight delays caused by *force majeure*?"

RÉSUMÉ

Cette thèse vise à justifier la nécessité de proposer un mécanisme de recours, comme alternative, aux obligations des transporteurs aériens actuels, à offrir des services gratuits, aux passagers en cas de retards causés par une force majeure. Ce mécanisme atténue les différends, résultants de l'insatisfaction des passagers des services des transporteurs aériens. Cette proposition est le résultat de recherches approfondies découlant d'une question fondamentale: Qui devrait être responsable des dommages et / ou inconvénients résultant des retards de vols causés par force majeure?

La source d'information pour cette these résulte d'une combinaison de l'analyse de la jurisprudence et des lois, d'une part, et de l'expérience tirée de la pratique professionnelle et du contexte culturel, de l'autre. Cette thèse traite de l'intersection des conventions internationales, de la législation nationale et de la pratique et des attentes des transporteurs aériens et de leurs passagers. Cette thèse examine spécifiquement et met en évidence les insuffisances des mécanismes de recours nationaux, existants actuellement, pour fournir une solution harmonisée aux demandes liées aux retards de vol. En termes de mécanismes de recours nationaux, la recherche et l'analyse ont été axées sur les marchés développés de l'aviation dans l'Ouest, tels que les États-Unis et l'UE, et sur les marchés en plein essor de l'Est, tels que la Chine Continentale et Taiwan. Les recherches et les analyses révèlent comment les lois nationales, qui sont profondément influencées par des facteurs socio-économiques et culturels, déclenchent des conflits d'intérêts distincts entre les transporteurs aériens et les passagers.

Au cours de l'examen du puzzle juridique et des incertitudes quant à la pratique juridique actuelle, les résultats ont révélé d'autres problèmes. En bref, créer plus de lois pour faire face à ce problème ne garantit pas une solution efficace pour les réclamations liées aux retards de vol, en particulier dans les différentes juridictions. En conséquence, les résultats confirment qu'une nouvelle solution, libre des incertitudes et de la complexité du cadre juridique actuel, est nécessaire pour résoudre les réclamations des passagers résultant de retards de force majeure.

Essentiellement, cette nouvelle solution consiste à former un autre mécanisme de réparation, qui comprend un fonds et des codes de conduite. Le fonds mettra en œuvre une fonction de partage des risques, entre les parties prenantes, qui sont les passagers, les transporteurs aériens et les directions des aéroports. Pour atténuer les conflits, les

codes de conduite proposés comprendront des lignes directrices, pour l'exploitation du fonds, dans le but d'assurer le respect mutuel entre les passagers et les transporteurs aériens. Ce faisant, le mécanisme de recours apportera des réponses équitables, à la question: “Qui devrait être responsable des dommages et / ou inconvénients résultant des retards de vols causés par force majeure”?

REMEDIES FOR PASSENGERS FOR FLIGHT DELAYS CAUSED BY *FORCE MAJEURE*

TABLE OF CONTENTS

CHAPTER V
PROPOSED REMEDY MECHANISM

CHAPTER VI
CONCLUSIONS

CHAPTER I
INTRODUCTION

CHAPTER I
INTRODUCTION

Safe and efficient air travel connects people around the world. The ability to connect people, however, results in enhancing interactions between varied cultures, societies and economies. Interestingly, while air transportation facilitates economic growth, flight delays have, on the other hand, posed a threat to national economic growth and prosperity.[1] Furthermore, in past years, the issue of passenger protection in flight delays has attracted increasing attention internationally, highlighted by air travel disruption caused by severe weather or natural disasters. The closure of European airspace triggered by the Icelandic volcano eruption in 2010 is a good example.[2] In the long delays caused by this natural disaster, air carriers had disagreements on the implementation of unlimited complimentary assistance to "all" affected passengers, a service that is required by the EU Regulation 261/2004[3], which had aimed for "high level" assistance and passenger protection. That situation underlines an issue that has never been adequately addressed and resolved: Who should be responsible for damage and/or inconvenience resulting from flight delays caused by weather or other unforeseeable factors?

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[1] See The Port Authority of NY & NJ, *Flight Delays Task Force Report* (New York: 6 December 2007) at 1.

[2] Volcanic ash from Iceland snarled air traffic across Europe causing the cancellation of thousands of flights. The disruption caused havoc for air travel around the world since volcanic ash can cause jet engines to shut down. The plumes have closed some of Europe's busiest airports, including Charles de Gaulle in Paris, London's Heathrow and Schiphol in Amsterdam. France, Germany, Ireland, Sweden, Norway, Belgium, Denmark, Poland and the Netherlands also announced the complete or partial closure of their airspace.
See ICAO, *ICAO Assesses Situation of Air Transport Following Eruption of EYJAFJALLAJOKULL VOLCANO in Iceland* (May 2010), online: ICAO Newsroom ＜ http://www.icao.int/Newsroom/Pages/icao-assesses-situation-of-air-transport-following-eruption-of-EYJAFJALLAJOKULL-volcano-in-iceland.aspx＞.

[3] The Regulation (EC) No 261/2004 of the European Parliament and of the Council on 11 February 2004 (hereinafter referred to as the EU Regulation 261/2004 or EU 261/2004), which came into force on 17 February 2005, provided significant principles and guidelines for compensation and offering various assistance to passengers in the event of denied boarding, cancellation and long delays. This Regulation repealed the Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement, online:
＜http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0261:EN:HTML＞.

Generally, in cases of *force majeure*, liability cannot be attributed or imposed for damage resulting from events beyond human control, including weather, natural disasters or other "acts of God".[4] Though "Law", according to Aristotle, "is reason unaffected by desire"[5], increasingly and in practice this quote does not apply to passengers' claims resulting from flight delays caused by *force majeure*[6]. Indeed, air carriers are increasingly being requested to assume financial and economic risks in order to satisfy passengers' expectations for compensation, even in the event of flight delays that are not attributable to them.

This thesis, therefore, addresses the issue of remedies to passengers in the case of flight delays caused by *force majeure.* It does this by examining and comparing legislation and practice in the United States (US) and the European Union (EU), which are representative of Western perspectives and approaches, and in Taiwan and Mainland China, which reflect perspectives and approaches rooted in the Far East. In so doing, this thesis examines how socio-economic, political, and cultural values affect legal practice in different jurisdictions. In assessing the approaches in the different jurisdictions, this thesis argues that neither the unified rules under the international conventions on air carrier liability nor the developed national laws[7] have been able to meet the expectations of passengers seeking effective and satisfactory remedies in situations where flight delays are caused by *force majeure*. Consequently,

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[4] The "*force majeure*" clauses mean: "A contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that parties could not have anticipated or controlled."
See *Black's Law Dictionary*, 8th ed., *sub verbo* "*force majeure*".

[5] Aristotle, "Politics, Book III, Chapter 16", translated by Benjamin Jewett, online:
＜http://jim.com/arispol.htm＞.

[6] The meaning of "*force majeure*" is referred to "an event or effect that can be neither anticipated nor controlled". In addition, this term "includes both acts of nature (e.g., flood and hurricanes) and acts of people (e.g. riots, strikes, and wars)".
See *Black's Law Dictionary*, 8th ed., *sub verbo* "*force majeure*".

[7] The "national law" is not defined as the law made a "State", but to distinguish it from the international lawmaking, such as the Conventions. Thus, even though the "EU" is not a nation, but the law made by the Commission to the European Parliament and the Council is defined as "national law" or "legislation" in this thesis.

this thesis proposes an innovative harmonized solution based on the philosophy of risk sharing to settle disputes and offer remedies where existing lawmaking has proven inadequate for handling flight delays claims. Finally, unlike previous academic papers and case studies on this topic, this thesis takes into account the author's more than two-decade experiences in handling passengers' pecuniary or non-pecuniary claims resulting from flight delays.

1.1 Unresolved Problems

The highlight of the author's personal experience in handling passengers' claims for flight delays caused by *force majeure* was a memorable moment in 1996 when an exasperated lawmaker tossed papers at the author in front of the media at Taiwan's Legislative Yuan (Parliament). At that time, international air carriers were accused by passengers of "unsatisfactory services" and for "discriminatory treatment" between Taiwanese and Caucasians in relation to flight delays. The local media created an immediate image of David vs. Goliath[8] to label the situation where passengers collectively exercised their consumer rights and pitted themselves against the argument of air carriers that they should not bear liability to compensate passengers in flight delays caused by bad weather, which by definition is "*force majeure*" and beyond human control.[9] Prior to this, the Taiwanese media was often filled with images of distraught and disgruntled passengers who, after suffering severe delays and inconvenience due to inclement weather, remained in their seats and refused to disembark out of protest. This affected a number of foreign carriers flying into

[8] In Mandarin, it is captured by the proverb "the little shrimp against the whale" (小蝦米對抗大鯨魚).

[9] In 1990s, domestic and international aviation market in Taiwan was dramatically growing. Passengers were frustrated for waiting without any updated information for their flights in flight delays when delays were also increasing during that period. Most of international air carriers paid more attention to passengers who needed rerouting and who were seating in the first or business classes. Thus, Taiwanese passengers felt insulted in such managements, and they requested for "explanations" from international air carriers. Unfortunately, air carriers did not handle such complaints properly so caused passengers' refusal of disembarking.

Taiwan[10] and the authorities, including the police, were at a loss as to what to do with passengers who refuse to leave the aircraft, which technically is a foreign jurisdiction.

These scenarios replayed themselves throughout the nineties, with the refusal of passengers to disembark becoming a constant headache for air carriers, as well as an embarrassment to Taiwan. However, from the passengers' perspective, they were exercising their consumer rights by making their voices heard in order to seek a "non-pecuniary remedy", such as a public apology for passengers' mental anguish. In 1997, the US government, as a condition to continue air transportation between Taiwan and the US, requested the Taiwan government to do something to prevent passengers from occupying an airplane and refusing to disembark.[11] After air carriers had voluntarily undertaken obligations to provide complimentary services to passengers in case of flight irregularities in 2002, the author worked with officials of the Taiwan Civil Aeronautics Administration (CAA) to draft a new provision called "Anti-Disembarking Clause"[12]. Since then, air carriers have argued that their liabilities for pecuniary and non-pecuniary claims of passengers had increased at a startling rate although passengers' refusal of disembarking is under control. To this

[10] To avoid political sensitivity, the author presents the People's Republic of China (PRC) as Mainland China, and the Republic of China (ROC) as Taiwan in this dissertation.

[11] In February 1997, the US demanded Taiwan Government to prevent passenger's refusal of disembarking by making a law; otherwise, the US would take " revenge actions" to place restrictions on international flights from Taiwan to the US.
See, Chen Mun-ling, "Is it justified for Taiwanese to refuse of disembarking, or is it an unruly behavior?" (April 1997) online: Taiwan Panorama < http://www.taiwan-panorama.com/tw/show_issue.php?id=199748604055C.TXT&table=0&h1=5Y%2Bw54Gj5a%2Br55yf&h2=55Sf5rS76JCs6LGh > (in Chinese).

[12] Article 47 of the Taiwan Civil Aviation Act provides that:

> The CAA should help mediate in any dispute between the air carrier and passengers during or upon completion of a flight.
>
> If passengers ignore efforts at mediation and refuse to leave aircraft after landing, the air carrier with the CAA consent may request assistance of the Air Police Bureau to persuade or force passengers to leave aircraft after landing, the air carrier with the CAA consent may request assistance of the Air Police Bureau to persuade or force passengers to leave aircraft.
>
> Measures for mediation stated in paragraph one shall be provided by the CAA.

The detailed of services and assistances will be discussed in Chapter IV. The particular services are referred to Article 4 of the *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers*.

day, the author is still being consulted by international air carriers to handle severe passenger claims arising out of flight delays caused by *force majeure* because of unsatisfactory complimentary services offered to passengers.

In response, air carriers insist that under the 1929 Warsaw Convention[13] and/or the 1999 Montreal Convention,[14] there is no obligation on carriers to compensate passengers in *force majeure* delays. However, in practice, passengers in Taiwan and - as will be discussed below - around the world, will often argue that air carriers should be liable for delivering unsatisfactory services and causing mental anguish during the flight delays and waiting periods for rerouting. Passengers, in order to establish their claims, often use more consumer-friendly national laws and regulations to seek pecuniary or non-pecuniary remedies. More surprisingly, Taiwanese passengers have even sought to apply the EU Regulation 261/2004 to make their claims against a European air carrier operating in Taiwan and national air carriers operating routes to and from Europe. This has occurred because Taiwanese passengers learned that air carriers must compensate passengers if they fail to inform passengers of "cancellations" before the scheduled time of departure and in addition to offer them reasonable re-routing, except when the cancellation occurs in "extraordinary circumstances"[15] which could not have been avoided even if all reasonable measures

[13] The 1929 Warsaw Convention refers to the "Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw on 12 October 1929", which is an international convention regulating liability for international carriage of persons, luggage or goods performed by aircraft for reward.

[14] The Montreal Convention of 1999 refers to the "Convention for the Unification of Certain Rules for International Carriage by Air on Montreal, 28 May 1999", which amended important provisions of the regime under the Warsaw Convention concerning compensation for the victims of air accident.

[15] Under the EU Regulation 261/2004, air carriers should inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. However, for the purpose of applying the EU Regulation 261/2004, draft list of extraordinary circumstances following the National Enforcement Bodies (NEB) meeting on 12 April 2013 was proposed. In brief, the "extraordinary circumstance" is defined by the certain principle; and, the event has to meet the three criteria, unpredictable, unavoidable and external. See online:
＜http://ec.europa.eu/transport/themes/passengers/air/doc/neb-extraordinary-circumstances-list.pdf＞.

had been taken. Although the EU measure was met with some opposition in different jurisdictions, passengers around the world are inspired by Regulation 261/2004 to make their claims even though it may not be technically applicable in the concerned jurisdiction.

After Taiwan and Mainland China started routine flights across the Taiwan Strait in 2008, the author experienced increased challenges to settle flight delay claims brought on by Taiwanese, Mainland Chinese as well as passengers of other nationalities. Though these passengers were taking the same flight, it is striking that due to the nature of the liability regime, different national laws are applicable.

In a thriving aviation market, such as the one in Mainland China,[16] passengers have increasingly suffered flight delays. The response by passengers to such flight delays, often in the form of sit-in demonstrations and refusal to disembark from the aircraft[17], has been considered to be unruly behavior by the public at large.[18] In some delay cases, Mainland China passengers have even taken legal action against

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In case C-549/07 *Wallentin-Herrman*, the European Court of Justice (the "ECJ") clarified when a technical problem in an aircraft cannot be regarded as an "extraordinary circumstance".
See *Friederike Wallentin-Hermann v. Alitalia - Linee Aeree Italiane SpA*, C 549/07 of 22-12-2008 online: ＜ http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d69939cfbb227b449c8ed0e34cc38bb07e.e34KaxiLc3qMb40Rch0SaxuOax90?text=&docid=76556&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=488260＞.

[16] In 2012, more than 2.6 billion travelers visited Mainland China, which is a threefold jump comparing with the previous year. It was estimated that Mainland China will replace the US to dominate the global aviation market in 2030.
See ARD, Media Release, "Hyper Growth Aviation Market in China" (12 August 2012) online: Deutsche Welle, ＜ http://www.dw.de/%E9%A3%9E%E9%80%9F%E5%8F%91%E5%B1%95%E7%9A%84%E4%B8%AD%E5%9B%BD%E8%88%AA%E7%A9%BA%E5%B8%82%E5%9C%BA/a-16435366＞ (in Chinese).

[17] The detailed analysis of Mainland Chinese refusal to disembark from the aircraft is given in Chapter IV of this thesis.

[18] For instance, since July 2014, the air crew of Hong Kong Airlines (HX) refused to speak Mandarin as an outcry against the refusal of Mainland China passengers to disembark for over 18 hours and as a protest against their airline's offer of public apology and offering HKD$800 to each passenger as compensation. The air crew of Hong Kong Airlines alleged that Mainland China passengers' unruly behavior and Airlines' compromise hurt their "dignity" in performing their duty.
See Weike, Media Release, "Air Crew of Hong Kong Airlines Refused to Speak Mandarin As An Outcry for Mainland China Passengers' Refusal of Disembarking", (23 June 2014) online: BBC News ＜http://www.bbc.co.uk/zhongwen/trad/china/2014/06/140623_passenger_hx234.shtml＞.

international air carriers to claim pecuniary and non-pecuniary compensation in the case of delays caused by *force majeure*. For instance, in 2003, out of business consideration, All Nippon Airways decided, for public relations reasons, to apologize for the Chinese passengers' unhappy experience and offered them pecuniary compensation to cover their hotel fees and transportation expenses even though the delays were caused by sand storms.[19] These kinds of *ad hoc* actions and responses on the part of passengers and air carriers to flight delays are simply not conducive to fostering the development of the industry in this and other parts of the world.

Flight delay is a growing problem that has had a snowball effect in the aviation industry, and in particular passengers and air carriers are at a loss as to how to deal with delays occasioned by unforeseeable factors. For instance, it was estimated in 2007 that each year, in the US alone there is over US$9 billion in lost productivity mainly because of flight delays.[20] Moreover, at the 6th Worldwide Air Transport Conference[21] and the 38th Assembly of the International Civil Aviation Organization (ICAO),[22] held in Montreal in 2013, consumer protection and passenger satisfaction were listed as one of the topics for forming principles and rules. In particular, in order to address the phenomenon of flight delays caused by *force majeure*, the World

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[19] Twelve Mainland China passengers, holding Northwest Airlines tickets from the US to Beijing, were transferred at Tokyo to take All Nippon Airways (ANA). Due to sand storms at Beijing, ANA flew all passengers back to Tokyo and arranged hotel accommodation at passengers' cost. Four of Mainland China passengers filed claims with the Hubei Province Consumer Protection Committee after they returned to China. In the end, ANA apologized for passengers' unhappy experience and offered each passenger Renminbi 1,500 to cover one night hotel fee and transportation expenses.
See Ho Yan-Hwa, "Air Carriers' Liability for *Force Majeure* Delays", *Social Science Study* (2003) Vol 6, online: Baidu ＜http://wenku.baidu.com/view/192301d384254b35eefd342a.html＞ (in Chinese).

[20] See The Port Authority of NY & NJ, *supra* note 1.

[21] The 6th Worldwide Air Transport Conference was held from 18-22 March 2013. A Worldwide Air Transport Conference is convened approximately every ten years to update ICAO's policies for the long-term growth of international air transportation.
See Roberto Kobeh González, *Opening Remarks by the President of the Council of the ICAO, 18 March 2013*, Doc. ATConf/6, online: ICAO
＜http://www.icao.int/Meetings/atconf6/Documents/ATConf-6_Speech_President.pdf＞.

[22] The ICAO 38th Assembly was held from 24 September to 4 October 2014. The ICAO, with 191 member States, is the Organization's sovereign body. "It meets at least once every three years and is convened by ICAO's governing body, the Council."
See ICAO online: ＜http://www.icao.int/meetings/a38/Pages/default.aspx＞.

Tourism Organization (UNWTO) proposed a draft instrument dealing with the obligations of States to provide assistance in *force majeure* situations for the protection of tourists.[23] These developments and realities illustrate the urgency and necessity to provide a comprehensive study on the appropriate remedies to be offered to global passengers in flight delays caused by *force majeure*.

1.2 Defining the Subject

Three terms, "remedies", "flight delays" and "*force majeure*", expressed in the subject of this thesis have no technical definition in aviation law. In fact, the author has successfully defended air carriers based on ambiguous definitions associated with contractual liability for delays under the Conventions[24] and national laws. The ambiguity is raised not only because different languages are used to interpret air carriers' obligations in delays beyond air carriers' control, but also because distinct legislation allows air carriers to undertake different obligations to remedy passengers in flight delays caused by "*force majeure"*. For instance, US air carriers avoid their contractual liability for delays caused by "*force majeure*", but the EU legislation uses "extraordinary circumstance" to govern similar circumstances. Also, the Taiwan legislation stipulates air carriers' liability to compensate passengers for their "necessary extra expense" through the delays caused by "不可抗力" (similar to "*force majeure*"); yet, no similar rule is found in the US and Mainland China. The later chapters will provide detailed analysis of such complexities.

Nevertheless, to start discussing the subject of this thesis, it is significant to explain how complex defining "flight delays" can be. A flight may not depart or

[23] See ICAO, *Consumer Protection and Definition of Passenger Rights in Different Contents*, Doc. ATConf/6-WP/5, online: ICAO Secretariat
＜http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp005_en.pdf＞.

[24] The "Conventions" are referred to the 1929 Warsaw Convention and the 1999 Montreal Convention.

arrive at the scheduled time usually caused by one or more of factors, such as weather, aircraft maintenance, aircraft connections, air traffic congestion, or security consideration. Yet, the notion of "flight delays" is unclear, especially as neither the Warsaw system[25] nor the Montreal Convention of 1999 provides a unified definition of "flight delays".

From an academic perspective, Shawcross and Beaumont proposed the following notions of flight delays:

> (1) the phrase refers only to delays occurring while the passengers, baggage or cargo are actually airborne;
> (2) delays in the entire carriage arising when the passengers, baggage or cargo do not arrive at their destination by the stipulated time; and
> (3) the meaning of the phrase depends on the context in which recovery is sought: in the carriage of cargo or registered baggage, the relevant definition is to be found in article 18(2) of the Warsaw text, while in the case of passengers, the scope is defined in article 17.[26]

From an industry perspective, the most debated concept of "delays" was introduced by Clause 9 of the General Conditions of Carriage under Resolution 724 of the International Air Transport Association (IATA), which has been printed on all tickets since 1972, and reads as follows:

> Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of the contract. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.[27]

There is debate whether Clause 9 shown in the IATA paper form of air tickets as a

[25] See Section 2.1.1.
[26] See *Shawcross and Beaumont on Air Law*, Editor: Sarah Vaughan for Issue 124, (London: Butterworths, 2010) Vol 1 at VII-945; Chaw Wei Tien, *International Air Law*, Vol 1, (Taiwan Taipei: Water Buffalo Publisher, 1991) at 412 (in Chinese).
[27] See IATA paper ticket; or IATA Recommended Practice 1724 General Condition of carriage (Passenger and Baggage) PSC (24) 1724, PR1724.

condition of carriage accords with Article 19 of the 1929 Warsaw Convention and the 1999 Montreal Convention.[28] It may also be argued that Clause 9 violates Article 26 of the 1999 Montreal Convention because it allows air carriers to "escape" from delay liability even if the delay is subject to the air carriers' discretion. [29]

In practice, the IATA Conditions of Carriage have always been under the scrutiny of the courts and regulators.[30] For instance, passengers and consumer groups have raised the unfairness of standard contract terms that are unilaterally determined by air carriers who have stronger bargaining power.[31] Facing such challenges, IATA proposed an amendment to its Conditions of Carriage, which resulted in IATA Recommended Practice 1724 (the "RP 1724"). Even though RP 1724 was considered as "recommended" and without legal teeth, many IATA members incorporated the full text of RP 1724 into their Conditions of Carriage as an industry practice.[32] Nevertheless, Article 10.1 of the General Conditions of Carriage (Passenger and

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[28] See Francesco Fiorilli, "IATA Conditions of Contract and Carriage: a Jeopardized Initiative towards the Harmonization of Airlines-Passenger Contract" (January/March 2011) V No 1 The Aviation and Space Journal 7.
Article 19 of the Conventions indicates: "The carrier is liable for damage occasioned by delays in the carriage by air of passengers, baggage or cargo…"

[29] Article 26 of the 1999 Montreal Convention provides that: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention."

[30] See Fiorilli, *supra* note 28.

[31] The reality is that when passengers booked their tickets online, it is usually quite easy for them to read the applicable Conditions of Carriage. However, they often skip this passage and they buy their tickets without reading all the information. In case of disputes, passengers argued that the clause for air carriers to defend for no liability is unfair to protect passengers' consumer rights because the contractual terms are unilaterally determined by air carriers.

[32] The IATA Resolution 724 provided "conditions of contract/carriage". ICAO summaried this Resolution as:

> To harmonize the conditions under which passengers travel on inter carrier journeys, airlines developed, through IATA, Resolution 724 on Passenger Ticket - Notices and Conditions of Contract and Recommended Practice 1724 (RP1724) on General Conditions of Carriage (Passenger and Baggage). Resolution 724 binds member airlines, which apply it to international flights. The Notices cover limitations of liability, overbooking, information on taxes and user fees, and some national requirements, while the Conditions of Contract include certain articles and incorporate by reference the provisions of the ticket itself, the carrier's tariffs and its general conditions of carriage. RP 1724 does not bind member airlines.

See ICAO, *Consumer Interests* DOC. ATConf/5-WP/13 (2003), online: ICAO Secretariat < http://www.icao.int/Meetings/ATConf5/Documents/atconf5_wp013_en.pdf >.

Baggage) of the Recommended Practice 1724, which was issued by IATA in February 2007, does not provide a significant definition of flight delays except that:

> Carrier undertakes to use its best efforts to carry the passenger and his or her baggage with reasonable dispatch and to adhere to published schedules in effect on the date of travel.[33]

However, based on the influence of the Regulation (EC) 261/2004 and pressure from EU Consumer Organization[34], RP 1724 was rescinded by IATA after its 35th Passenger Services Conference in 2013.[35] Consequently, the interpretation of flight delays and the associated air carriers' liability for flight delays has been left to national laws.

A quick review of the selected four jurisdictions reveals that the concept of flight delays in the US, EU, Taiwan and Mainland China is very different. For instance, the official notion of flight delays in Taiwan is considered in relation to the scheduled flight's "departure time" by referring to Article 3 of the *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers*.[36] Interestingly enough, in Mainland China, the

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[33] See IATA-General-Conditions-of-Carriage (2012), online: IATA Passenger Services Conference Resolution Manuals
＜http://tiara-air.com/wp-content/uploads/2012/11/IATA-General-Conditions-of-Carriage.pdf＞.

[34] See A letter dated 5 February 2013 from Mr. Monique Goyens, Director General of the European Consumer Organization to Mr. Tony Tyler, Chief Executive Officer of IATA, addressed the complaints on "no right to refund in case of force majeure" under Article 3.1.4 of the IATA RP 1724. Online:
＜http://www.frc.ch/wp-content/uploads/2013/02/L2013_016-mgo-Letter-to-Mr-Tyler_IATA.pdf＞.

[35] See Passenger Services Conference Resolutions Manual (PSCRM), online: IATA
＜http://www.iata.org/publications/Pages/pscrm.aspx＞.

[36] Article 3 of the Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers provides that:

> "If a carrier is convinced any aircraft will not be able to depart according to scheduled time so that a flight is expected to be delayed for more than fifteen minutes in cases of domestic routes or for more than thirty minutes in cases of international routes, or that air route or place of takeoff and/or landing will be changed, it shall forthwith explain to passengers in detail the reasons therefore, as well as the manners in which it will deal with the situation."

In practice, two major international air carriers of Taiwan, China Airlines and EVA Air, clearly indicate that there are no guarantees to the published flight schedules regardless of departure or arrival, and only assume liability for damages caused by flight delays in there is "fault", which can be found in Article 10.1 of China Airlines' Conditions of Carriage; and Article 9.1.1 of EVA Air's Internal Tariff.
"China Airline Conditions of Carriage", online: China Airlines
＜http://www.china-airlines.com/en/en_def.pdf＞; "EVA Air Conditions of Carriage", online: EVA Air

flight delays generally referred to the airplane's "actual arrival time" against the arrival time shown in the flight table for the purpose of recording the flight on-time performance statistical data.[37] In 2012, the Civil Aviation Administration of China (CAAC) allowed two exceptions to not consider a delay as flight delay, if: (1) the airplane took off within thirty minutes after the airplane closes the hatch door as per planned schedule; or (2) if the airplane lands within ten minutes later than the planned schedule for airplane to open the hatch door.[38]

Compared to legislation in Taiwan and Mainland China, the notions of flight delays in the US and in the EU are more complicated due to precedents that have been set by case law. In short, in the US, flight delay is interpreted by the courts to mean "abnormal delay".[39] For instance, in *Monhammed Jahanger v. Purolator Sky Courier*[40], the US District Court for the Eastern District of Pennsylvania referred to Rene H. Mankiewicz's view,[41] and held that "the delay of one day was indeed 'abnormal' because it resulted from a weather-caused diversion of the carrier's airplane from its normal destination".[42] In fact, the courts in the US common law jurisdiction seemed to have added to the confusion by creating a new definition for flight delays by adopting the concept of "abnormal delay". Nevertheless, to establish the updated "Airline On-Time Statistics and Delay Causes", the US Federal Aviation

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＜http://www.evaair.com/en-us/conditions-of-carriage/＞.

[37] See "Flight Delays" (2014) online: Baidu News＜http://baike.baidu.com/view/1842692.htm＞ (in Chinese).

[38] See Civil Aviation Administration of China (CAAC; simplified Chinese: 中国民用航空局), Rules of Flight On-time Performance Statistics, CAAC [2012] No 22 online: ＜http://xn.caac.gov.cn/skgl/GLGD/201212/P020121217598682742984.pdf＞ (in Chinese).

[39] See Paul S. Dempsey, *Aviation Liability Law* (Canada: LexisNexis Canada Inc., 2010) at §14.1; Christopher Nyholm Shawcross and Kenneth Macdonald Beaumont, *Air Law*, 4th Edition (Butterworh, 1977) at 410.

[40] See *Monhammed Jahanger v. Purolator Sky Courier* (1985), CIV A No 83-4674, United States District Court, E.D. Pennsylvania.

[41] See *Ibid*. The court cited: "Given the inevitable hazards of air navigation, which the carrier's client cannot escape being aware of, many authors and some courts are of the opinion that 'delays' should be construed as meaning 'abnormal delays', i.e., a delay resulting from the carrier's failure to take all appropriate measures to ensure departure and arrival of the aircraft at the times specifically specified or indicated in [the] timetable."

[42] See *Ibid*.

Administration (FAA) defines: "A flight is considered delayed when it arrived fifteen or more minutes later than the schedule."[43] It is worth noting that more than 25% of the US national aviation system delay was caused by "weather" in the first half of 2014.[44]

In the EU, Regulation 261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding, cancellation and long delays of flights.[45] Article 6, Paragraph 1 of the Regulation provides the "definition" of delay for the purpose of applying this Regulation as:

> When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:
>
> (a) For two hours or more in the case of flights of 1,500 kilometers or less; or
>
> (b) For three hours or more in the case of all intra-Community flights of more than 1,500 kilometers and of all other flights between 1,500 and 3,500 kilometers; or
>
> (c) For four hours or more in the case of all flights not falling under (a) or (b),

From strict interpretation, this Regulation provides legislative clarification for "abnormal delay". In spite of this definition, in *Sturgeon v. Condo*[46] and *Böck v. Air France,*[47] the European Court held that: "Regulation No 261/2004 does not contain a definition of 'flight delay'. That concept may, however, be clarified in light of the context in which it occurs".[48] In addition, the Court clarified that:

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[43] See Airline On-Time Statistics and Delays Causes, online: Research and Innovative Technology Administration (RITA) Bureau of Transport Statistics
＜http://www.transtats.bts.gov/OT_Delays/ot_delayscause1.asp?type=5&pn=1＞.

[44] See Weather's Share of Delayed Flights National (January - June, 2014), online: RITA
＜http://www.transtats.bts.gov/OT_Delays/ot_delayscause1.asp?type=3&pn=1＞.

[45] In this thesis, the Regulation (EC) No 261/2004 is also referred to as "the EU Regulation 261/2004" or "Regulation 261/2004".

[46] *Christopher Sturgeon, Gabriel Strurgeon and Alana Sturgeon v. Condor Flugdienst GmbH; Stefan Böck and Cornelia Lepuschitz v. Air France SA*, Case C-402/07 and (C-432/07 [2009] ECR I-10923).

[47] *Stefan Böck and Cornelia Lepuschitz v. Air France SA* (Case C-432/07),
online: EUR-Lex ＜http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:C2007/283/37＞.

[48] The whole content is read as: "Regulation (EC) No 261/2004 establishing common rules on

> It is clear furthermore from Article 6 of Regulation No 261/2004 that the Community legislature adopted a notion of 'flight delay' which is considered only by reference to the scheduled departure time and which implies as a consequence that, after the departure time, the other elements pertaining to the flight must remain unchanged. Thus, a flight is "delayed" for the purposes of Article 6 of Regulation No 261/2004 if it is operated in accordance with the original planning and if the actual departure time is later than the scheduled departure time.[49]

It cannot be denied that the judgment of the Court still attempted to distinguish "flight delays" from "cancellations" for the purpose of applying this Regulation without the intention of granting an interpretation of "flight delays".

In sum, from the perspective of passengers, flight delays are based on the time difference between scheduled departure time and actual flight departure time, and between the scheduled arrival time and actual flight arrival time. From the point of view of air carriers, "abnormal delay"[50] and technical problems[51] should be taken into consideration to justify the differences between scheduled arrival time and actual arrival time.

Given the distinct interpretations of flight delays as examples, it is obvious that

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compensation and assistance to passengers in the event of denied boarding and of cancellation of flight provides in particular for the obligation for air carriers to compensate passengers, on a lump-sum basis, in the event of cancellation of a flight followed by arrival at destination by a replacement flight with a delay of more than three hours. Air carriers can escape this obligation only by relying on the existence of "extraordinary circumstances". However, Regulation (EC) No 261/2004 does not provide explicitly for the same obligation to compensate in the case of the flight merely being delayed."
See *Sturgeon v Condor Flugdienst GmbH and Böck and Lepuschitz v Air France*, C-402/07 and C-432/07 (19 November 2009), online: European Commission Legal Services < http://ec.europa.eu/dgs/legal_services/arrets/07c402_en.pdf > & < http://eur-lex.europa.eu/LexUriserv/LexUriServ?LexUriServ.do?uri=CELEX:62007J0402:EN:MTML >.

[49] *Ibid.*

[50] For instance, due to the rotation of the Earth, it usually takes about fourteen hours and fifteen minutes to fly from Taipei to Toronto in the summer solstice, and about thirteen hours and fifty minutes during the winter solstice; yet, it takes around fifteen hours and thirty minutes from Toronto to Taipei in both the summer and winter time. Thus, as long as the Earth keeps revolving, and the air space is subject to navigation control, then "abnormal delays" should be formed based on a comparative approach from a geographical dimension instead of applying the flight table schedules.

[51] For example, in busy airports, like Beijing International Airport, airplanes need to wait for air traffic control for departure and for landing. The actual arrival time should be different from the scheduled time.

the notion of flight delays has hardly been harmonized in different jurisdictions; and, that causes considerable difficulty for unification of air carriers' liability for flight delays through traditional lawmaking. This finding also applies to define remedies and *force majeure*; thus, in this thesis, no attempt to provide a "uniform definition" of any of the three terms will be made, instead the definitions will be taken "as is" in the different jurisdictions. Moreover, instead of trying to resolve these ambiguities, this thesis emphasizes the need to have a practical solution for addressing passenger claims for delays caused by *force majeure*.

1.3 Outline of this Thesis

Claims resulting from flight delays can be categorized as involving an international private law issue. As a result, numerous academic discussions[52] and case studies had looked for answers by examining the application of the 1929 Warsaw Convention and the 1999 Montreal Convention, especially based on the exclusive character of the two Conventions.[53] The principle of exclusivity provides an umbrella for air carriers to limit their operational burden under the Conventions: that is to say, if the passenger's claim is within the scope of the Conventions, there is no other claim for damage under national laws.[54] Unfortunately, the present legal practice allows the national laws to override the Conventions by interpreting the principle of exclusivity in a manner that does not cover passengers' claims. For instance, in the 1979 case of *Mahaney v. Air France,*[55] the US New York District Court held that the damage

[52] See Paul Stephen Dempsey and Michael Milde, International Air Carrier Liability: The Montreal Convention of 1999 (Montreal: McGill University Centre for Research in of Air and Space Law, 2005).
[53] See Mark Andrew Glynn, "*Montreal Convention Ousts All: Canadian Courts Rule on Exclusivity*" (2013) Vol. XXXVIII Annals of Air and Space Law 543.
See also Alexander Ho, "Does the Montreal Convention of 1999 provide an Exclusive Remedy in the International Carriage of Goods and Passengers?" (2009) Vol. XXXIV Annals of Air and Space Law at 379 at383.
[54] See Mark Glynn, *Case comment: Stott v. Thomas Cook Tour Operators Ltd [2014] UKSC 15 & Thibodeau v. Air Canada [2014] SCC 67* (2014) XXXIX Annals of Air and Space Law 683.
[55] See *Mahaney v. Air France* ,15 Avi. 17,665 (D.C. N.Y., 1979).

occasioned by delays are under the jurisdiction of the Warsaw Convention; however, claims under "discriminatory bumping" should be governed by the *Federal Aviation Act*. Similarly, after EU Regulation 261/2004 had allowed passengers to make pecuniary claims for cancellation, denied boarding and delays, various studies were conducted and focused on the impacts of Regulation 261/2004[56] and the scope for flight delays under passenger protection policy.[57] It was found that European legislators felt the need to prioritize the interests and address the "inconvenience" experienced by passengers over the interests of the air carriers.

A similar approach in passenger protection could be found in the blooming aviation market in Eastern Asia. Particularly, in Taiwan and Mainland China, where the societies and people's mentalities prioritize "humanity" (Chinese:情) before rationality (Chinese:理) and rationality before rules (Chinese:法); recourse to the law is often the last resort in resolving disputes. Taking the All Nippon Airways (ANA) case as an example, ANA initially justified not compensating passengers for costs incurred for accommodation and meals by resorting to the law. ANA stated that under the law, there is no legal obligation on her part to compensate passengers in such situations. However, based on commercial considerations, eventually ANA felt the need to compromise in order to satisfy the passengers' demands. In short, the existing international and national legal frameworks leave gaps, uncertainties and/or create complexities in responding to passengers' claims for flight delays caused by *force majeure*.

From Chapter II to Chapter IV, this thesis examines the gaps and uncertainties in applying the Conventions, and the complexities arising from the disjointed ways that

[56] See Francis P. Schubert, "Air Navigation and Volcanic Ash Contamination: A Legal Analysis" (2011) Vol. XXXVI Annals of Air and Space Law 217. See also Francis P. Schubert, "The Liability of Air Navigation Services for Air Traffic Delays and Flight Cancellations – The Impact of EC Regulation 261/2004" (2007) Vol. XXXII Annals of Air and Space Law 65.

[57] The detailed discussions will be given in Chapter III and Chapter IV.

the US, the EU, Taiwan and Mainland China have dealt with passengers' claims resulting from flight delays caused by *force majeure*. In addition to the application of the law, the author also examines how the intrinsically different values in the West and the East have influenced the importance and role that the law plays in providing remedies in flight delays caused by *force majeure*.

In the author's practical experience with severe claims for flight delays, air carriers have agreed to offer "remedies" to satisfy passengers' "needs" or expectations instead of insisting on who should be liable. In other words, in case of flight delays caused by *force majeure*, most passengers need "care" or "assistance" from air carriers more than a "pecuniary remedy", and some passengers request monetary compensation as the alternative solution when "care" or "assistance" is not available. Such alternative remedies could be understood from socio-economic, political, and cultural approaches in implementing the law in different jurisdictions.

With such controversial perspectives from the Conventions and from the national responses in these four jurisdictions, in Chapter V, the author attempts to justify why a remedy mechanism based on the philosophy of risk sharing can be applied to bridge gaps, and addresses the uncertainties and complexities under existing international and national legal frameworks. Final remarks are provided in Chapter VI.

1.4 Methodology

The author adopts an analysis from historical, analytical and comparative angles which is supported by case studies that examine passenger protection reality in the US, EU, Taiwan and Mainland China. These four jurisdictions and their legal systems have been selected to conduct a comparative analysis for the following reasons:

(1) Taiwan clearly illustrates a gap in the application of international conventions to govern air carriers' unified liability, including flight delays. Consequently,

national law plays a critical role for lawmakers, judges and lawyers who contribute to the diversity in the application of passenger protection in different jurisdictions;

(2) In assessing the essence of passengers' claims for pecuniary and non-pecuniary remedies, the US and the EU best represent the Western socio-economic and cultural values, where Mainland China and Taiwan epitomize typical Eastern values; and

(3) The concept of passenger protection is different in the US, the EU and Taiwan, which are distinct free market democracies, from Mainland China, which has adopted the so-called "Socialism with Chinese characteristics (Chinese: 中國特色社會主義)"[58].

Moreover, the US and the EU illustrate mature and capitalistic aviation markets, whereas Taiwan and Mainland China are still in the developing stages.[59] In particular, the US and the European countries rely mainly on rule of law to settle disputes arising from conflicts of interest, whereas in Taiwan and Mainland China, the application or interpretation of the law often first focuses on aspects of "social emotion", which is the synonym of "force of public opinion" (Chinese: 輿論壓力), and "ethics" before eventually turning to the "rule of law". More interestingly, it appears that passenger protection for flight delays in all four jurisdictions is gradually moving towards reliance on legislation to burden air carriers with an obligation of protecting

[58] "Socialism with Chinese characteristics" was mentioned in the report at the Seventeenth National Congress of the Communist Party of China (CPC). "The theoretical system of socialism with Chinese characteristics is a dynamic historical process and by now it has experienced three stages. Since the implementation of the reform and opening-up policy, it has become Chinese Marxism and expanded Marxism in three aspects of socialism, party and development."
See Changsheng Rong, "Analyzing the Theoretical System of Socialism with Chinese Characteristics" (2009) Vol 5 No 10 Asian Social Science at 134.

[59] Mainland China performs so-call "market socialism" in her Constitution. Some of Taiwan's academics held that Taiwan has been under the "Party-State Capitalism" under the KMT Party's ruling period. See Chen Hsih-mong and others, *The Role of the State in the Development of Capitalism in Taiwan: A Review of Party-State Capitalism* (Taipei: Chen Association Press 1992) at 16. (in Chinese)

passengers during the flight delay period. However, an analysis of the four jurisdictions and the multiple legal systems that govern flight delays caused by *force majeure* reveals inconsistencies both in legislation and practice regarding the protection of passengers. This trans-systemic analysis supports the necessity for finding a harmonized solution and framework to minimize the complexities and uncertainties resulting from legislation and practice in the jurisdictions where the claims are made.

In addition to carrying out desk reviews of primary and secondary materials, and attending international conferences to collect up-to-date information, with the permission of McGill Research Ethics Board Office, in 2013, the author had also conducted interviews to confirm the shortcomings of the current insurance system for flight delays. The interviewees included two government officers from the Taiwan Civil Aeronautics Administration, a Consumer Ombudsman Officer, four senior managers representing international air carriers operating in Taiwan and an insurance underwriter representing a global reinsurance company. These interviewees responded to ten questions and provided their views on complexities of legislations, the shortcomings of the current insurance system for flight delays and commented on having an innovative remedy mechanism to assist passengers for *force majeure* delays. The results point to support a simple and effective remedy mechanism for *force majeure* delay claims that is beyond the confines of the existing legal frameworks.[60]

The author has attempted to cover all key issues for the thesis and has strived to seek relevant up-to-date information on legislation and practice concerning flight delays caused by *force majeure*. There are, however, instances where dead ends have

[60] The interview and survey was approved by McGill Research Ethics Board to conduct between 11 January 2013 to 10 January 2014. In 2013, the author conducted interviews and survey on international air carriers, Taiwan Consumer Protection Commission, Taiwan Civil Aeronautics Administration as well as a well-known international insurance underwriter. Please refer to Chapter V.

been met; especially, when searching for official legislation and court cases in Mainland China where there is no established comprehensive case-law database. Some references found online today could cease to exist with the passage of time. Furthermore, the analysis of inconsistencies in legislation and practice aims to explain that lawmaking has hardly provided a solution for flight delays caused by *force majeure* that are not attributable to air carriers. Thus, it is meaningful to find an innovative remedy scheme to provide alternatives to air carriers' regulatory obligations and to immediately respond to passengers' expectations. Nevertheless, given the scope of the dissertation, the business plan for the suggested remedy mechanism will be left for future studies.

1.5 Conclusion - Hypothesis of Innovative Remedy Mechanism

Discussions on the global impact of flight delays during the 6th Worldwide Air Transport Conference held by the ICAO[61] concluded that neither the Warsaw Convention nor the Montreal Convention could solve the present issues arising from delays caused by *force majeure*. Furthermore, based on experience in handling severe passenger claims from different jurisdictions, the author has witnessed that the interpretations of certain terms in the two Conventions are different in various jurisdictions, and the exclusivity principle created by the Conventions has also been eroded by national law in legal practice. This is despite provisions of the principle of exclusivity under the Conventions.

Such findings support the argument by the author that more lawmaking will not reduce the numbers of passengers' claims, especially for non-pecuniary claims against air carriers in delays caused by *force majeur*e. So, in light of the uncertainties and

[61] The ICAO's 6th Worldwide Air transport Conference was held at Montreal from 18-22 March 2013.

complexities of the laws to address remedies for delays caused by *force majeure*, what other tools should we seek to use? An innovative remedy mechanism beyond liability-bearing arguments appears to be more practical to reduce conflicts from distinct socio-economic, political, and cultural values in handling passenger claims in different jurisdictions. Most importantly, such an innovative remedy mechanism will focus on answering the question, "Who should be responsible for damage and/or inconvenience resulting from flight delays caused by *force majeure*?"

CHAPTER II
INTERNATIONAL REGIME: WARSAW AND MONTREAL CONVENTIONS

CHAPTER II
INTERNATIONAL REGIME: WARSAW AND MONTREAL CONVENTIONS

Can the international legal framework governing air carrier liability, the Warsaw and the Montreal Conventions, provide harmonized answers as to who should be responsible for flight delays caused by *force majeure*? The answer is an unequivocal "no." Why? To date, only 113 (59%) of ICAO Member States have ratified the Montreal Convention.[62] A number of major States such as Bangladesh, Indonesia, Russia, Sri Lanka, Thailand, The Philippines and Vietnam have yet to become parties to the Montreal Convention.[63] Based on such reality, how could a harmonized solution be formed?

More importantly, the exclusivity principle, created by the Warsaw and Montreal Conventions, has been eroded by national laws in response to passengers' claims. The exclusivity principle has also created complexities in making claims since the interpretation of the "rules" established by the Conventions is mainly subject to the judicial assessment. This chapter will demonstrate how politics and national laws have influenced the application of the exclusivity principle. For instance, the goal of uniformity of liability under the conventions is frustrated by the special political status of Taiwan, which is not considered a "State" party to any of the air carrier liability conventions.

In this chapter, the examination of the exclusivity of the Conventions focuses on three topics: first, the political influence in defining "international carriage" of which "Taiwan" is a fitting example; second, the distinct results of choosing "jurisdiction" to make claims — taking the SQ006 Accident as an example; and finally, the "mental

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[62] See ICAO, "Current Lists of Parties to Multilateral Air Law Treaties", online: ICAO Secretariat ＜http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf＞.
[63] *Ibid.*

anguish" debates against permissible types of remedies under the Conventions. Studies of these three issues support the argument that there are no satisfactory solutions under the Conventions to respond to passengers' flight delay claims.

In terms of remedy for flight delays caused by *force majeure*, Article 20 of the Warsaw Convention and Article 19 of the Montreal Convention preclude air carriers from availing themselves of limited liability where air carriers can show that they had taken the necessary precautions to avoid the delays. Accordingly, air carriers try to avoid liability for compensating passengers in delays beyond their control, such as *force majeure* or extraordinary circumstance. Furthermore, due to no definition of "damage" under Article 19 of the Warsaw Convention, passengers borrow the case-law made for mental anguish associated with "bodily injury" specified in Article 17 of the Warsaw Convention to claim damage in flight delays. However, in practice, the remedy scheme for international flight delays caused by *force majeure* is in most cases subject to national laws instead of the Conventions. Because of that, relying on the international legal framework, like the Conventions, to solve this particular issue is not realistic!

2.1 From Warsaw to Montreal

The 1929 Warsaw Convention[64], formally entitled the Convention for the Unification of Certain Rules Relating to International Carriage by Air, has evolved into one of the most important instruments of private international air law. The 1999 Montreal Convention[65], as the successor of the Warsaw Convention, formally entitled the Convention for the Unification of Certain Rules for International Carriage by Air,

[64] Convention for the Unification of Certain Rules Relating to International Carriage by Air, 14 October 1929, ICAO Doc. 7838, 49 Stat. 3000, 137 LNTS 11 [*Warsaw Convention*]
[65] Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, ICAO Doc. 9740, TIAS 13038, 2242 UNTS 350 [*Montreal Convention*].

was signed on 28 May 1999 and came into force on 4 November 2003. As their names imply, the two Conventions attempted to unify "certain rules" relating to carriage by air, and apply to all international carriage of persons, luggage or goods performed by aircraft for reward.[66] In the other words, the Conventions aimed to serve the needs for the passengers on international air journeys to receive similar compensation for certain claims whether such a claim was brought in Montreal or Beijing. The "certain rules" eventually focused on air carriers' liability for passengers' death, bodily injury, and delay damage caused to passengers, luggage and cargo. For instance, Article 19 of the Warsaw and Montreal Conventions provides that an air carrier is liable for damage occasioned by delays in the carriage by air of passengers, luggage or goods. Accordingly, the compensation for flight delays should be governed by the Conventions; that is to say, air carriers' obligations should be the same if the flight is delayed in Montreal or in Beijing, or anywhere in the world. Unfortunately, the experience from the author's own legal practice in handling severe passenger complaints shows that the Conventions provide limited scope for delay claims. Furthermore, it is evident that there is a diverse application of the Conventions and the remedy schemes when comparing jurisdictions in the West and the East. Even the very basic question regarding whether or not the Conventions are applicable can be interpreted and answered disparately in different jurisdictions.[67] To understand how such practices have evolved, a review of the history of the two Conventions is useful.

2.1.1. Warsaw Convention

International air transportation saw its development in the 1920s. To avoid financial crises for air carriers in case of an aircraft crash, international conferences on

[66] See Warsaw Convention, art. 1(1); Montreal Convention, art. 1(1).
[67] This conclusion is made by the author from personal experience in the field, and the further cases discussed in this chapter are evidence to support author's conclusion.

private air law were held in Paris in 1925 and in Warsaw in 1929 resulted in the drafting of the Warsaw Convention.[68] The Warsaw Convention was conceived by legal experts of the *Comité International Technique d'Experts Juridiques Aériens*[69] with the purpose of providing a uniform regime for air carriers' limited liability.[70] The Convention came into force on 13 February 1933, and has been recognized and implemented by 152 Contracting States as of April 2016.[71]

The Conventions attempted to standardize some elements, such as to eliminate conflicts which might arise in international air travel, to create a system of internationally recognized documentation, to prescribe a limitation period for claims, to resolve questions of jurisdiction, and perhaps most importantly, to impose very strict limits on carriers' liability.[72] The *quid pro quo* of the limitation of liability was the reversal of the burden of proof.[73] Fault of air carriers was assumed on proof of damage, and air carriers could only escape from liability by establishing that it, its servant and agents, had taken "all necessary measures" to avoid the damage.[74] These liability rules established by the Warsaw Convention were in favor of air carriers in order to promote investment for the commercial air transport industry.[75] The uniform regime under the Warsaw Convention, therefore, had limited recovery for passenger death or bodily injury to a maximum sum of 125,000 *Poincaré Francs*, or approximately US $8,291.87, without having to prove the misconduct of the air

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[68] See Nathan Gayle Ostroff, "Warsaw Convention, the Comments" (1966) 2 Texas International Law Forum 207 at 207.

[69] The *Comité International Technique d'Experts Juridiques Aériens* had been referred to as the "CITEJA." See Georgette Miller, *Liability in International Air Transport* (Deventer: Kluwer Law International, 1977) at 12.

[70] See Miller, *supra* note 69 at 7.

[71] See ICAO, "Current lists of parties to multilateral air law treaties", online: ＜http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx＞.

[72] See Fountain Court Chambers, *Carriage by Air* (London: Butterworths 2001) at 3.

[73] *Ibid.*

[74] See Warsaw Convention, art. 20(1).

[75] See George N. Tompkins Jr, *Liability Rules Applicable to International Air Transport as Developed by the Courts in the United States*: *From Warsaw 1929 to Montreal 1999* (The Netherlands: Kluwer Law International, 2010) at 3.

carrier.[76]

It is worth mentioning that Article 23 of the Warsaw Convention nullifies certain abusive provisions in contracts of carriage.[77] Article 32 of the Warsaw Convention renders null and void any contractual provision infringing on rules of the Convention concerning the choice of law and the jurisdiction of the court. These two articles endorse the purpose of the Warsaw Convention to unify air carriers' limited liability in the Contracting States. The limited liability, however, faced its challenges when World War II came to an end. The "Jane Froman" litigation in New York forced aviation authorities in the US to review the drastic impact of limited liability for passengers' death or bodily injury caused by an accident during international transportation by air. The New York jury made a verdict in favor of the air carrier, and Jane Froman, an internationally acclaimed singer, was granted US $8,300 as total compensation for her bodily injury as well as loss of income.[78] This case explored the unacceptably low amount of compensation to passengers from a wealthy country. From this case onward, the US has urged the international aviation community to increase the limited compensation for passengers' death and bodily injury caused by accidents in "international carriage".[79] As a consequence, the Warsaw Convention liability regime was amended by a series of private international law conventions, such as the 1955 Hague Protocol,[80] the 1961 Guadalajara Convention,[81] the 1971

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[76] See "Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention" (1967) 34 University of Chicago Law Review 580 at 580. See also George N. Tompkins Jr., *supra* note 75 at 1.

[77] Article 23 of the *Warsaw Convention* provides:

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

[78] "Jane Forman" litigation is referred to "*Ross v Pam American Airways*" 190 Misc. 974 (N. Y. Misc.1947). See also Wei-Tien Chaw, *International Air Law*, Vol.1, (Taipei: Water Buffalo Publisher, 1991) (in Chinese), at 261-262.

[79] See Tompkins, Jr. *supra* note 75 at 2-3.

[80] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 28 September 1955, 478 UNTS 371.

Guatemala City Protocol,[82] and the 1975 Montreal Protocol No 4.[83] The Warsaw Convention together with its amendments is collectively called the "Warsaw System."[84] The Warsaw Convention liability regime was also supplemented by intercarrier agreements, such as the 1966 Montreal Intercarrier Agreement,[85] the 1992 Japanese Initiative,[86] the 1995 IATA Intercarrier Agreement on Passenger Liability (IIA),[87] the 1996 IATA Intercarrier Agreement on Measures to Implement the IIA (MIA),[88] and the 1996 IATA Provisions Implementing the 1995 and 1996 IATA Intercarrier Agreements (IPA).[89] Nevertheless, the scope of uniform regimes

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[81] *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,* 18 September 1961, ICAO Doc8181

[82] *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, 8 March 1971,* ICAO Doc 8932

[83] *Montreal Protocol No 4 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,* 25 September 1975, ICAO Doc 9148 (entered into force 14 June 1998)

[84] See Michael Milde, *International Air Law and ICAO* (Utrecht: Eleven International Publishing, 2008) at 283.

Based on the author's study, the necessity of protecting infant air carriers under the *Warsaw Convention* designed in 1929 has been challenged, and eventually led to modifications of the *Warsaw Convention* through the a series of protocols which are collectively known as the Warsaw System. The Hague Protocol of 1955 doubled the limits of liability under the Warsaw Convention. The Guadalajara Convention of 1961, ratified by 66 States, which supplemented the Warsaw Convention in terms of the contracting company's liability in cases where the transport is provided by another carrier essentially relates to charter flights in the context of an association. In 1971, by the Guatemala City Protocol, the Warsaw Convention rule on the presumption of fault yielded to strict liability, irrespective of fault. The four Montreal Protocols of 1975 amended the earlier acts in terms of the limits of liability, and the fourth Montreal Protocol in particular specified that the Warsaw System did not apply to postal transport. Of these four protocols, the first two only came into effect on 5 February 1996, while the third and fourth have not yet been ratified by a sufficient number of States. The US has signed only the last two and has ratified none of them. Only nine European Community States have ratified the four protocols to date

[85] See 106th Congress Treaty Doc. 106-45.

[86] In November 1992, the airlines of Japan amended their conditions of carriage to provide for strict liability for passenger death or bodily injury for provable damages up to 100,000 SDRs. See Tompkins, Jr. *supra* note 75 at 2.2.2.

[87] See International Air Law (in Thai) Annex C: IATA Intercarrier Agreement on Passenger Liability, Department of Civil Aviation, The Thailand, online:
＜http://www.aviation.go.th/airtrans/airlaw/IATAInterCarrierAgreemennt.html＞

[88] See International Air Law (in Thai) Annex E: Provisions Implementing the IATA Intercarrier Agreement to be Including in Conditions of Carriage and Tariffs, Department of Civil Aviation, The Thailand, online: ＜http://www.aviation.go.th/airtrans/airlaw/ProvisionsImplementing.html

[89] See Milde, *supra* note 84 at 283. Online: ICAO
<http://legacy.icao.int/icao/en/assembl/a37/wp/wp281_rev_en.pdf> .
For table which provides an overview of the status of treaties and status of States in relation to the treaties, online: ICAO

under the above-mentioned amendments is limited and does not exceed far beyond passengers' death, bodily injury, luggage and delay damage. In fact, many of the more common present-day passenger grievances and issues, such as flight cancellation, denied boarding, disabled passenger carriage or the handling of unruly passengers, are not governed by the Warsaw Convention or its related international conventions. With time, a new convention, therefore, was brewing to reform the equilibrium between air carriers' obligation and passenger protection to meet the transformation in the aviation industry.

2.1.2 The Montreal Convention

By modernizing the Warsaw Convention regime, the International Civil Aviation Organization (ICAO) attempted to draw up a single unifying instrument. As a result, the 1999 Montreal Convention was proposed to the ICAO Member States and superseded the Warsaw Convention, with many concepts and principles remaining unchanged.[90] For example, air carriers' liability only arises for delay, passengers' death and bodily injury caused by an accident onboard the aircraft in the course of embarking or disembarking.[91] The main changes are related to liability limits and jurisdiction.

This Convention essentially formed a two-tier liability system. Under the first tier, air carriers are strictly liable for the proven damages up to 100,000 SDRs (Special Drawing Rights), which has been increased to 113,100 SDRs on 30 December 2009.[92] Above 113,100 SDRs, which is the second tier, air carriers are

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[90] Fountain Court Chambers, *supra* note 72 at 17.
[91] See *Warsaw Convention*, art. 17 and *Montreal Convention*, art. 17.
[92] See ICAO State Letter LE3/38.1-1-09/87. Tompkins Jr., *supra* note 75 at 385.
SDRs is an abbreviation of "Special Drawing Rights". See International Monetary Fund, *Special Drawing Rights*, online: International Monetary Fund <http://www.imf.org/external/about/sdr.htm>:

> The Special Drawing Right (SDR) is an international reserve asset, created by the IMF in 1969 to supplement the existing official reserves of member countries. The SDR is neither a

liable unless they prove that the damages was not caused by the negligence or other wrongful act or omission of the air carrier's servants or agents, or was solely due to the negligence or other wrongful act or omission of a third party.[93] In addition, passengers are entitled to compensation of 4,694 SDRs for flight delay, and 1,131 SDRs per ticketed passenger for destruction, loss or damage to baggage.[94] The Montreal Convention proposes to provide full compensation for all economic and non-economic losses incurred, according to the laws of the domicile of the victim.[95] This uniform regime was created to avoid "forum shopping" litigation but preserves for air carriers the right to prove their lack of wrongdoing.[96] Punitive damages remain excluded.[97]

To be precise, the Montreal Convention is an independent instrument, not an amendment to the Warsaw System.[98] Nevertheless, the Montreal Convention had achieved the following innovations:[99]

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currency, nor a claim on the IMF. Rather, it is a potential claim on the freely usable currencies of IMF members. Holders of SDRs can obtain these currencies in exchange for their SDRs in two ways: first, through the arrangement of voluntary exchanges between members; and second, by the IMF designating members with strong external positions to purchase SDRs from members with weak external positions. In addition to its role as a supplementary reserve asset, the SDR serves as the unit of account of the IMF and some other international organizations.

[93] See Article 21(2) of the Montreal Convention, which provides that:

> 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 100,000 Special Drawing Rights has been increased to113,100 SDRs on 30 December 2009.
See Raymond Benjamin, "Revision of limits of liability under the Montreal Convention of 1999 – Notification of effective date of revised limits", 4 November 2009, LE 3/38.1-09/87 online: ICAO < http://folk.uio.no/erikro/WWW/cog/087e.pdf >.

[94] See ICAO State Letter LE3/38.1-1-09/87. Tompkins, Jr. *supra* note 75 at 385.

[95] See Fountain Court Chambers, *supra* note 72 at 18.

[96] *Ibid.*

[97] *Ibid.*

[98] See Milde, *supra* note 84 at 283.

[99] The information is organized from a paper prepared by Prof. Dr. Michael Milde for the International Conference on Contemporary Issues of Air Transport, Air Law & Regulation, New Delhi, India 21-25 April 2008. This conference was held by the Institute of Air & Space Law of McGill University, in collaboration with the Airports Authority of India, and the Center for Aviation Studies at the University of Petroleum and Energy Studies. The Conference papers could be found at online: IASL <http://www.mcgill.ca/files/iasl/C08-Michael_Milde-M_99_Merits_and_Flaws.pdf>.

(1) The new convention forms a single instrument instead of a patchwork of a Convention, Protocol, Protocol-to-Protocol and Protocol-to-Protocol-to-Protocol;

(2) The new convention is written in six languages (English, French, Spanish, Russian, Arabic and Chinese) compared to the Warsaw Convention, which was only penned in French with some amendments compiled in English, Spanish, and Russian. The English, Arabic, Chinese, French, Russian and Spanish languages are official languages;

(3) The best elements of the previous amendments, such as the Guadalajara 1961, the Guatemala City 1971, and the Montreal Protocol No 4 of 1975, were accepted by the new convention. The new convention provides a considerable saving to the airlines by simplifying the documents of carriage, and by separating the regime of liability;

(4) The two-tier regime of liability initiated by Japan and IATA was adopted into the new convention after complex negotiations;

(5) The new convention includes a specific provision on insurance (nearly all States required this as a condition for the granting of air carriers' permits);

(6) The new convention introduced an additional jurisdiction, which is so called the 5th Jurisdiction, to supplement the four bases of jurisdiction provided under the Warsaw Convention;[100]

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[100] The Warsaw Convention allows a suit to be brought against a carrier in the country: (1) of its incorporation, (2) of its principal place of business; (3) where the ticket was purchased, and (4) of destination of the passenger.
Article 33 of the Montreal Convention provides:

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of

(7) China ratified the Convention first (also with respect to Macao) and Hong Kong later, which is so called the "Hong Kong Clause"[101]; and

(8) The European Union was named a "party" to the Convention.[102]

Despite the above changes, the innovations presented several critical flaws: The Montreal Convention does not provide unified solutions to resolve passenger disputes following the implementation of the Warsaw Convention such as flight cancellation or denied boarding. The new convention failed to clarify the vague and imprecise term "accident" that is the key trigger of air carriers' limited liability for passengers' death and bodily injury.[103] Some judicial decisions have interpreted the term in a broader view and placed air carriers in a position of an insurer of any conceivable risk.[104] Moreover, the new convention still kept the term "bodily injury", which has historically been coupled with the ambiguity of whether or not it applies to "mental trauma" or "mental anguish". Much leeway has been left to jurisprudence and this has generated obstacles to a uniform interpretation of the unified law. The jurisprudence now allows national courts to interpret the "certain rules" under the Conventions.

In conclusion, the Warsaw Convention and the Montreal Convention were not designed to resolve all passenger disputes related to international air transport, but

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passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

[101] See Milde, *supra* note 84 at 284.
Due to the PRC's special case, an innovative provision in Article 56 of the Convention was adopted to enable a State, composed of territorial units with different legal systems, to accept the Convention either for the entire territory or only one of them. The intention was to address the issue of Hong Kong and Macau; thus, the term "Hong Kong Clause" was coined. It was expected that for Hong Kong the Convention would be applicable first while China may require some time to accept it. However, for political reason, China ratified the Convention well before it became applicable for Hong Kong.

[102] See Milde, *supra* note 84 at 283.
It is worth mentioning that Dr. Milde remarked that to recognize the European Union as a "party" to the Convention is to please the Brussels bureaucracy. From a conventional legal perspectives, the European Union is not a "State" which can sign or ratify an international treaty. A special provision under Article 53(2) opens the Montreal Convention to signature and ratification by "Regional Economic Integration Organizations", which the EU is undoubtedly an archetype of.

[103] See Milde, *supra* note 84 at 284.

[104] *Ibid.*

only to unify "certain rules", such as air carriers' limited liability for passengers' death, bodily injury, and delay damage caused to passengers, luggage and cargo relating to international carriage by air. Judicial decisions play a critical role in interpreting the terms of the Conventions, and as a result, passengers seek remedies, including pecuniary and non-pecuniary claims resulting from flight delays, under or outside the Conventions by "forum shopping". Moreover, there are 193 nations in the UN[105], but only 152 States are the Contracting States to the Warsaw Convention and 113 States are governed by the Montreal Convention. Consequently, the international legal framework created by the Warsaw and the Montreal Conventions has hardly achieved the expectation of unifying air carrier's liability. As a result, the Conventions cannot provide harmonized answers and solutions to remedies for flight delays caused by *force majeure.*

2.2 Defining "International Carriage" - Using "Taiwan Issue" as an Example

To determine the applicability of the Conventions, the first step is to establish whether the concerned international flight falls into the definition of "international carriage" under Article 1(2) of the Conventions. International carriage means any carriage according to the contract made by the parties, in which the place of departure and the place of destination, whether or not there is a break in the carriage or a transshipment, are situated either within the territories of two "High Contracting Parties" or "State Parties", or within the territory of a single "High Contracting Party" or "State Party", if there is an agreed stopping place within the territory of another State, even if that State is not a party to this Convention.

For instance, Taiwan is neither a "High Contracting Party" under the Warsaw Convention nor a "State Party" under the Montreal Convention, but Canada is.

[105] See Member States of the United Nations, online: ＜http://www.un.org/en/members/＞.

Accordingly, the round trip with departure from Montreal to Taipei is considered an "international carriage"; however, it is not defined as "international carriage" if the round trip departure is from Taipei to Montreal. Moreover, depending on a State's political position on China, the "Taiwan" issue is very different from one jurisdiction to another in interpreting "international carriage" under the Conventions.

2.2.1 What is the "Taiwan Issue"?

Taiwan is an island which lies 110 miles from the southeast coast of Mainland China, and is separated from the Mainland by the Taiwan Strait.[106] Taiwan was annexed to be a province of China during the Qing Dynasty in 1683, and then was ceded to Japan by the Treaty of Shimonoseki.[107] After the end of World War II, Japan surrendered Taiwan to the Allied Forces, which were under the direction of General Chiang Kai-Shek representing the government of the "Republic of China" (ROC).[108] On 1 October 1949, the Chinese Communist defeated the Chinese Nationalist Party and established the People's Republic of China (PRC). In the meantime, the Chinese Nationalist Party fled to Taiwan to form the government and maintained the name of the Republic of China (ROC). Since 1949, the Taiwan government and the PRC's government have been claiming to be the sole legitimate government of "China". Based on the United Nations General Assembly Resolution 2758, passed on 25 October 1971, the UN recognized the People's Republic of China (PRC) as "the only legitimate representative of China to the United Nations".[109] As a result, the ROC

[106] Jessika Li-Juan Ko, "Liability aspects of air transport between Taiwan, Hong Kong and Mainland China" (LL.M. Thesis, Institute of Air and Space Law, McGill University, 1995) at 5. [unpublished]
[107] See Kent L. Chrisiansen, "Comment Self-determination for the People of Taiwan" (1984) 14 California Western International Law Journal at 475.
[108] Jessika Li-Juan Ko, *supra* note 106, at 6.
[109] United Nations General Assembly Session 26 Resolution 2758, Restoration of the lawful rights of the People's Republic of China in the United Nations A/RES/2758(XXVI) 25 October 1971, Retrieved 2008-10-07.
＜http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2758%28XXVI%29＞.

retains control only over the island of Taiwan while the PRC retains control over Mainland China. Thus, the jurisdiction of Taiwan is independent from the jurisdiction of Mainland China.

It is worth noting that the Warsaw Convention came into force in the territory of "China", including Taiwan, on 18 October 1958.[110] However, after the PRC inherited the legal position of the ROC in the UN in 1971, there is no legal basis for Taiwan to apply either the Warsaw Convention or any other treaties under the "China" entitlement. Accordingly, the ROC declared that Taiwan is not an original signatory to the Warsaw Convention. The courts in Taiwan, therefore, have held a view that neither the Warsaw nor the Montreal Convention is applicable for governing passengers' claims against air carriers in international flights from, to or through Taiwan unless contractual parties chose the conventions as the governing laws for their disputes. For instance, in a verdict (No: Tai-Shan 1201) made in 2008, the Taiwan Supreme Court clarified that:

> Customs are only applicable as supplement when no available provision is found in the law. Article 649 of the *Civil Code* expressly provides the rules for carriers to waive or to restrict their liability. In addition, our country is not a contracting State to the Warsaw Convention. Since the Appellant and Yu-Jan Company did not expressly agree to apply the Warsaw Convention to govern their contract, the Warsaw Convention should not prevail over the liability regime specified in Article 649 of the *Civil Code* simply because the limited liability under the Warsaw Convention is a custom in international trade activities...[111]
> (Chinese:…又習慣僅於法律無明文規定時，始有補充之效力，民法第649條既已就運送人免除或限制運送人責任予以明文規定，且我國並非華沙公約締約國，上訴人與宇瞻公司復未明示同意適用華沙公約，自不得僅以國際貿易有以華沙公約限制運送人之單位責任，而據以排

[110] See Status of China with regard to International Air Law Instruments, online: ICAO ＜http://www.icao.int/secretariat/legal/Status%20of%20individual%20States/china_en.pdf＞.

[111] See *Global United Air Cargo Forwarder Ltd. v. MSIGMingtai Inusrance* (2008) Supreme Court (case no: 97 Tai-Shan No 1201, 97 年臺上字第 1201 號) online: ＜http://jirs.judicial.gov.tw/Index.htm＞ (in Chinese).

除民法第 649 條規定之適用…)

Nevertheless, in a verdict (No: Sue 2168) rendered by the Taipei District Court in 2006[112], the judge emphasized that the Warsaw Convention is limited to the defined international carriage specified in Article 2(2) of the Convention, but not for all flights. The judge, therefore, held the view that even though the standard air ticket might indicate the Warsaw Convention as the governing law for the air transportation contract, it is just a reminder to passengers and is not legally binding between passengers and the air carrier. Consequently, the judge applied Taiwan law as the governing law for making a verdict in favor of Taiwanese passengers to claim their non-pecuniary remedy, or so called "remedy for mental anguish" (精神賠償), for the flight delay caused by a snow storm in Japan. The detailed analysis of this verdict is provided in Chapter IV.

2.2.2 The Taiwan issue under US Jurisdiction

In *Atlantic Mutual Insurance Company v. Northwest Airlines Inc.*,[113] the US District Court held that under Article 38 of the Warsaw Convention, a "High Contracting" party is a State which is an original signatory to the Convention or one which ratified the Convention or filed declarations of adherence to the Convention after it went into force. From 1949 to the present, two governments, the ROC and the PRC, have been claiming to be the sole legitimate government of "China". On 30 December 1978, the United States formally recognized the PRC as the sole government of China in its entirety and withdrew recognition of the Republic of China which it had recognized as the legal representative of China since 1949. The

[112] See *53 Passengers v. Japan Asia Airlines* (2006) Taipei District Court (case no: 95 Sue No 2168, 95 年訴字第 2168 號) online: ＜http://jirs.judicial.gov.tw/FJUD/＞(in Chinese).
[113] 796 F. Supp. 1188; 1992 U.S. Dist. LEXIS 12423.

plaintiff contended that Taiwan is not a party to the Warsaw Convention because Taiwan, in its own name, is not an original signatory to the Convention, nor has it, in its own name, ratified or adhered to the Convention since the Warsaw Convention went into force. The defendant argued that the PRC ratified the Convention in July 1958 and that the Convention "shall of course apply to the entire Chinese territory including Taiwan". The court concluded that Taiwan is part of the PRC, and thus, Taiwan is a party to the Warsaw Convention.

The opposite result is found in *Mingtai Fire & Martine Insurance Co., Ltd. v. United Parcel Services & United Parcel International, Inc.*[114] The plaintiff's argument on appeal asserted that the United States' recognition of China and de-recognition of Taiwan required the court to honor China's declaration that its adherence to the Convention binds Taiwan. The rationale of the US Court of Appeal for the 9th Circuit is that the determination of whether China's adherence to the Convention binds Taiwan conflicts with two distinct areas of foreign relations: the effects of foreign sovereign recognition, and the status of treaties. The Court of Appeal held that the recognition of a foreign sovereign binds the courts because determining "who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question".[115] The Court of Appeal found that "China" is listed as a signatory to the Warsaw Convention, while "China (Taiwan)" is not, thus, the Court of Appeal concluded that Taiwan, which is not a signatory to the Convention, was not bound by the People's Republic of China's adherence to the Convention. Mingtai petitioned to the US Supreme Court for a writ of certiorari, but the US Court of

[114] See *Mingtai Fire & Martine Insurance Co., Ltd. v. United Parcel Services & United Parcel International, Inc*. (No 98-15088) 177 F.3d 1142; 1999 U.S. App. for the 9th Circuit of California; *Mingtai Fire & Martine Insurance Co., Ltd. v. United Parcel Services Inc., Et al.* 99-319, Supreme Court of the United States 528 U.S. 951; 120 S. Ct. 374; 145 L. Ed. 2d 292; 1999 U.S. LEXIS 6950; 68 U.S.L.W. 3262.
[115] *Ibid.*

Appeals for the 9th Circuit denied the motion. As a result, Taiwan is not a "High Contracting Party" of the Warsaw Convention.

The US Court of Appeal system encountered a growing number of disputes involving private parties from Taiwan in the past several years.[116] After the US de-recognized the ROC, the US Congress enacted the *Taiwan Relations Act* (TRA), which was effective as of 10 April 1979, to continue the "commercial, cultural and other relations" between the US and Taiwan on unofficial bases. The TRA should be the grounds for determining all issues concerning the legal status of Taiwan. In practice, however, the federal courts have not been consistent in their holdings on the legal status involving Taiwan officials, nationals, and/or entities.[117] The *Mingtai* case explored the issue of whether the PRC's accession to a certain international convention or treaty should bind Taiwan as well. Unfortunately, the *Mingtai* case created a new challenge to apply the Conventions for international air transport involving Taiwan because it held that Taiwan is not bound by either Convention.

Undoubtedly, the legal practice in the US evidenced that there is a confusingly diverse application of the Conventions in the West based on political concern. Even the very basic question of whether or not the Conventions are applicable can be interpreted and answered differently in the jurisdictions under the same country.

2.3 Choosing "Jurisdiction" — Using SQ006 Accident as an Example

In examining the exclusivity of the Conventions, the restrictions in choosing a jurisdiction also provided loopholes to not apply the Conventions. Article 28(1) of the Warsaw Convention as well as Articles 33 and 46 of the Montreal Convention define

[116] See Andy Y. Sun, "Revising Taiwan's Legal Status in the United States: The Impact of Taiwan Relations Act on Private Disputes", online: Asia Pacific Legal Institute <http://apli.org/ftp/Taiwanstatus.pdf> at 1.
[117] *Ibid* at 4.

eligible jurisdictions for claimants to bring their action.[118] By referring to "international carriage" and "jurisdiction," a national court is able to determine if the Conventions are applicable to the claimants' actions. Nevertheless, where the jurisdictional rules under the Conventions do not apply, jurisdiction can be decided according to the ordinary rules of private international law; because of this, "forum shopping" exists.

Forum shopping is used by practitioners as part of their litigation strategy; this jeopardizes the attempts to unify certain air carriers' liability under the Conventions. Furthermore, because of the two-year prescription period under Article 29 of the Warsaw Convention and under Article 35 of the Montreal Convention, practitioners usually file more than one lawsuit in various jurisdictions to avoid the risk that claims may be dismissed in the most favorable jurisdiction.[119] As a result, the application of the rules of jurisdiction as well as the scope of applying the Conventions have direct and indirect influence on air carriers' liability, especially when domestic passenger protection is taken into consideration.

The claims related to the "SQ006 Accident", which took place in Taiwan, illustrate the distinct outcomes in applying the Conventions. Particularly, the application of the Conventions can be affected by political issues in some jurisdictions,

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[118] Article 28 of the *Warsaw Convention* provides two conditions for choosing the forums:
(1) before a court in the territory of one of the High Contracting Parties; and
(2) either one of the following forums: (a) at the domicile of the carrier; (b) principal place of business of the carrier; (c) a place of business of the carrier; or (d) at the place of destination.
Article 33 of the Montreal Convention provides plaintiffs with five possible jurisdictions within which to pursue a legal action under the Convention, namely the domicile of the carrier, the carrier's principle place of business, where the contract was made and carrier has a place of business, the destination and where the passenger has his principal and permanent residence. In addition, Article 46 of the Montreal Convention allows plaintiffs to either bring their lawsuit against the contracting air carrier or against actual air carriers. Laura M. Safran believes Article 33 may well invite "forum shopping" on the part of plaintiffs: see "Recent Developments in Aviation Liability & Insurance" (paper delivered at the McGill Conference on International Aviation Liability & Insurance, Montreal, 6-7 May 2011).

[119] See Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (The Netherlands: Kluwer Law International, 2000) at 179.
This statement is also concluded from the author's professional experience in handling the defence of air carriers' for passengers' claims under the Conventions.

and these concerns may present a means to avoid application of the Conventions. Furthermore, political consideration plays a critical role for practitioners to decide on the proper forum under the Conventions to seek possible immunity from legal proceedings of air carriers owned by foreign governments.

The "SQ006 Accident" refers to Singapore Airlines Flight SQ006, which was on its way to Los Angeles from Singapore via Taiwan, and crashed on a closed runway at Chiang Kai-shek Airport (now called Taiwan Taoyuan International Airport) during takeoff on 31 October 2000 at 11:18 pm local time. The accident destroyed the aircraft, and of the 179 people on board 83 were killed, amongst them twelve Singaporeans. The pilot and two co-pilots survived but four cabin crews members died, and the deceased passengers came from eight different countries.[120] After the accident, affected passengers filed actions in different States.

2.3.1 US Jurisdiction

In the US, in the case *Subhas Anandan v. Singapore Airlines*,[121] twelve residents of Singapore and two of Taiwan filed claims for damages for wrongful death and personal injuries as a result of the SQ006 accident. The California Court of Appeal confirmed the trial court's ruling dismissing the claims under the *forum non conveniens* doctrine, and held that:

> In determining whether to grant a motion based on *forum non conveniens*, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. (*Stangvik v. Shiley Inc*. (1991) 54 Cal.3d 744, 751 (*Stangvik*).)… We apply a *de novo* standard of review to the first determination, and an abuse of discretion standard to the second.

[120] See Fatimah Mehron Nisha, "Crash of Singapore Airlines Flight SQ006" (2011) online: Singapore Infopedia <http://infopedia.nl.sg/articles/SIP_1813_2011-07-13.html>.
[121] See *Subhas Anandan v. Singapore Airlines* (B175069) 2005 Cal. App. Unpub. LEXIS 3106.

(*American Cemwood Corp. v. American Home Assurance Co*. (2001) 87 Cal. App. 4th 431, 436.)[122]

The respondents claimed that Singapore would be a suitable forum; yet, the appellants contended that the respondents had failed to meet their burden to prove that Singapore was suitable because it had failed to demonstrate that Singapore would have jurisdiction over the parties or the dispute. In the end, the Court of Appeal accepted the respondents' arguments and dismissed the appellants' action due to *forum non conveniens.*

In *Lai Chew Yen, et al v. Singapore Airlines,*[123] the Court of Appeals confirmed application of the Warsaw Convention to determine that the US court did not have jurisdiction to determine the claims. Though the route was from Singapore Changi Airport to Los Angeles International Airport via Taipei Taoyuan International Airport, each plaintiff's final destination country was a High Contracting Party, such as India, Indonesia and Malaysia, so plaintiffs are subject to the Convention's jurisdictional limitations.[124] However, the Court held that "under the Convention, an action for damages against Singapore Airlines may be brought only before a court having jurisdiction where Singapore Airlines is domiciled or has its principal place of business, where the contract for international carriage was made or at plaintiff's final destination". Because the US is not one of these locations, the district dismissed the plaintiffs' claims against Singapore Airlines under Articles 1(2) and 28(1) of the Warsaw Convention.[125] Furthermore, the passengers had purchased their tickets with

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[122] *Ibid.*

[123] *Lai Chew Yen, et.al v. Singapore Airlines Limited* (No 03-55722, No 03-55723, No 04-56379) 140 Fed. Appx. 661; 2005 U.S. App. 9th Circuit LEXIS 15675.

[124] The judges held:

> The district court did not err in finding that India, Indonesia and Malaysia are High Contracting Parties to the Warsaw Convention. The United States Department of State has taken the position that these countries were High Contracting Parties on the date of the accident.

[125] The the verdict shows:

> Because each plaintiff's final destination country was a High Contracting Party, plaintiffs are

EVA Air, a Taiwan air carrier, with no connection with the US or Singapore. The court also held that the services performed by EVA Air on behalf of Singapore Airlines were "in furtherance of the contract of carriage of an international flight", thus EVA is protected by the jurisdictional and liability limitations of the Convention.

In *Subhas Anandan*, the California Court of Appeal applied the local interpretation for determining *forum non conveniens* because the Convention did not propose the privilege of all available jurisdictions under Articles 1(2) and 28(1). In contrast, in *Lai Chew Yen, et al*, the US Court of Appeals for the 9th Circuit applied Articles 1(2), 25(1) and 28(1) of the Warsaw Convention to determine the jurisdiction issue. The two cases exposed obvious inconsistencies in the US jurisdiction to apply or not to apply national laws for the same SQ006 accident to determine jurisdiction and scope of application of the Warsaw Convention.

2.3.2 Singapore Jurisdiction

Following the SQ006 Accident, a number of actions were instituted in Singapore. Singapore Airlines joined the Taiwan CAA as a third party to the proceedings on the ground that CAA was jointly liable for loss because the CAA, being the authority in control of the facilities at the airport, was wholly or partly responsible for the accident. The CAA contended that it is a department of the government of Taiwan and, as such, is immune from the jurisdiction of the Singapore courts pursuant to the *State Immunity Act* (Cap 313, 1985 Rev Ed) ("the Act"). In *Civil Aeronautics Administration v Singapore Airlines Ltd.*,[126] the Singapore Court of

subject to the Convention's jurisdictional limitations. *See* Warsaw Convention arts. 1(2), 28(1). Under the Convention, an action for damages against Singapore Airlines may be brought only before a court having jurisdiction where Singapore Airlines is domiciled or has its principal place of business, where the contract for international carriage was made or at plaintiff's final destination. *Id.* art. 28(1). Because the United States is not one of these locations, the district court did not err in dismissing plaintiffs' claims against Singapore Airlines.

[126] See *Civil Aeronautics Administration v Singapore Airlines Ltd.* [2004] 1 SLR 570; [2004] SGCA 3

Appeal held that the Taiwan CAA does not enjoy immunity. By including the Taiwan CAA as a defendant, there is a probability that it would share legal responsibility with Singapore Airlines to compensate the heirs and executors of deceased passengers under the Warsaw Convention.

The CAA's application for State immunity initially came before the assistant registrar who dismissed it. The CAA appealed to the Court of Appeal which affirmed the decision of the assistant registrar. Since there is no definition of "State" in the Act, the CAA wrote a letter to the Singapore Foreign Affairs Ministry to request a Certificate pursuant to Section 18 of the *State Immunity Act* certifying that Taiwan (the Republic of China) is a State for the purpose of Part II of the Act. The Singapore Foreign Affairs Ministry refused to reply to the CAA's request. The CAA referred to the case of *In re Al-Fin Corporation's Patent* [1970] Ch 160 to argue that the courts have an independent role to determine whether an entity is a State. The Court of Appeal viewed that under customary international law, four conditions (outlined below) must exist for there to be a State.

(1) There must be a defined territory;

(2) There must be a permanent population;

(3) There must be an effective government; and

(4) The entity must have the capacity to enter into relations with other States.

Recognition is not essential for a State to come into being, but recognition is vital in relation to matters such as sovereign immunity.[127] In sum, the Court of Appeal held that the CAA does not enjoy immunity under Singapore law mainly because Singapore did not recognize Taiwan as a State under her One-China policy; thus, Taiwan is not a "State" for the purposes of the *State Immunity Act*.[128]

[127] *Ibid*, paras. 30-31.
[128] *State Immunity Act*, RSC 1985, c S-18.

Eventually, the main lawsuit was settled between Singapore Airlines and the plaintiffs, thus avoiding a court decision exploring the applicability of the Warsaw Convention to Taiwan through a foreign jurisdiction. However, if a ruling from the Singapore Court of Appeal was made on Taiwan CAA's liability under the Warsaw Convention, it would have been an unprecedented decision that would have revealed the political perspectives affecting the exclusivity principle of the Convention and the application of the law on State immunity.

2.3.3 Canada Jurisdiction

In *Francois Parent v. Singapore Airlines Ltd. and Civil Aeronautics Administration,*[129] a Canadian citizen filed a lawsuit against Singapore Airlines under the Warsaw Convention with respect to injuries sustained in the SQ006 Accident. Singapore Airlines requested that Taiwan CAA should be included in the lawsuit as a co-defendant. Because of the "State Immunity" clause, the Quebec Superior Court in Montreal dismissed Singapore Airlines' action to include the Taiwan CAA as a co-defendant for a Canadian citizen's claim under the Warsaw Convention. The plaintiff and his company commenced an action for damages against Singapore Airlines, and the airline, in turn, commenced an action in warranty against the Taiwan CAA, pleading that the liability for the accident should be borne by the Taiwan CAA due to its responsibility for the management and supervision of the airport.[130] The Taiwan CAA presented a motion to the Quebec Superior Court to dismiss the action in warranty, based on ss.2 and 3 of Canada's *State Immunity Act*.[131] Singapore

[129] See *Francois Parent v. Singapore Airlines Ltd. v. Civil Aeronautics Administration*, J.E. 2003-2160 (S.C.) Montreal 500-05-074778-026 (Sup. Ct. Q).
[130] *Ibid.* See also Canadian Bar Association, "National Section on International Law Newsletter" (April 2004), online: Canadian Bar Association <http://www.cba.org/cba/newsletters/intl-2004/PrintHtml.aspx?DocId=11630>.
[131] *State Immunity Act* (R.S.C., 1985, c. S-18).

Airlines submitted to the Court that the refusal of Canada's Ministry of Foreign Affairs to issue a certificate under s.14 of Canada's *State Immunity Act* meant that the CAA could not benefit from immunity.

However, the Quebec Superior Court held that the absence of the certificate did not necessarily mean the absence of the right to immunity because the Canadian legislature has separated the legal sphere from the political and diplomatic spheres. By referring to the evidence, the Superior Court found that the island of Taiwan constitutes a defined territory; the island of Taiwan is occupied by a permanent population; an effective government exists in Taiwan; and the government of Taiwan has relations with other States. In reaching this conclusion, the Court referred to a statement made by the former Canadian Minister of Foreign Affairs, Paul Martin Sr., during a speech in Banff entitled Canada and the Pacific, which appeared in 1968 volume of The Canadian Yearbook of International Law:

> We consider that the isolation of Communist China from a large part of normal international relations is dangerous. We are prepared to accept the reality of the victory in mainland China in 1949 […] We consider, however, that the effective political independence of Taiwan is a political reality too.[132]

The Superior Court dismissed Singapore Airlines' action in warranty because Taiwan exists as a State, and benefits from immunity from jurisdiction under Canada's *State Immunity Act*.

Given the above, courts in Singapore and Canada in examining State immunity had reached opposing views on Taiwan's legal status and its potential liabilities with respect to the SQ006 Accident. It is very possible that a Taiwan government agency could be jointly liable with an international air carrier to passengers when the

[132] See *Parent v. Singapore Airlines, supra* note 129, para. 57. See also Paul Martin, "Canada and the Pacific" (1968) VI Canadian Yearbook of Intl Law at 144.

Convention was applied in a jurisdiction holding that Taiwan is not a State.

In 2014, more than 55 million passengers were carried by 79 air carriers from, to and via Taiwan.[133] These 79 air carriers are members of IATA, and it shows that about 30% of IATA members' operations are associated with Taiwan.[134] The two State immunity cases for the same accident illustrate that juridical interpretation can create different legal status for Taiwan. The result leads to uncertainty on whether Taiwan's government agencies can be held jointly liable with other international air carriers for passengers' damages under the Conventions. It is bewildering that there exists such an uncertainty as in the application of the Conventions to international air transport involving Taiwan in different jurisdictions.

2.3.4 Taiwan Jurisdiction

In *Singapore Airlines Limited v. Trenwick International Ltd.*,[135] the Taiwan Court of Appeal held that with respect to jurisdiction over the SQ006 Accident, the Warsaw Convention was applicable to cargo claims under contractual obligations, but was not applicable to the claim for extra-contractual liability. The case dealt with ST Microelectronics Asia Pacific (Pte) Ltd., which had concluded a contract with Singapore Airlines to deliver electronic components from Singapore to Los Angeles on 31 October 2000. As a result of the SQ006 Accident, the products were damaged, and Trenwick International Ltd. (plaintiff/respondent) compensated the consignee for damages, which then was assigned to claim compensation from Singapore Airlines (the defendant/appellant). The district court held in favor of the plaintiff following

[133] See Taiwan CAA, "2014 Annual Report (June 2015)", online: CAA ＜http://www.caa.gov.tw/APFile/big5/download/ao/1435568674439.pdf＞ (in Chinese)

[134] In August 2015, IATA represents 260 airlines in over 117 countries, carrying 83% of the world's air traffic. See IATA, online: ＜http://www.iata.org/about/members/Pages/index.aspx＞.

[135] See *Singapore Airlines Limited v. Trenwick International Ltd.* (2005) Taiwan Court of Appeal (93 Insurance Shan No 9) (in Chinese).

which the appellant filed an appeal and argued that:

(1) The Taiwanese court did not have jurisdiction over this case under Article 28 of the Warsaw Convention, which applied because the contracting parties are legal entities incorporated under Singapore law, and the airport of departure (Singapore) and the airport of destination (the United States) are contracting States of the Warsaw Convention.

(2) The Warsaw Convention was the governing law for the plaintiff's claim, and the appellant was entitled to limit the compensation owed.

The Taiwan Court of Appeal referred to the principle that the defendant should be well protected, and held that the Taiwan court had jurisdiction over the plaintiff's claim under the Taiwan's *Code of Civil Procedures* because the SQ006 Accident happened in Taiwan and the appellant has a business establishment in Taiwan. With regard to the governing law, the Taiwan Court of Appeal viewed that the Warsaw Convention was applicable by referring to the conditions of carriage under the airway bill, since both Singapore and the United States had ratified the Warsaw Convention. The civil law of Taiwan, however, should also govern air carriers' liability in relation to the cause of the accident in Taiwan.[136] The Warsaw Convention was the governing law if the plaintiff claimed compensation for its damages based on breach of contract. That is to say, Taiwan's civil law would be the governing law if the plaintiff made its claim under "infringement of rights" (Chinese:權利侵害), which is similar to "torts" in common law.

The Taiwan Court of Appeal's rationale shows a distinction in applying the exclusivity of the Convention's remedy for a cargo claim. The conditions of carriage

[136] The conclusion is made by referring to Article 25 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, which provides:

> An obligation arising from a tort is governed by the law of the place where the tort was committed. However, if another law is the law most closely connected with the tort, it governs.

printed on the back of the airway bill have been considered as "contract terms". Thus, the Taiwan court held that the Warsaw Convention is limited to air carriers' contractual obligation and excluded extra-contractual obligation, such as "torts" under the *Civil Code*.[137] Again, the distinction made by the Taiwan Court of Appeal exposes the gaps for international air carriers in applying the Conventions in Taiwan for reaching unified limited liability.

The above-mentioned findings of the "chosen forum" relating to the SQ006 Accident in applying the Warsaw Convention illustrate significant complexities between national laws and the Convention, at the end of which national laws may trump the Convention, which is aimed at ensuring international uniformity. The SQ006 Accident, therefore, reveals that the exclusivity principle created by the Warsaw and Montreal Conventions can be and is eroded by national law and national courts, particularly, as illustrated, in response to political considerations.

2.4 Permissible Type of Remedies—Debates in Remedy for "Mental Anguish"

In addition to the distinct practice in interpreting the terms "international carriage" and "jurisdiction", the permissible remedies can be examined to determine whether the Conventions are able to provide a unified answer to passengers' claims for "damage" from flight delays. In practice, bearing passengers' rights in mind, passengers will usually claim pecuniary and/or non-pecuniary remedies for flight delays. Legal experts who are familiar with the Conventions may be surprised to observe that passengers seek non-pecuniary remedy in flight delays; however, it is

[137] Article 196 of the Civil Code of Taiwan provides:

> If a person (or enterprise) has wrongfully damaged to a thing which belongs to another, the injured person (or enterprise) may claim to make compensation for the diminution of the value of the thing.

The verdict made by the Taiwan Court of Appeal held that in the case of cargo damages, the consignee was entitled to make his claim either under "breach of contract" or under "delict" depending on which cause of action provides a better result to the consignee.

worth trying to claim non-pecuniary remedies since no precedents have clarified the scope of "damage" occasioned by delays under the Conventions. For example, "mental anguish" has been a significant debate for recognition and compensation under the Convention using reference to many cases in the US, such as *Eastern Airlines, Inc.* v. *Floy*[138], and *Ehrlich v AA*[139]. For example, under Article 17 of the Conventions, "mental anguish" has been associated with claims for death or bodily injury of a passenger upon condition 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.

In most delay cases, passengers have difficulty proving accurate monetary loss in connection with the flight delays. Often, passengers suffer inconvenience and time loss during waiting periods. Passengers, therefore, ask whether "mental anguish" can be remedied under the permissible types of remedies for flight delays under the Conventions. Air carriers, on the other hand, may question whether the claims for "mental anguish" could follow the rule of exclusivity of the Conventions. In reality, neither of these questions can be easily answered as there is no definition of "damage" under Article 19 of the Conventions. However, "mental anguish" debates associated

[138] *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991)
After air carrier's plane narrowly avoided crashing during a flight between Miami and the Bahamas, passengers filed separate complaints seeking damages solely for mental distress arising out of the incident. The District Court held that Article 17 of the Warsaw Convention does not allow recovery for mental anguish alone. The Court of Appeals reversed, holding that the phrase "*lesion corporelle*" in the authentic French text of Article 17 encompasses purely emotional distress. Interestingly, in 1991, the US Supreme Court reversed the ruling made by the Court of Appeals.

[139] *Ehrlich v. American Airlines Inc.,* Docket No 02-9462, 8 March 2004 - US Second Circuit.
In this case, on 8 May 1999, passengers boarded American Eagle Flight No 4925 in Baltimore, Maryland. They intended to travel to JFK, where they were scheduled to connect to an American Airlines flight to London. When their flight reached JFK, the plane approached the airport at a high rate of speed, overshot its designated runway, and was abruptly stopped from potentially plunging into Thurston Bay by an arrester bed. The passengers subsequently evacuated that aircraft by jumping approximately six to eight feet from its doorway. Passengers contend that they suffered bodily injuries during the course of both the abnormal landing and the ensuing evacuation. In addition to these bodily injuries, passengers further contend that they sustained mental injuries. The Court of Appeal concluded that a carrier may be held liable under Article 17 for mental injuries only if they are caused by bodily injuries.

with the concept of "bodily injury" under Article 17 of the Conventions in different jurisdictions provides another angle to examine the undermining of the exclusivity of the Conventions. As a result, debates over the remedy for mental anguish have provided convincing evidence to illustrate the complexities of applying the Conventions to form a harmonized solution to delay claims.

2.4.1 Restriction of Claims under the Conventions

To determine if mental anguish is a permissible remedy under the Conventions, Article 24 of the Warsaw Convention and Article 29 of the Montreal Convention should be referred to. Interestingly, these two articles are a matter of controversy, and legal professionals have debated whether the Conventions were intended to be an exclusive code. If so, claimants are bound to fail in their claims if these do not fall within the strict terms of the Conventions. Alternatively, claimants could choose to sue under national laws.[140] To examine whether the Conventions were intended to be an exclusive code, and whether the Conventions have left options open for national laws to be used, the first step is to analyze the essence of exclusivity for remedies under the Conventions.

2.4.1.1 Warsaw Convention

The Warsaw Convention provides that all actions brought to recover damages must comply with the "conditions and limits" of the Convention; for instance, Article 24 of the Warsaw Convention indicates:

1. In the cases covered by Articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

[140] See Alexander Ho, "Does the Montreal Convention 1999 Provide an Exclusive Remedy in the International Carriage of Goods and Passengers?" (2009) XXXIV Annals of Air and Space Law 379, at 383.

2. In the cases covered by Article 17, the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

In practice, when damages are claimed under the Warsaw Convention, lawyers should first determine whether Article 24 is applicable.[141] This article states that air carriers' limited liability is restricted to actions brought to recover damages permitted under Articles 17, 18 and 19 of the Warsaw Convention. Article 17 provides the rule of liability for passengers' death or bodily injury[142]; Article 18 deals with liability for damages to and loss of baggage and cargo[143]; and Article 19 covers damages for delays of passengers and goods[144]. Article 24 sets up restrictions for the different types of claims, limitations of damages permitted, and the class of complainants who are allowed to sue.[145] The Warsaw Convention is applicable and is exclusive when

[141] Article 24 of the Warsaw Convention provides:
1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

[142] Article 17 of the Warsaw Convention provides:
The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[143] Article 18 of the Warsaw Convention provides:
1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.
2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
3. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

[144] Article 19 of the Warsaw Convention provides:
The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

[145] See Goldhirsch, *supra* note 119 at 143.

claimants can prove that their claims fall into one of the three identified categories.[146] If the claims do not fit into one of the categories under Article 24, lawyers are then free to file suits under any recovery mechanism permitted by the applicable national laws.

2.4.1.2 Montreal Convention

The Montreal Convention was expected to achieve the objective of consolidating and modernizing the Warsaw System.[147] However, the same rule of exclusivity in the Warsaw Convention remedy remains under Article 29 of the Montreal Convention, which states that:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liabilities are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Comparing Article 29 of the Montreal Convention with Article 24 of the Warsaw Convention, the former has a clearer provision for exclusivity of the Convention's remedial regime. The Montreal Convention, however, recognizes that rights of suit *outside* of the Convention exist, but can only be taken subject to the conditions and limitations defined by Article 29.[148] Article 29 of the Montreal Convention clearly rejected the theory that the Convention is an exclusive code which excludes actions that do not arise under its terms. Nevertheless, it is important to affirm that the

[146] Experts explained that if the Warsaw regime applies to the facts at issue, the Warsaw provides the exclusive grounds for relief. In case that Warsaw applies, and limits or precludes recovery, the plaintiff is without an alternative common law form of relief. See Paul Stephen Dempsey & Laurence E. Gesell, *Air Commerce and the Law* (Chandler, AZCoast Aire Publications, 2004) at 781-782.
[147] See Milde, *supra* note 84 at 283.
[148] See Ho, *supra* note 140 at 403.

remedy is exclusive once the claimant has established that his or her claim falls within the Montreal Convention. Hence, the Montreal Convention continues to treat exclusivity with an "all or nothing" approach if the claimant decides to seek a remedy provided by it. In spite of the "all or nothing" approach, practitioners continue to refer to national laws to support claims against air carriers, aircraft manufacturers, air traffic controllers, and/or any other related parties, jointly or separately, who may be liable for damages caused by the accident.

In practice, claimants flying the same aircraft, therefore, can be compensated differently, under the Montreal Convention's "all or nothing" approach and based on the jurisdiction where they file their claims.[149] In addition to the scope of the uniform regime, claimants are able to claim for other compensation which is allowed under national laws, for instance, non-monetary compensation for mental anguish. As a result, an air carrier's obligation to compensate different passengers flying the same aircraft can be very different due to the judicial interpretation by national courts of the restrictions and strict terms of the Montreal Convention and of the existence of other causes of action under national laws.

Accordingly, when interpreting Article 17, the claimant's lawyer will refer to local laws to determine the maximum allowable damages under local law for a passenger's death or bodily injury to improve the bargaining power against air carriers and underwriters. That is one of the reasons why lawsuits brought by a decedent's heirs against air carriers usually take a very long time to produce results irrespective of whether the Convention is applicable or not. For example, in the China Airlines

[149] This result came from the author's legal practice in handling passengers' complaints against international air carriers in Taiwan. For instance, KLM provides direct flight between Taipei and Amsterdam. On the KL0807 flight from Amsterdam to Taipei, passengers buying their return tickets in Amsterdam should apply the Montreal Convention for their claims against KLM, but passengers buying their return tickets in Taipei are able to apply the Taiwan local law, the competent EU regulations or the Dutch law against KLM in Taiwan. Passengers flying KL0807, therefore, apply different laws against KLM, and KLM would bear different liability schemes for different passengers, depending on where the action is brought.

Flight 140 crash accident, one of the Japanese decedents' daughter and son filed a lawsuit at Nagoya District Court and then the Nagoya Court of Appeal against China Airlines and insurance company for the loss of their parents. The whole litigation took a total of fourteen years, and the final judgment by the Nagoya Court of Appeal ordered China Airlines to compensate the complainants about one million US Dollars in 2008.[150]

Where the Convention is applicable, practitioners may focus their attention on the types of damages and permissible associated damages. If passengers have suffered bodily injury in the form of an "accident" as recognized by the Warsaw Convention, passengers are willing to be bound by the limited monetary compensation. However, air carriers have strongly resisted plaintiff attempts in arguing that the liability limits of the Warsaw Convention that apply to "bodily injury" do not apply to the broader category of "personal injury" or "mental anguish".

2.4.2 Remedy for "Bodily Injury" under the Conventions

The Montreal Convention failed to clarify the vague and imprecise term for "accident", and that has been the key issue of air carriers' limited liability for passengers' death and bodily injury. The term "bodily injury" is translated from "*lésion corporelle*" as used in the French text of the Warsaw Convention.[151] The claim made for "bodily injury" under the Conventions indeed causes confusion to remedy "damage" for flight delays under the Conventions. The concept established for "bodily injury" under the Conventions also provides the grounds for passengers to claim non-monetary compensation under national laws instead of the Conventions in

[150] China Airlines Flight 140 crashed en route to Nagoya Airport on 26 April 1994, and 264 people were killed in the accident. See Now News, "1994 China Airlines Nagoya Aerial Accident Court Appeal Maintain Original Judgement, China Airlines liable, Airbus not liable" (29 February 2008) online: Now News <http://www.nownews.com/2008/02/29/334-2238030.htm> (in Chinese).
[151] See Fountain Court Chambers, *supra* note 72 at 92.

the case of flight delays. Since municipal courts have not agreed on a uniform interpretation, the main issue in numerous cases had focused on whether or not mental anguish unaccompanied by physical injury can give rise to damages.[152] The following cases indicate the conflicts with respect to the exclusion (or inclusion) of mental anguish as damage under the Warsaw Convention and the Montreal Convention in the jurisdictions of the US, the UK and Mainland China.

2.4.2.1 US Jurisdiction

In *T. T. Burnett and Winifred Burnett v. Trans World Airlines, Inc.*,[153] the plaintiffs claimed damages for mental anguish as well as mental anguish with bodily injury because the airplane was hijacked, and the plaintiffs were held captive in a desert dry lake-bed for several days. The district court looked to federal law rather than State tort law for the interpretation of "bodily injury" under Article 17 of the Warsaw Convention, and the court determined that the French legal meaning applied in this case. The court viewed that within the French legal interpretation, mental anguish alone was not encompassed within the meaning of "bodily injury," but Article 17 of the Convention permitted recovery for mental anguish suffered as a result of physical injuries from the hijacking.

Greta Husserl v. Swiss Air Transport Company, Ltd.[154] concerned an action for US$75,000 for bodily injury and mental anguish allegedly caused by the hijacking of one of the defendant's airplanes to a desert area near Amman, Jordan on 6 September 1970. On 3 November 1972, in denying the defendant's motion for summary

[152] See Goldhirsch, *supra* note 119 at 77.
[153] See *T. T. Burnett and Winifred Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.C. N.M.); 1973 U.S. Dist. LEXIS 10655.
[154] See *Greta Husserl v. Swiss Air Transport Company, Ltd (Swissair)*, 351 F. Supp. 702; 1972 U.S. Dist. LEXIS 11294; aff'd 485 F. 2d 1240 (2d Cir. 1973); 388 F. Supp. 1238 (D.C. N.Y. 1975); 1975 U.S. Dist. LEXIS 13920; 13 Av. Cas. (CCH) P17,603.

judgment, the District Court of the Southern District of New York (Manhattan) held that the definition of "accident" in Article 22 of the Warsaw Convention as modified by the 1966 Montreal Agreement was broad enough to encompass "hijacking".[155] On 10 February 1975, in dismissing the defendant's second motion for summary judgment the same court concluded that it was the intent of the drafters of the Warsaw Convention that the phrases "death or wounding[…] or any other bodily injury," as used in Article 17, does comprehend mental and psychosomatic injuries.[156]

In 1991, in *Eastern Airlines v. Floyd*[157] the US Supreme Court ruled that purely mental injuries should not be recovered under the Convention after exploring the historical study of the Warsaw Convention as well as French legal source and French translation of the term, "*lésion corporelle*." In *Floyd*, the air carrier told passengers that they would crash in the ocean because of engine failure. Passengers filed complaints against the air carrier to recover damages for mental injury. The district court viewed that passengers' mental anguish alone was not compensable under Article 17 of the Warsaw Convention; but the Court of Appeals for the Eleventh Circuit reversed and held that recovery for purely emotional distress was possible. The US Supreme Court revised the judgment of the Court of Appeals, and concluded that: "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."[158] Again, in 2004, in *Ehrlich v. American Airlines Inc.,* the Ehrlichs (passengers) contended that, under Article 17 of the Warsaw Convention, air carriers are liable for mental injuries that accompany, but are not caused by, bodily injuries.

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[155] See *Greta Husserl v. Swiss Air Transport Company, Ltd (Swissair) 351 F.Supp. 702 (1972)* at 707. affirmed Court of Appeal for 2nd district 485 F. 2d 1240.

[156] *Greta Husserl v. Swiss Air Transport Company, Ltd (Swissair)*, 388 F. Supp. 1238 (D.C. N.Y. 1975); 1975 U.S. Dist. LEXIS 13920; 13 Av. Cas. (CCH) P17,603.

[157] See *Eastern Airlines v. Floyd, supra* note 138.

[158] *Ibid.*

The US Court of Appeal affirmed the district court's judgment and held that the Ehrlichs could "only recover for emotional damages caused by physical injuries."[159]

2.4.2.2 British Jurisdiction

The United Kingdom is one of twenty-eight European Union Member States, and is a High Contracting State of the Warsaw Convention[160] as well as being a State Party of the Montreal Convention[161]. The United Kingdom is chosen to illustrate the European perspective in interpreting the term "bodily injury" under the Conventions, especially as the British court cases did indicate a significant evolution of interpreting "bodily injury".

From *Philip King v Bristow Helicopters Ltd* to *Kelly Morris v. KLM Royal Dutch Airline*s,[162] in clarifying the legal interpretation for "bodily injury" under the Warsaw Convention, the English Courts have followed a similar path to that of their American cousins. The British Court of Appeal concurred with the US Supreme Court's decision in *Floyd*, and concluded that mental illness without physical injury did not amount to bodily injury. In 2002, King and Morris were eventually judged together in the UK House of Lords to conclude that: "fright alone is not compensable, but brain injury from fright is".[163]

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[159] See *Ehrlich v. American Airlines Inc., supra* note 139.

[160] For a list of contracting States to the Warsaw Convention, see ICAO, "Current lists of parties to multilateral air law treaties", online:
< http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx>.

[161] For a list of contracting States to the Montreal Convention, see ICAO, " Current lists of parties to multilateral air law treaties", see online: ICAO
< http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx>.
The European Community ratified the Montreal Convention in 2001: see EC, Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [2001] OJ, L 194.

[162] See *Philip King v Bristow Helicopters Ltd*. 1999 S.L.T. 919. & 01489/5/1995. And *Kelly Morris v. KLM Royal Dutch Airlines*, EWCA Civ. 790 (2001).

[163] See King (AP) (Respondent) v Bristow Helicopters Ltd. (Appellants) (Scotland) In Re M (A Child By Her Litigation Friend CM) (FC) (Appellant) [2002] UKHL7, paragraph 4. The whole content can be found online:
<http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020228/king-1.htm>.

In *Philip King v Bristow Helicopters Ltd.*, the complainant was on board a helicopter, owned and operated by the respondent on 22 December 1993. The helicopter took off in poor weather conditions and after ascending and hovering for a short period, the helicopter's two engines failed. Passengers feared that the helicopter was about to crash into the sea, but the helicopter managed to land at which point smoke engulfed the helicopter. The complainant finally disembarked from the helicopter, and he developed post-traumatic stress disorder. As a result of the stress, he suffered an onset of peptic ulcer disease. The Inner House of the Court of Session of Scotland held that Article 17 of the Convention precluded recovery for "psychological injury" alone. The complainant appealed. Various points were raised in the argument of the appeals and the judges shared different views in determining whether bodily injury included physical injury and mental injury under the Warsaw Convention. A majority of the House of Lords supported Mr. King's appeal based on the rationale that a person who suffers no physical injury but who does suffer mental injury or illness (such as clinical depression) is as a result of an accident under article 17 of the Convention.[164]

In *Kelly Morris v. KLM Royal Dutch Airlines*, the complainant was an unaccompanied minor on a KLM flight from Kuala Lumpur to Amsterdam in 1998. She complained that the man sitting next to her on the flight had touched her thigh indecently. As a result, she suffered from clinical depression, although she had made a full recovery. She claimed that the carrier was liable in damages under Article 17 of the Warsaw Convention, as amended at The Hague in 1955 and incorporated into English law as Schedule 1 to the *Carriage by Air Act 1961*. The English law provided

[164] A majority of the House of Lords supported Mr. King's appeal based on the rationale that a person who suffers no physical injury but who does suffer mental injury or illness (such as clinical depression) is as a result of an "accident" under article 17 of the Convention. That is to say, passengers are not allowed to claim "mental anguish" without physical injury as remedy for "bodily injury" under Article 17 of the Warsaw Convention.

that the carrier was liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the sustained damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The county court judge held that Morris' illness was within the article since it was bodily injury suffered in an accident. KLM appealed. One of the issues for the British Court of Appeal to examine was whether "bodily injury" or "*lésion corporelle*" in the prevailing French text includes liability for purely mental injury. The Court of Appeal held that the depressive illness suffered by Morris was not "bodily injury" within the meaning of the Warsaw Convention based on the following reasoning:

(1) The Court held that construing Article 17 should take into consideration the overall purpose and scheme of the Convention as the drafters and signatories intended in 1929 rather than in the light of changes in civil aviation transportation since 1929, or the current domestic law view of mental injury.

(2) Bodily injury under Article 17 means injury that results in some form of physical damage to the structure of the body and does not extend to illness of the mind. Mental illness without physical injury did not amount to bodily injury although mental illness may not have been thought of in the Convention in 1929.

In 2002, by referring to the rationale in Mr. King's appeal, the UK House of Lords considered whether an opportunity should be given in Miss Morris' case to re-open the question whether her depressive illness was linked to changes in her brain cell structures and could be said on this ground to have amounted to a physical injury.[165] Consequently, the judges held that the Court of Appeal applied the wrong

[165] Please see paragraph 130 of the verdict for *King v. Bristow Helicopter* [2002] UKHL7.

test and their reading of Article 17 cannot stand.[166] Miss Morris had adequately pleaded a *prima facie* case of *bodily injury* in relation to the psychiatric element in her case. But she had also pleaded and accepted that the assault did not cause her any physical injury. Thus, Miss Morris did not suffer a "bodily injury" and her appeal, therefore, was dismissed.[167]

As shown above in the US, a few instances of judicial determination support the view that passengers could not recover damages for purely psychological injuries. Some cases had ruled that passengers can only be compensated for mental illness that results in the form of physical injury. After the Montreal Convention came into force, the British Court of Appeal held that the court was bound to interpret Article 17 as the signatories intended, and it was not the court's role to read into the Convention modern exigencies and changes in civil aviation.[168] At the crossroads of Warsaw and Montreal, the verdicts in two of the world's aviation leaders, the US and the United Kingdom, indicate that mental anguish unaccompanied by physical injury will not give rise to damages under Article 17 of the Conventions. Nevertheless, in 2009, the British House of Commons proposed a Warsaw Convention (Carrier Liability) Bill to the Secretary of State to amend Article 17 of the Warsaw Convention for the purpose of extending carrier liability to cases of detriment to health or psychological

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[166] *Ibid.* Please see paragraph 184 of the verdict for *King v. Bristow Helicopter* [2002] UKHL7.

[167] *Ibid.*

[168] See Ruwantissa Abeyratne, "Morris v KLM Royla Dutch Airlines: At the Crossroads of Warsaw and Montreal" (2001), XXVI Annals of Air and Space Law 283 at 296-297. Vijay Poonoosamy, the Rapporteur of the ICAO Secretariat Study Group, stated:

> [T] expression "personal injury" would open the door to non-physical personal injuries […] and this could be neither desirable nor acceptable. Use of "bodily injury" would be more acceptable but exclude mental injuries such as shock. Recent Court decisions in the U.S. demonstrate how difficult an area this is and a clear statement must be agreed upon which is not limitless in scope […]"

See also Paul Stephen Dempsey, *Aviation Liability Law* (Toronto: LexisNexis Canada, 2010), at §12-34. At §12.63, Dr. Dempsey explains the Montreal Convention of 1999 declined to expand the limiting concepts of "accident" and "bodily injury" beyond those of the original Convention, in particular rejecting the Guatemala City Protocol's adoption of "event" and "personal injury". These references support that from drafting records, the term of "bodily injury" under the Warsaw Convention and Montreal Convention do not apply to the broader category of "personal injury".

well-being, and for related purposes.[169] Although the bill has since been withdrawn, it underlines the fact that the bill went through the House of Commons and shows that there are voices in one of the world's aviation giants which are not satisfied with the restricted scope of bodily injury under the Convention in the new era.

2.4.2.3 Mainland China Jurisdiction

Lu Hong v. United Airlines[170] inspired legal professionals to make serious comments on the judge's reasoning to wrongly apply the international convention as well as domestic law to govern the complainant's claims. In this case, the plaintiff flew on the defendant's aircraft from Hawaii to Hong Kong via Tokyo. The passenger suffered a right ankle bone fracture caused by an emergency evacuation due to the failure of one engine when the aircraft was about to take off at Tokyo. The passenger had two operations, and she became disabled after medical treatments. The air carrier paid for her medical fee but refused to pay any extra costs, such as nursing care, loss of salary, and mental injury. The passenger claimed US$75,000 for her body injury and living supplement under the Warsaw Convention and the Montreal Agreement of 1966. During the litigation, the passenger changed her legal ground to the "Kuala Lumpur Agreement" [171] and claimed 100,000 SDRs for her monetary and non-monetary damages. The Shanghai Chin-An District Court concurred with two

[169] Warsaw Convention (Carrier Liability) Bill 2009-10. The bill has since been withdrawn, but the contents of bill can still be found at: UK, Parliament, online: Parliament <http://services.parliament.uk/bills/2009-10/warsawconventioncarrierliability.html>.

[170] *Lu Hong v. United Airlines* (2001.11.26) Shanghai Chin-An District Court (in Chinese).

[171] International Air Transport Association (IATA) carriers met at the Washington Conference to draft the IATA "Intercarrier Agreement on Passenger Liability" after IATA gained antitrust immunity from the US Department of Transportation (DOT) in 1995. On 21 October 1995, the agreements consist of the IATA Intercarrier Agreement of Passenger Liability were signed in Kuala Lumpur, Malaysia. The IATA Agreement on Measure to Implement the IATA Intercarrier Agreement opened for signature in May 1996.
These agreements are collectively called the "Intercarrier Agreements." Mainland China referred to them as "Kuala Lumpur Agreement." See Alaa A. Naji, *Dihah as A Third Dimention to Air Carrier Liability Conventions* the (D.C.L. Thesis, Institute of Air and Space Law, McGill University, 2006) at 170.

parties' statements that the Warsaw Convention was applicable in this case, but the Court did not apply Article 24 to exclusively review the plaintiff's claim subject to the conditions and limits set out in the Convention. Furthermore, the Court did not apply Article 28 of the Convention to review the forum issue but applied Article 243 of China's *Code of Civil Procedures* to hold that the Court had jurisdiction over this case because the defendant had a business office in Shanghai to conclude a contract with the plaintiff. The Court found that the passenger was entitled to make her claims either based on breach of contract or based on "infringement of rights" (Chinese:權利侵害), which is the concept of "delict" (Chinese:侵權行為) in civil law. Since the passenger requested "mental injury compensation", the Court exercised its right to choose the favorable national laws related to delict for the passenger, and ordered the defendant to pay nursing fee, loss of salary, disabled compensation, mental injury, lawyer fees and reimbursement for the lawyer's travels. Notwithstanding, based on the agreed conditions of carriage specified in the air ticket, the Court found that the passenger was only entitled to claim an amount including legal fees of not more than the prescribed limited liability of US$75,000.

The Shanghai Chin-An District Court did not give detailed explanation for the reason why the Warsaw Convention, the national laws and the conditions of carriage printed in the air ticket could be simultaneously applied for choice of forum and the passenger's monetary and non-monetary claims. It is worth mentioning that even though the judge did not examine the definition of "bodily injury" under the Convention in this case, the judge intended to award non-monetary compensation for the passenger's suffering as a result of being disabled. Passenger protection became the judge's main concern in making a decision in favor of the passenger without thinking of the logical flaws in applying the Convention and national laws at the same time. This case became a remarkable case in Chinese society and clearly indicated

how the local judge made a decision in favor of a passenger by referring to familiar national laws instead of applying the rules of the appropriate international convention.

In *Yang Pin v. Northwest Airlines Limited*,[172] the Shanghai Chin-An District Court held that it had jurisdiction under the Montreal Convention over the plaintiff's claim because the final destination was Shanghai. The plaintiff alleged that on 4 August 1999, she flew from Hawaii to Shanghai through Tokyo, and suffered bodily injury and mental anguish when the defendant's crew accidentally emptied a cup of scalding water on her. It is worth noting that the plaintiff filed a complaint in Hawaii, a US jurisdiction, in August 2001, but the Hawaiian court dismissed the case in March 2004. After that, the plaintiff filed a new complaint at the Shanghai District Court in accordance with Mainland China's local law and claimed compensation for mental anguish and for a public apology.

However, in *Mrs. Ma v Thai Airways International*,[173] the plaintiff and her family, who were domiciled in Beijing, bought air tickets for flights operated by the defendant to take a five day vacation in Bangkok, Thailand. When the aircraft flew over the territory of Thailand, the plaintiff fell down and broke her right leg in the aisle because the defendant followed the instructions of a "Traffic Collision Avoidance System". The defendant agreed to compensate the plaintiff for her medical expenses and refund the fare for a total of 60,000 Renminbi (RMB), but refused to compensate the plaintiff's mental anguish at 620,000 RMB. The plaintiff referred to the Montreal Convention of 1999 and filed a lawsuit against the defendant at Beijing Dongcheng District People's Court. This is the first case where a Chinese plaintiff

[172] See *Yang Pin v. Northwest Airlines Limited* (2005), Shanghai Chin-An District Court (in Chinese). It is worth mentioning that in this case, the Shanghai District Court applied the *Warsaw Convention* to hold the defendant should compensate the plaintiff US $10,000 for mental anguish associated with bodily injury, but the defendant was not obligated to make a public apology to the plaintiff because such purely mental suffering is not compensated under Article 17 of the Convention.

[173] See *Mrs. Ma v Thai Airways International* (2011) Beijing Dongcheng District People's Court, online: <http://big5.china.com.cn/travel/txt/2011-12/19/content_24190095.htm> (in Chinese).

brought claim for mental anguish in China under the Montreal Convention. The Beijing District Court dismissed the plaintiff's suit because Thailand was not a contracting party of the Montreal Convention, and the plaintiff had not proven that both the plaintiff and the defendant had conducted an agreement to be governed under the Montreal Convention. In addition, the Beijing District Court held that under the rule *lex loci delicti*, Mainland China's "*Tort Law*" (侵權責任法), it was not applicable for the plaintiff to claim at the Beijing court because she was injured in the territory of Thailand.[174]

In comparing the "mental anguish" claims under the concept of "bodily injury" under the Conventions, the following came to light: (1) the judicial views in the US and the United Kingdom, which is one of the EU members, support that air carriers could not be held liable under the Warsaw Convention for mental injuries that were not caused by physical injuries; and (2) in contrast, the courts in Mainland China neither dig into the exclusivity rules of the Convention nor distinguished "mental injury" from "bodily injury" under the Convention. These courts granted passengers the remedies based on breach of contract or based on "infringement of rights" (Chinese:權利侵害), which is the concept of "delict" (Chinese:侵權行為). Hence, the "mental anguish" debates under the concept of "bodily injury" is one instance of interpreting terms in the Conventions that have the equivalence in national laws, and illustrate the challenges of applying the Conventions to achieve uniform regime for permissible type of remedies.

2.5 Flight Delay Remedy under the Conventions

Article 19 is similar in both the Warsaw and the Montreal Conventions which

[174] It is worth mentioning that the action was brought after the 2 year limit in the Warsaw Convention, and nearly 5 years before the Montreal Convention entered into force in Mainland China.

provide that the carrier is liable for damage occasioned by delay in the air carriage of passengers. The Conventions, however, are silent in defining the scope of "damage" caused by delay in the carriage of passengers. In practice, passengers are liable for their "proven damage" and causation between damage and the time when passengers are entitled to expect the performance of the air carrier's duty and the time when the duties are actually performed.[175] Nevertheless, in the aforementioned cases from the US, the United Kingdom and Mainland China, it is clear that outcomes from passengers' claims for non-pecuniary remedies based on "bodily injury" are not harmonized despite the wording of Article 17. Finally, the "damage" specified in Article 19, such as for mental anguish incurred from flight delay, is likely to be governed by national laws.

The Montreal Convention provides detailed rules regarding air carriers' limited liability and unlimited liability for flight delay, and under Article 22(1) of the same Convention, it limits the liability of the carrier for delay to 4,694 Special Drawing Rights (SDRs) for each passenger.[176] Article 22(5) of the Convention essentially expresses that this limit is not to apply if the damage results from an act or omission of the carrier, done with intent to cause damage or recklessly and with knowledge that damage would probably result. With regard to the type of damages, Article 29 of the Convention, headed "Basis of claims", clearly indicates that: "punitive, exemplary or any other non-compensatory damages shall not be recoverable". As a result of these rules, compensation claims for delay against air carriers are assumed to be comprehensively resolved by the Convention.

[175] See Ruwantissa Abeyratne, "Aviation and Social Responsibility: Rights of Passengers" (2002) XXVII Annual of Air and Space Law at 51.

[176] The original Article 22(1) of the Convention limits the liability of the carrier for delay to 4,150 SDRs. However, ICAO issued the Working Paper No C-WP/13342 on 22 May 2009 to conclude that the inflation factor had exceeded 10% in 2009, the threshold stipulated in Article 24(1) for adjustments of limits of liability, and that an upward revision of the limits was required. ICAO determined the inflation factor is 13.1%, resulting in an upward revision of 13.1% of the new limits of liability. Hence, the 4,150 SDRs became 4,694 SDRs.

However, the current practical reality shows a contrasting situation. Articles 19 and 29 of the Montreal Convention jointly provide an opening for the claimant's lawyers to circumvent the Conventions' limited compensation if national laws allowed damages for "mental injury" (Chinese:精神損害) resulting from delays which are beyond air carriers' control.[177] This is the case in Mainland China and Taiwan. Thus, this provides evidence that claims in each flight delay case, especially delays caused by *force majeure,* could be assessed in accordance with the national laws of the jurisdiction in which a case is heard. The air carrier can exonerate itself in certain circumstances where it had taken all the necessary precautions to avoid the delays, or where it had minimized monetary damages to passengers by offering complimentary services. The confusion between law and practice as well as the perceived shortcomings on the Conventions explain why consumer protection law and/or "delict" under the civil law system have been invoked by passengers and/or their lawyers to file non-pecuniary claims against air carriers.

EU law provides another example of non exclusivity of the Conventions. The Member States of the EU are all signatories of the Montreal Convention. EU law has unified jurisdiction rules in the Brussels I Regulation[178] which includes provisions for protective jurisdiction in relation to carriage contracts.[179] Article 71 of the Brussels I Regulation provides that where the Montreal Convention applies, jurisdiction of a claim shall be decided under the rules of the Convention; and where the Convention does not apply, jurisdiction can be decided according to the original rules of the

[177] In spite of "personal injury" used in the US court cases, "Mental injury" has been used in Taiwan and in Mainland China for passengers to make their civil claims against air carriers under the national law in case of long flight delays.
[178] EC, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12.
[179] See Zheng Sophia Tang "Aviation Jurisdiction and Protection of Passengers" (2011) 6 European Journal of Consumer Law 331 at 333.

Brussels I Regulation.[180] The European Court of Fourth Chamber in *Peter Rehder v. Air Baltic* (No 204/08)[181] dealt with the cancellation of a flight between two Member States of the EU. The Court allowed the plaintiff (as a passenger), residing in a Member State which is different from the air carrier established in another Member State to claim compensation under Article 7(1)(a) of Regulation 261/2004, which is independent of the Montreal Convention. To be more specific, in the EU jurisdiction, EU law and the Conventions provide parallel passenger protection in order to satisfy passenger claims in flight cancellation or delay where the Conventions fail to provide clear remedies.

In *ex parte IATA* (No 344/04),[182] the European Court of Grand Chamber held that the measures prescribed by Articles 5 and 6 of Regulation 261/2004 are in themselves capable of immediately redressing some of the damages suffered by those passengers, and therefore enable a high level of passenger protection to be ensured. The European Court viewed that Articles 19, 22 and 29 of the Montreal Convention merely govern the conditions under which a scheduled flight has been delayed and that passengers concerned may bring actions for damages by way of redress on an individual basis for compensation against the carriers who were liable for damage resulting from that delay. The European Court held that the authors of the Convention did not intend to shield the carriers from any other form of intervention; in particular, actions which could be contemplated by the public authorities to provide the remedy mechanism without the passengers having to suffer the inconvenience of bringing

[180] Article 71 of the Brussels I Regulation provides:
(t)his regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the reorganization or enforcement of judgments.
See also Tang, *supra* note 179 at 333.

[181] See *Peter Rehder v. Air Baltic* (No 204/08), [2009] ECR I-6073. The ECJ ruling was the result of a request for a legal reference to the ECJ: see EC, Case C-204/08: Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 19 May 2008 — *Peter Rehder v Air Baltic Corporation*, [2008] OC, C 197.

[182] *R. v. Department of Transport ex parte IATA* [2006] ECR I-00403.

actions for damages.[183] Moreover, to bolster the Community's legislative power, the European Court insisted on judicial remedy under the Community Act and emphasized that the operating air carrier must offer to assist and take care of the passengers concerned. Thus, passengers are entitled to bring actions to redress damages after a delay, and to be compensated for inconvenience caused by the delay, which is not expressly addressed in the Montreal Convention.[184]

Despite these judgments in the EU, it is worth mentioning that the interpretation of "delay" in *Rehder v. Air Baltic* and *ex parte IATA* under the Conventions is inconsistent with the "mainstream view" held by academic opinion, which subscribes to the view that "denied boarding" and "flight cancellation" are included in the concept of "delay" under Article 19 of the Convention.[185] Detailed analysis of the US and EU legislation and practice related to "delay" is discussed in the next chapter.

Practitioners on the passenger side, therefore, have studied the conflicts resulting from the interpretations of strict terms of the Conventions in different jurisdictions in order to plan their litigation strategies to gain a broader remedy and improve the likelihood of success for their clients. The aforementioned cases, however, form a serious challenge on the remedy mechanism for flight delay under the Conventions in the EU, and also broadly influence global passenger protection to claim flight delay damage outside the scope of the Conventions. In particular, under the Regulation 261/2004, air carriers are requested to compensate and "assist" passengers in the event of denied boarding and of cancellation or long delay of flights. The assistance, for example, is to offer passengers meals and refreshments, hotel accommodation and transport between the airport and place of accommodation (hotel or other)

[183] *Ibid*, para. 45.
[184] *Ibid*, paras. 47-48.
[185] See Dempsey, *supra* note 39 at §14.1 at 14-1.

commensurate with the waiting time.[186] Such legal practice diverts the air carriers' liability for flight delays from the conventional "right vs. liability" to the "duty of providing assistance" under passenger protection philosophy. Chapters III and IV will provide more detailed analysis on national responses to flight delay remedies under their passenger protection legislation.

2.6 Conclusion

The international legal framework formed by the Warsaw and Montreal Conventions has been considered as achieving important successes in unifying certain rules for air carriers' obligations relating to international transportation by air. Regrettably, on a practical level, the remarkable exclusivity principle created by the Warsaw and Montreal Conventions is being eroded by national laws. The cited court cases in developed and developing countries in the West and in the East illustrate that there are challenges in "unifying certain rules relating to international transportation by air" under the international legal framework, like the Conventions. Accordingly, it is a complex task to create a satisfactory solution to identify the party that should be responsible for flight delays caused by *force majeure*.

Most importantly, the tendency to resort to national laws by local judges to render their decisions as to whether the Conventions are applicable has also been raised to evidence the different interpretations of terms in the Conventions. Such differences were examined in the scope of application of international carriage, jurisdictions, and debates in remedy for "mental anguish". The findings clearly reveal that national laws have gradually prevailed over the Conventions. To satisfy passengers' expectations, national law has been increasingly relied upon and is playing a critical role for lawmakers, judges and lawyers. Such laws contribute to the

[186] See Article 9 of the Regulation (EC) 261/2004.

diversity in applying the Conventions and are shaped to focus on passenger protection. In other words, passenger protection policy prevails over the international legal framework in the current political and social climate. Furthermore, judicial remedies will trigger a renewed compromise between air carriers and passengers by compelling the duty of assistance on to air carriers, which then will result in air carriers recovering such additional costs through raising air-fares or reducing complimentary services. Consequently, neither air carriers nor passengers will emerge with a financial advantage.

In the new era, we will need an innovative solution that is based on a practical universal settlement system for passengers and air carriers to solve conflicts of interest in flight delays caused by *force majeure* instead of incurring unproductive time and cost in arguing about the rights and obligations under the Conventions and different national laws.

CHAPTER III
NATIONAL RESPONSES: THE US AND THE EU

CHAPTER III
NATIONAL RESPONSES: THE US AND THE EU

Chapter II sought to demonstrate that the Conventions could not provide a harmonized solution for flight delay claims. The following two chapters will examine how national remedy mechanisms respond to flight delays caused by *force majeure* and in particular, how national laws, deeply influenced by socio-economic and cultural factors, trigger distinct conflicts between air carriers and passengers. In this chapter, the analysis is focused on the advanced aviation markets in the West, such as the US and the EU. In Chapter IV, the focus is on the prospering markets in the East, specifically in Taiwan and Mainland China. These two chapters will provide readers with comparative approaches to appreciating the complexities arising from national responses to flight delay claims, especially when *force majeure* is involved.

In both the US and the EU, the remedy mechanism for delays is provided for in three regimes: (1) for "international carriage" as defined under the Conventions, (2) for domestic flights under domestic statutes and (3) for international flights under domestic statutes.[187] Neither the Conventions nor the domestic statutes define the scope of "damage" for which air carriers are liable in case of delays caused by *force majeure*. For example, in the EU, Regulation 261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delays of flights. Yet, no rules are in place to specify terms and conditions of complimentary assistance to be rendered by air carriers, or passengers' right if receiving inadequate assistance. Such limitations of this particular Regulation became apparent with the Eyjafjallajökull Icelandic volcano eruption in 2010[188]

[187] See Section 2.2 of this thesis. The "international carriage" is defined in Article 1(2) of the Conventions. If a flight, in addition to domestic flight, does not fall within the definition of "international carriage", it is called "international flight" in practice.
[188] See *supra* note 2.

because air carriers refused to assume unpredictable liability to offer passengers monetary remedies and unlimited free assistance. This scenario invites us to ask whether the legislation indeed achieves a high level of passengers' protection for unforeseeable flight delays; and if not, why?

This chapter will be divided into four parts. The first part will examine how consumer protection legislation has influenced air passenger protection in both the US and in the EU, which provides legal endorsement for passengers to claim remedy from air carriers when air carriers refused to assume unpredictable liability in unforeseeable flight delays. The second part will examine the remedy mechanism under the US DOT statutes, which specifically emphasize passenger protection in case of tarmac delay and allow air carriers to declare limited obligations for offering services in *force majeure* delays through contract arrangement. In contrast and as discussed in the third part of this chapter, the EU legislation and court cases appear to impose on air carriers compulsory obligations to ensure passengers' "right to care"; yet, European air carriers seek to limit their obligations regarding free assistance through their conditions of carriage. More importantly, European air carriers must offer free assistance to passengers even in instances where delays are caused by "extraordinary circumstances", which may be distinct from "*force majeure*" in the US. Finally, the fourth part will explore the uncertainty relating to the extraterritoriality issue resulting from the US and the EU legislation, according to which liability may extend to foreign air carriers outside the US and the EU territories. These four parts demonstrate the level of complexities and uncertainties even under the so-called high-level protection of passengers' rights when *force majeure* is involved.

3.1 Interaction between Consumer Protection and Passenger Protection

In most passengers' claims resulting from *force majeure* delays, one of the main

causes of action involves references to "fraud and deceit" based on incorrect or insufficient information provided by air carriers to passengers[189], which is considered an infringement of the "right to be informed" (US legislation) or the "right of information and education" (EU legislation) under the general consumer protection regimes. In addition, consumer protection legislation typically reverses the burden of proof of negligence from the plaintiff-consumer to the merchants. A passenger, therefore, may see the advantage of exercising her rights against air carriers as a consumer, and thus require that the air carriers prove the absence of their negligence in causing delays and with providing sufficient information on the delays. As a result, there is evidence that general legislation on consumer protection has an influence on the more specific field of passenger protection.

3.1.1 Consumer Protection in the US

Prior to World War I, there was scant legislation in the US to protect the consumer against unfair treatment in the marketplace; mainly because most consumer transactions were conducted personally, in small communities, with local vendors.[190] Society then was not ready to set up a legal framework for solving individual problems relating to consumer affairs, which meant that only a certain degree of fairness and ethical behavior was expected when dealing on a small-scale basis.[191] After World War II, the US economy boomed.[192] Increasingly sophisticated products were being manufactured and distributed through the national distribution systems,[193] and by the 1950s, a movement called "consumerism" pushed for increased consumer

[189] See Section 3.2.2.2. The comments are made for *Biscone v JetBlue Airways Corporation* case.
[190] See Margaret C. Jasper, *Consumer Rights Law* 2nd Edition (New York: Oceana Published by Oxford University Press 2008) at xix.
[191] *Ibid.*
[192] See Sheila Aylesworth, *Economic Boom after the Second World War*, online: ＜http://suite101.com/a/economic-boom-after-the-second-world-war-a330627＞.
[193] See Iain Ramsay, *Consumer Law and Policy-Text and Materials on Regulating Consumer Markets*, 2nd Edition (Portland, OR: Hart Publishing, 2007) at 6.

rights and legal protection against malicious business practice.[194] In 1962, the Consumer Bill of Rights was enacted to emphasize customer rights such as: (1) the right to safety; (2) the right to be informed; (3) the right to choose; (4) the right to be heard; (5) the right to education; and (6) the right to redress.[195] Following the Consumer Bill of Rights, the US actively proceeded with further legislation and policies to govern consumer transactions and to enhance consumer protection.[196]

In order to adequately protect consumer's rights, a few leading cases reversed the burden of proof of negligence from the consumer to the manufacturers in product liability claims. For example, in the case of *Escola v. Coca Cola Bottling Co.*, the user only needed to prove injury by using a defective product, rather than proving corporate negligence.[197] In order to claim remedy under a product liability lawsuit,

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[194] See Margaret C. Jasper, *supra* note 190.

[195] This *Consumer Bill of Rights* was proposed by President John Kennedy to the Congress in 1962: see John F Kennedy, "Special Message to the Congress on Protecting the Consumer Interest", 15 March 1962, online: the American Presidency Project <http://www.presidency.ucsb.edu/ws/?pid=9108>. The concept of the consumer rights includes: The right to safety: to be protected against the marketing of products and services that are hazardous to health or to life. The right to be informed: to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts needed to make informed choices. The right to choose: to have available a variety of products and services at competitive prices. The right to be heard: to be assured that consumer interests will receive full and sympathetic consideration in making government policy, both through the laws passed by legislatures and through regulations passed by administrative bodies. The right to education: to have access to programs and information that help consumers make better marketplace decisions. The right to redress: to work with established mechanisms to have problems corrected and to receive compensation for poor services or for products which do not function properly.
Looking at the Consumer International website, it is evident the consumer movement has developed the abovementioned six consumer rights into a set of eight basic consumer rights: (1) the right to satisfaction of basic needs; (2) the right to safety; (3) the right to be informed; (4) the right to choose; (5) the right to be heard; (6) the right to redress; (7) the right to consumer education; and (8) the right to a healthy environment.
See "Consumer Rights", online: Consumers International,
＜http://www.consumersinternational.org/who-we-are/consumer-rights＞.

[196] See Yang Soon-Whei, *Comparative Study for Consumer Protection Law on Civil Aviation Passengers between Taiwan and Mainland* (Taiwan: National Taiwan Ocean University Master Thesis 2001) at 117. (in Chinese)
In Ms. Yang's thesis, she examined consumer protection legislation in Taiwan and Mainland China, but the history and practice of legislation for consumer protection in the US was referred to in support of her arguments.

[197] See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 435, 461 P2 d 436 (1944); *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* Case C-300/95. In a footnote of the Opinion of Advocate General Tesauro, Mr. Tesauro expressed that: "the doctrine of objective or, to use the English term, strict liability originates in the US in a concurring opinion of Judge Roger Traynor in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 435, 461 P2 d 436 (1944)…"

the consumer had to prove three objective elements: (1) the defective product;[198] (2) the consumer's damages; and (3) the causation between the defective product and damages. The most significant leading case to sustain the three objective elements was *Greenman v. Yuba Power Products, Inc*.,[199] in which the Supreme Court of California opened the floodgates of strict liability, and in so doing, dramatically altered the landscape of product liability law in the US.[200] The rule of "strict liability" became the legal foundation for consumer protection.[201] The purpose of strict liability is to ensure that the cost of injuries resulting from defective products are assumed by the manufacturers who had put such products on the market, rather than by the injured persons who are powerless to protect themselves.[202] In other words, for reasons of public policy, US law developed a "no-fault" regime in consumer protection to protect the vulnerable position of consumers.[203]

By referring to *Escola* and *Greenman*, it is noted that strict liability claims only focus on the defective product itself. More importantly, in the *Escola* Case, the US

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[198] The defects generally fall into three categories: (a) manufacturing defects; (b) design defects; and (c) warning defects. The manufacturer of the defective product should bear the "strict liability" for the consumer's damages. The warning defects usually involve written communication accompanying the product. In the case that a product fails to include a warning necessary to the consumer's proper use of the product, this omission may be deemed a warning defect and it may make the product unreasonably dangerous. See also August Horvath, John Villafranco & Stephen Calkins, *Consumer Protection Law Developments* (Chicago, IL: ABA Publishing, 2009) at 23.

[199] See *William Greenman v. Yuba Power Products, Inc.* (1963), L. A. No 26976. Supreme Court of California, In Bank. Jan. 24, 1963. 59 Cal. 2d 57; 377 P.2d 897; 27 Cal. Rptr. 697; 1963 Cal. LEXIS 140; 13 A.L.R.3d 1049.

[200] See Andrew C. Spacone, "Strict Liability in the EU" (2000) 5 Roger William University Law Review 341; By referring to Black Law Dictionary, strict liability means that liability does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. Strict liability most often applies either to ultra hazardous activities or in product liability cases.

[201] There are four main theories of liability which encompass a product liability claim: (1) strict liability; (b) negligence; (3) breach of warranty; and (4) intentional tort. The breach of warranty is a claim which is more contractual than tortious - i.e., wrongful. In addition, three types of warranties, which a consumer relies, may be violated: (1) express warranty; (2) implied warranty of merchantability; and (3) implied warranty of fitness for a particular purpose. See Margaret C. Jasper, *supra* note 190 at 28 and 29.

[202] *Ibid.*

[203] In *Greenman*, Justice Traynor laid the following rationale: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."

judicial view held that "the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured", and "for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business".[204] That is to say, the US consumer protection for defective products is justified by placing strict liability on manufacturers and encouraging manufacturers to distribute their risks through the insurance mechanism. As a result, placing strict liability on enterprises that distribute risks through insurance mechanisms, provides a foundation for customers to justify their claims against powerful enterprises without having to prove fault.

3.1.2 Consumer Protection in the EU

Similar to the US, most EU consumer legislation is based on a string of directives adopted between 1985 and 2002. These include package travel (90/314/EC);[205] unfair terms (93/13/EEC);[206] and the sale of consumer goods and guarantees (99/44/EC).[207] These directives call for the national laws of Member States to ensure the outcomes specified in the particular directives, or to retain more

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[204] In *Escola*, Justice Traynor held that:

> […] It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market…

[205] See Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, online Europa.eu:
< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0314:en:HTML >.

[206] See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, online Europa.eu:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>.

[207] See Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, online Europa.eu:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:NOT>.

favorable rules for consumers.[208] In summary, the "old approach" was directed towards "minimal harmonization", whereas the new approach of the EU directives is focused on "complete harmonization".[209] Failure to do so may also allow consumers to claim compensation from the concerned Member States that breached Community law.[210] Nevertheless, the final arbiter in interpreting the EU consumer law is the Court of Justice of the European Union (the "CJEU"), not the courts of the Member States. Thus, the case law of the CJEU provides sources to examine the EU consumer protection implementation.[211]

Although consumers are able to benefit from the unrestricted movement of goods among Member States,[212] at the same time they are facing a predicament: Member States will have varying levels of consumer protection. Should a consumer in one State tolerate a lower protection standard for the same product defect as a consumer in another State? To address consumer concerns, regulations related to product liability at the EU level, which have different standards when it comes to compensation issues, must also establish the safety standards that are directly attached to the free movement of goods.[213] The safety concept, which is rooted in the perception of defect, refers equally to persons and things. In other words, the "safety concept" of a product is not

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[208] *Ibid.*

[209] See Hans-Wolfgang Micklitz, Norbert Reich, Peter Rott, *Understanding EU Consumer Law* (Antwerp: Intersentia Publishers, 2009) at viii.

[210] An example of the failure of a Member State fulfilled its obligation to implement a community directive could be referred to Case C-414/01, *Commission of the European Communities v Kingdom of Spain*, [2002] ECR I-11121. See online: < http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48279&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=428072 >.

[211] *Ibid.*

[212] See Articles 28-30 of the *EU Treaty*. It is worth mentioning that following the entry into force of the Lisbon Treaty, the *EU Treaty* has been amended and renamed the *Treaty on the Functioning of the European Union* (TFEU). The provisions on the free movement of goods (ex Articles 28–30 EC) have remained unchanged, but received a new numbering as Articles 34–36 of the TFEU. Other articles have also had their numbering changed. The present guide will use this new numbering of the TFEU, also when referring to judgments of the Court of Justice rendered under the EC Treaty. Detailed interpretation for the free movement of goods can be found at the EU website online: < http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf >.

[213] See Micklitz, Reich and Rott, *supra* note 209 at 219.

only determined by the producer, but it is also linked to consumer expectations.[214] The Council Report of 14 April 1975 marked an important step in bringing to realization the policies and priorities set out in the preliminary program for consumer protection.[215] This Report sets forth five basic consumer rights: (1) the right to protection of health and safety, (2) the right to protection of economic interests, (3) the right of redress, (4) the right of information and education, and (5) the right of representation.[216] Most importantly, the significant European legislation for consumer protection should refer to the Council Directive 85/374/EEC of 25 July 1985, in which the EU established product liability principles for consumer protection.[217] Under this Directive, manufacturers and producers are subject to strict liability to ensure a high level of consumer protection.[218] In early 1970, the European Economic Community (EEC) raised the concern that strict liability should be applied to product liability in Europe in order to protect consumers in industrial manufacturing chains.[219] However, it took about fifteen years to finally adopt Directive 85/374/EEC.[220] Since

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[214] See Micklitz, Reich and Rott, *supra* note 209 at 223.

[215] See Commission of the European Communities "Consumer Protection and Information Policy – Second Report Manuscript finished in March 1978" (Germany 1979). ＜http://aei.pitt.edu/3102/1/3102.pdf＞.

[216] See August Horvath, John Villafranco & Stephen Calkins, *Consumer Protection Law Developments* (Chicago, IL: ABA Publishing, 2009) at 716.

[217] All the principles related to producer's liability for defective product could be referred to the preamble of the Council Directive 85/374/EEC of 25 July 1985. See online: ＜http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:en:HTML＞.
It is important to note that Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1999] OJ L 141/20.

[218] It is worth mentioning that in the preamble of the Council Directive 85/374/EEC, it shows:
> Whereas liability without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables.

[219] See Micklitz, Reich and Rott, *supra* note 209 at 220. The Council issued the first draft of product liability directive in 1974, and the Proposal of a Convention of 4 April 1975 was promulgated.

[220] Directive 85/374/EEC can be found online at: ＜ https://osha.europa.eu/en/legislation/directives/workplaces-equipment-signs-personal-protective-equipment/osh-related-aspects/council-directive-85-374-eec＞.
After Council Directive 85/374/EEC was promulgated, the *Henning Veedfaald v. Arhus Amtskommune* case provided guidance for applying the Directive in the EEC. In later days, the EU legislation and the

then, the strict liability doctrine has been established to provide broader consumer protection.

Nevertheless, even though the consumer protection rules pass risks on to the producers based on the fact that the defect was present at the time of putting the particular product into circulation,[221] consumers cannot expect absolute safety. For example, according to Article 7(d) of the Directive 85/374/EEC,[222] the producer shall not be liable if he proves that "the defect is due to compliance of the product with mandatory regulations issued by the public authorities".[223] In such cases, manufacturers and producers are able to defend against their liability by proving exceptional causes, such as "state of the art" (or "the state of scientific and technical knowledge at the time when the product was put into circulation…"), government/military contractor ("mandatory regulations") or manufacturer of components.[224] In sum, the strict liability regime in the EU has allowed certain exceptional causes that are recognized by legislation to be in line and commensurate with economic development and expectations.

3.1.3 Consumers' Rights in *Force Majeure* Delays

In spite of the distinctions in the consumer protection legislation and practice of the US and the EU,[225] both consumer protection legislations share the same

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European courts adopted the doctrine of strict producer liability in handling various product liability claims.
See Professor Ludwig Weber, "Comparative Air law" Vol. II Textbook for IASL of McGill University (McGill University, 2011) at 667-684 (*Henning Veedfaald v. Arhus Amtskommune* Case C-203/99).

[221] See EC, *Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*, *OJ L 210/29*, art 7(b)

[222] *Ibid*, art 7(d).

[223] See *Ibid*.

[224] See *Bruce v. Martin-Marietta Corp.* (US Court of Appeal, Tenth Circuit, 24 September 1976); *Varig Airlines v. Walter Kidde & Co., Inc.* (US Court of Appeal, Ninth Circuit, No 79-3720, 26 February 1982); *Deniston v. Boeing* (US District Court, Northern District of New York, No 87-CV-1205, 22 March 1991); Article 7 of the Council Directive 85/374/EEC.

[225] Comparing the consumer protection legislation and practice, the following differences also express

consumers' rights, such as: (1) right to safety; (2) right to be informed; (3) right to education; and (4) right to redress. Bearing these rights in mind, it is common practice for passengers, consumer protection groups and consumer protection lawyers to argue that air carriers are in a better position to offer updated travel information and to bear the costs associated with the risks of operating international air transportation service in delays caused by *force majeure*.

A further assumption is that through corporate buying power and networking, air carriers hold stronger bargaining power to negotiate with hotels and caterers for favorable pricing to offer hotel rooms and food in cases of flight delay. Even in case of *force majeure* delays, some passengers argue that air carriers should satisfy passengers' needs or expectations based on air carriers' advantage of controlling their sources. Some passengers have demanded the equivalent in monetary compensation for services which air carriers fail to provide during delays, including those caused by *force majeure*.

The reality is that both air carriers and passengers do not have the ability to control the weather, or any *acts of God* which can easily interrupt international air transportation. Additionally, for safety and security reasons, air carriers must follow the instructions of air traffic controllers when taking off or landing.[226] There are third

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distinct aspects in the US and the EU:

a. The general definition of "consumer" in the EU and the US differs in focus; the EU's definition is "a natural person" engaged in transactions covered by the Directive 85/374/EEC, but the definition under the FTC Act focuses on the individual's purpose in entering a contract "A natural person who seeks or acquires goods, services, or money for personal, family, or household use."[225]
b. What constitutes a "defective product" in the US court cases is seen from the manufacturer's view, but the determination of the "safety" of a product under Article 6(1) of the Directive 85/374/EEC takes the user's perspective into consideration.
c. The "state of the art" defense in the US could be used only when the product was put on the market and no one could be aware of the defects. Under Article 7(e) of the European Directive, the "state of scientific and technical knowledge" is based on the time when the producer placed the product into circulation, and was unable to discover the existence of the defect.

See William T. Vokowich, *Consumer Protection in the 21st Century-A global Perspective* (New York: Transnational Publishers 2000) at 99.

See also Case C-300/95, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, [1997] ECR-I 2649.

[226] See US DOT, "Understanding the Reporting of Causes of Flight Delays and Cancellations" online:

parties involved in the network of international air transportation and air carriers have no control over the actions of these third parties, such as air navigation control agencies. International air transportation involves both unexpected and expected factors that may prevent air carriers from performing the duties that are expected by passengers. Consequently, in cases of *force majeure* delays, unresolved conflicts between air carriers and passengers exist when passengers expect that air carriers undertake obligations and the air carriers refuse to compensate passengers for inadequate services resulting from events beyond their control. For instance, based on the author's experience, American and European air carriers claim to respect passengers' "consumer rights" but argue that passengers abuse these rights in *force majeure* delays. In most flight delays caused by bad weather, air carriers may not be able to release confirmed flight information to passengers because they also rely on instructions from the air traffic controllers for take-off. In such cases, air carriers usually refuse to compensate passengers.

In conclusion, consumer protection legislation indeed provides certain legal grounds (consumer rights) for passengers to make their claims against the air carriers. However, most countries have promulgated particular laws governing aviation matters and air carriers have resisted applying such consumer protection legislation to compensate passengers. Consequently, consumer protection legislation cannot provide a comprehensive solution to resolve the disputes between air carriers and passengers resulting from delays caused by *force majeure*.

＜http://www.rita.dot.gov/bts/help/aviation/html/understanding.html＞.
According to the US DOT, the air carriers report the causes of delay in broad categories that were created by the Air Carrier On-Time Reporting Advisory Committee. Security and National Aviation System Delay are two causes of delay.

3.2 Passenger Rights in Flight Delays in the US

In the US, the rights of domestic air passengers are set forth with three levels of protection: (1) State and local government; (2) Congress; and (3) Federal laws, regulations and air carriers' policies.[227] In the 2000s, the US promulgated statutes to implement its air passenger protection policy; and, based on such statutes, the US DOT granted "Fly-Rights" to passengers, which can be found online.[228] However, the US DOT statutes specifically emphasize passenger protection in tarmac delays, and allow air carriers to define any additional obligations regarding services in *force majeure* delays through the terms and conditions of their contracts of carriage. This framework invites a consideration of passengers' claims against US air carriers for compensation in cases of "unsatisfactory services" as well as for consequential damages resulting from travel interruption in case of delays caused by *force majeure*.

3.2.1 Remedy Mechanism under the Conventions

In the US, the Conventions are applicable if the flights are considered "international carriage" as defined in the Conventions; otherwise, international or domestic flights are governed by the US statutes.

However, as discussed in Chapter II, this thesis provided a few examples where US courts did not respect the exclusivity principle even where passengers had made their claims under the Conventions for "international carriage". Particularly, in *El Al Israel Airlines Ltd. v. Tseng*, the US courts held on the core issue that "[w]hen the Convention allows no recovery for the episode-in-suit, does it correspondingly

[227] See Rachel Tang, "Airlines Passenger Rights: The Federal Roles in Aviation Consumer Protection" (20 May 2013), Congressional Research Services online: ＜http://www.fas.org/sgp/crs/misc/R43078.pdf＞.("The rights of domestic airline passengers are set forth at three different levels: in federal laws, in regulations, and in the airlines' own policies. Congress, under its constitutional power to "regulate Commerce with foreign Nations, and among the several States," has authority over airline passengers' rights. State and local governments are generally preempted by law from regulating "price, route, or services of an air carrier.")

[228] DOT, Fly-Rights, online: ＜http://airconsumer.ost.dot.gov/publications/flyrights.htm＞.

preclude the passenger from maintaining an action for damages under another source of law, in this case, New York tort law?"[229] The conclusion of the US Supreme Court is negative on the basis that "[t]he Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention". In addition, the court held that Article 19 (damage occasioned by delays) is not limited to accidents; therefore, any liability under local law for damages to goods or for delays is explicitly preempted by Article 24(1).[230] In other words, air carriers are enabled to argue there will be no compensation made for "mental anguish" or "inconvenience" resulting from *force majeure* delays under the Convention.

3.2.2 Remedy Mechanism under the Statutes

The remedy mechanism related to *force majeure* delays under the US statutes will first be presented through an overview of passenger rights, followed by a discussion of passenger rights in the specific case of tarmac delays.

3.2.2.1 Overview of Passenger Rights

An outline of air passenger rights in the US can be easily understood from the "Summary" of the Congressional Research Service Report for "Airline Passenger Rights: The Federal Role in Aviation Consumer Protection" dated 20 May 2013:

> […]Congress can authorize or require the U.S. Department of Transportation (DOT) to enact rules on certain issues, and it can enact

[229] See *El Al Israel Airways, Ltd. v. Tsui Yuan Tseng* (No 97-475) 122 F. 3d 99 and No 97–475. Argued 10 November 1998—Decided 12 January 1999.

[230] *Ibid.* It is worth mentioning that Article 24(1) of the Warsaw Convention provides that

> In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

The wordings are different from Article 24 (2) of the Convention to indicate that:

> In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

> requirements for airlines through direct legislation. In specific cases, DOT may take enforcement actions against air carriers that violate consumer protection rules […] In April 2011, DOT completed a further rulemaking that strengthened the rights of air travelers in the event of oversales, flight cancellations, and delays. The rule also required consumer access to accurate and adequate information when selecting flights, and improvements in agency responsiveness to customer complaints… Nonetheless, a number of consumer-related subjects, including disclosure of code sharing arrangements on domestic flights, compensation of passengers "bumped" from oversold flights, and disclosure of ancillary fees, remain controversial.[231]

In short, at the federal level, DOT is charged with protecting consumers from unfair or deceptive practice and to ensure safe and adequate services in air transport.[232] By referring to the Congressional Research Service Report, the scope of passenger rights, at minimum, include: (1) compensation for passengers "bumped" from oversold flights; (2) airlines' duties for flight cancellations and delays; (3) passengers' access to accurate and adequate information when selecting flights; (4) improvements in agency responsiveness to customer complaints; (5) disclosure of code sharing arrangements on domestic flights; and (6) disclosure of ancillary fees. Lately, DOT has developed a consumer guide with thirteen items of passenger protection, such as "air fare" and "delayed and canceled flights".[233] And, the targeted

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[231] See Congressional Research Service Report- Airline Passenger Rights: The Federal Role in Aviation Consumer Protection, online: ＜http://fas.org/sgp/crs/misc/R43078.pdf＞.

[232] See 49 US Code Section 41712, in concert with 49 US Code Sections 40101(a)(4), 40101(a)(9), and 41702. With regard to the FAA's role to offer passenger protection, it can be referred to the following summary made by Rachel Tang, "Airlines Passenger Rights: The Federal Roles in Aviation Consumer Protection" (20 May 2013):

> The FAA Modernization and Reform Act of 2012 (P.L. 112-95), signed into law by the President on February 14, 2012, included a number of provisions regarding the rights of airline passengers and created a firmer statutory basis for the rules adopted by DOT in 2009 and 2011. Nonetheless, a number of consumer-related subjects, including disclosure of code sharing arrangements on domestic flights, compensation of passengers "bumped" from oversold flights, and disclosure of ancillary fees, remain controversial.

[233] The thirteen items listed under the consumer guidance for "Fly Rights" are: 1. Air Fares; 2. Schedules and Tickets; 3. Delayed and Canceled Flights; 4. Overbooking; 5. Baggage; 6. Smoking; 7. Passengers with Disabilities; 8. Frequent-Flyer Programs; 9. Contract Terms; 10. Travel Scams; 11. To Your Health; 12. Airline Safety and Security; 13. Complaining.

entities include air carriers, foreign air carriers, and ticket agents.

As far as passenger protection is concerned, the DOT's regulations, standards, and procedures related to air travel[234] mainly include:

(1) 14 CFR Part 234 - Airlines Service Quality Performance Reports

(2) 14 CFR Part 253 - Notice of Terms of Contract of Carriage

(3) 14 CFR Part 259 - Enhanced Protection for Airline Passengers

(4) 14 CFR Part 399 - Statements of General Policy

To better appreciate the need for DOT regulation regarding delays, it is worth mentioning the findings of the project "Total Delays Impact" (TDI), sponsored by the Federal Aviation Administration, according to which the estimated total cost of all US air transportation delays in 2007 was US$32.9 billion.[235] Statistics by DOT also show that in the four quarters of 2009, the percentage of not-on-time flights was 70% to 93.48 percent for all national air carriers' scheduled flights in the US.[236] Such figures indicate that in the US, air carriers and passengers are facing the serious reality of

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See DOT, "Fly Rights", online: ＜http://www.dot.gov/airconsumer/fly-rights＞.

[234] See Rachel Tang *supra* note 227.

[235] See National Center of Excellence for Aviation Operations Research (NEXTOR) of the FAA, "Total Delays Impact Study - A Comprehensive Assessment of the Costs and Impacts of Flight Delays in the US" (October 2010), online:
<http://www.isr.umd.edu/NEXTOR/pubs/TDI_Report_Final_10_18_10_V3.pdf> at vii.

[236] See The US DOT, online:
＜ http://www.bts.gov/programs/airline_information/frequently_delaysed_flights/ ＞ (data accessed date: March 10, 2011) & Bureau of Transport Statistics, online: ＜ http://www.transtats.bts.gov/HomeDrillChart.asp＞ (data accessed date: 10 March 2011)
The figures were made by the US Department of Transportation based on the following assumption:

> Flights ranked by percent not on-time (number delayed includes cancelled and diverted flights). A flight is considered delayed when it arrived 15 or more minutes later than the schedule. A complete listing of airline and airport abbreviations is available. Some flights on the list are a combination of flights operated by the same carrier between the same origin and destination with a change in scheduled departure time of 30 minutes or less.

The information of 20.41% not on-time percentage is based on data submitted by reporting carriers. The US of Department of Transportation made further interpretation that:

> The number of reporting carriers varies as follows: 14 from 1987 to 1988, 13 in 1989, 12 from 1990 to 1991, 10 from 1992 to 1999, 11 in 2000, 12 in 2001, 10 in 2002, 18 in 2003, 19 in 2004, 20 from 2005 to 2008, 19 in 2009, 18 in 2010, and 16 in 2011 […]. In the dropdown list, All Major Carriers 1987-Present refers to the 10 major carriers that reported for all years or merged into another major carrier. They are Alaska Airlines, America West (merged into US Airways starting January 2006), American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines (merged into Delta Air Lines since January 2010), Southwest Airlines, Trans World Airways (merged into American Airlines since January 2002), United Airlines, and US Airways."

flights that are not on-time.

As a result, the Airline Passenger Bill of Rights Act of 2009 (H.R.624/S.213) was re-introduced in the Senate (S.213) on 12 January 2009 and in the House of Representatives (H.R.624) on 21 January 2009.[237] The aim was to improve air passenger services by enacting minimum standards for lengthy on-board tarmac delays, while also improving the health and safety of passengers and crew in such circumstances.[238] This legislation imposed air carriers' assistance to passengers in the case of tarmac delays, and required air carriers to provide essential services to their passengers, including: (1) adequate food and portable water; (2) adequate restroom

[237] Association for Airlines Passenger Rights, "Airline Passenger Bill of Rights Act of 2009" online: ＜http://www.flyfrienDeltayskies.com/pdf-docs/2009_AARP_Leg_Summary_Bill_of_Rights.pdf ＞.

[238] Part 259.5(b) provides twelve guidelines for the minimum standards for air carriers' consumer services plan, including handling "bumped" passengers with fairness and consistency in the case of oversales, and meeting customers' essential needs during lengthy tarmac delays. The twelve standards are:

(1) Disclosing on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation, that the lowest fare offered by the carrier may be available elsewhere if that is the case;

(2) Notifying consumers of known delays, cancellations, and diversions as required by 14 CFR 259.8 of this chapter;

(3) Delivering baggage on time, including making every reasonable effort to return mishandled baggage within twenty-four hours, compensating passengers for reasonable expenses that result due to delays in delivery, as required by 14 CFR part 254 for domestic flights and as required by applicable international agreements for international flights, and reimbursing passengers for any fee charged to transport a bag if that bag is lost;

(4) Allowing reservations to be held without payment or cancelled without penalty for a defined amount of time;

(5) Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and CFR part 226 for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation;

(6) Properly accommodating passengers with disabilities, as required by part 382 of this chapter, and other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays;

(7) Meeting customers' essential needs during lengthy tarmac delays as required by § 259.4 of this chapter and as provided for in each covered carrier's contingency plan;

(8) Handling "bumped" passengers with fairness and consistency in the case of oversales as required by part 250 of this chapter and as described in each carrier's policies and procedures for determining boarding priority;

(9) Disclosing cancellation policies, frequent flyer rules, aircraft seating configuration, and lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff;

(10) Notifying consumers in a timely manner of changes in their travel itineraries;

(11) Ensuring responsiveness to consumer problems as required by § 259.7 of this chapter; and

(12) Identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.

facilities; (3) cabin ventilation and comfortable cabin temperatures; and (4) access to necessary medical treatment.[239] In addition, the *Airline Passenger Bill of Rights Act* requires airline contingency plans to provide passengers with the opportunity to safely deplane from on-board tarmac delays after three (3) hours. Such an option shall be made available, at the very minimum, once every three (3) hours so long as the plane is delayed on the ground with its doors closed.[240] The Act also granted the pilot some flexibility in the event that a pilot has determined that allowing the passengers to deplane would jeopardize the safety or security of the passengers, or if notified that the flight will depart or unload within thirty (30) minutes after the three (3) hour delays.[241] The Act provided legislative rationales for the DOT to codify the existing "Enhancing Airline Passenger Protection I" rules that it had issued on 15 November 2007.[242] In December 2009, the US DOT issued a comprehensive final rule,

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[239] *Ibid.*
[240] *Ibid.*
[241] *Ibid.*
[242] The DOT issued an Advance Notice of Proposed Rulemaking (ANPRM), under Docket DOT-OST-2007-22, entitled "Enhancing Airline Passenger Protections I" to set forth numerous measures to protect air passengers, including:

a. Requires US carriers to adopt contingency plans for lengthy tarmac delays that include provisions for adequate food and water within 2 hours and deplaning of passengers within 3 hours;
b. Requires US carriers to post contracts of carriage, contingency plans, and customer services plans on their web sites;
c. Requires US carriers to respond to consumer problems;
d. Defines chronically late flights and deems the holding out of such flights to be unfair and deceptive in violation of 49 U.S.C. 41712;
e. Requires US carriers to publish information on flight delays on their websites;
f. Requires US carriers to adopt customer services plans and audit their own compliance with their plans; and
g. Prohibits US carriers from retroactively applying any material amendment to their contracts of carriage that has significant negative implications for consumers.

See *Final Rule on Enhancing Airline Passenger Protections*, DOT Docket No DOT-OST-2007-0022, online: Government Printing Office
＜http://www.gpo.gov/fdsys/pkg/FR-2007-11-20/html/07-5760.htm＞.
See also The US Department of Transportation, "Answers to Frequently Asked Questions Concerning the Enforcement of the Final Rule on Enhancing Airline Passenger Protections" (28 April 2010), online: DOT
<http://airconsumer.ost.dot.gov/rules/FAQ%20on%20Consumer%20Rule%20April%2028%202010.pdf>.
Following the DOT's adoption of comments from individuals, consumer advocacy organizations, carriers, airport authorities, industry associations, and travel agency associations, on 2 June 2010, it published the "Enhancing Airline Passenger Protection II" rules and proposed to improve air travel environment for consumers by:

"Enhancing Airline Passenger Protections"[243], which expanded regulatory protection of air passengers by adopting standards for customer services plans in case of tarmac delays, such as properly accommodating disabled and special-needs passengers.[244] The 2009 "Enhancing Airline Passenger Protections" rule [245] was supplemented in

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a. Increasing the number of carriers that are required to adopt tarmac delays contingency plans and the airports at which they must adhere to the plan's terms;
b. Increasing the number of carriers that are required to report tarmac delays information to the Department;
c. Expanding the group of carriers that are required to adopt, follow and audit customer services plans and establishing minimum standards for the subjects all carriers must cover in such plans;
d. Requiring carriers to include their contingency plans and customer services plans in their contracts of carriage;
e. Increasing the number of carriers that must respond to consumer complaints;
f. Enhancing protection afforded to passengers in oversales including increasing the maximum denied boarding compensation airlines must pay to passengers bumped from flights;
g. Strengthening, codifying and clarifying the Department's enforcement policies concerning air transportation, price advertising practices;
h. Requiring carriers to notify consumers of optional fees related to air transportation and of increases in baggage fees;
i. Prohibiting post-purchase price increases;
j. Requiring carriers to provide passengers timely notice of flight status changes such as delays and cancellations; and
k. Prohibiting carriers from imposing unfair contract of carriage choice-of-forum provisions.

On 22 January 2010, the DOT issued the "Final Rule Enhancing Airlines Passenger Protection" (OST-2010-0039) to extend 90 days for air carriers in order to grant air carriers enough time to complete the changes necessary to ensure compliance with the additional flight time disclosure requirements in the new rule. See online: Government Printing Office
< http://www.gpo.gov/fdsys/pkg/FR-2010-03-10/html/2010-5244.htm>.
See also 76 Fed Reg 23110-23167, DOT-OST-2010-0140, online: Federal Register
<https://www.federalregister.gov/articles/2011/04/25/2011-9736/enhancing-airline-passenger-protections>.

[243] The "Enhancing Airline Passenger Protections" is applicable for all US carriers' scheduled flights, both domestic and international, including those involving aircraft with fewer than 30 seats if a carrier operates any aircraft with 30 or more passenger seats.
See US Department of Transport, Enhancing Airline Passenger Protections, *supra* note 242.

[244] The minimum "services elements" in the standards of services plans included: (1) offering the lowest fare available; (2) notifying consumers of known delays, cancellations, and diversions; (3) delivering baggage on time; (4) allowing reservations to be held or cancelled without penalty for a defined amount of time; (5) providing prompt ticket refunds; (6) properly accommodating disabled and special-needs passengers, including during tarmac delays; (7) meeting customers' essential needs during lengthy on-board delays; (8) handling ''bumped'' passengers in the case of oversales with fairness and consistency; (9) disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration; (10) ensuring good customer services from code-share partners; and (11) improving responsiveness to customer complaints. See *Ibid*.
The "Enhancing Airline Passenger Protections" has been revised in 2011, 2012 and 2015.

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a. Requires US carriers to adopt contingency plans for lengthy tarmac delays that include provisions for adequate food and water within 2 hours and deplaning of passengers within 3 hours;
b. Requires US carriers to post contracts of carriage, contingency plans, and customer services plans on their web sites;
c. Requires US carriers to respond to consumer problems;

April 2011 to strengthen the rights of passengers in the event of over sales, flight cancellations, and delays.[246] This version of the "Enhancing Airline Passenger Protections" rules, however, established procedures related to extended ground delays involving aircraft with passengers aboard, required air carriers to address chronically delayed flights, and mandated more information disclosure to passengers.[247]

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d. Defines chronically late flights and deems the holding out of such flights to be unfair and deceptive in violation of 49 U.S.C. 41712;
e. Requires US carriers to publish information on flight delays on their websites;
f. Requires US carriers to adopt customer services plans and audit their own compliance with their plans; and
g. Prohibits US carriers from retroactively applying any material amendment to their contracts of carriage that has significant negative implications for consumers.

See *Final Rule on Enhancing Airline Passenger Protections*, DOT Docket No DOT-OST-2007-0022, online: Government Printing Office
＜http://www.gpo.gov/fdsys/pkg/FR-2007-11-20/html/07-5760.htm＞.
See also The US DOT, "Answers to Frequently Asked Questions Concerning the Enforcement of the Final Rule on Enhancing Airline Passenger Protections" (28 April 2010), online: DOT
<http://airconsumer.ost.dot.gov/rules/FAQ%20on%20Consumer%20Rule%20April%2028%202010.pdf>.

[246] Following the DOT's adoption of comments from individuals, consumer advocacy organizations, carriers, airport authorities, industry associations, and travel agency associations, on 2 June 2010, it published the "Enhancing Airline Passenger Protection II" rules and proposed to improve air travel environment for consumers by:

a. Increasing the number of carriers that are required to adopt tarmac delays contingency plans and the airports at which they must adhere to the plan's terms;
b. Increasing the number of carriers that are required to report tarmac delays information to the Department;
c. Expanding the group of carriers that are required to adopt, follow and audit customer services plans and establishing minimum standards for the subjects all carriers must cover in such plans;
d. Requiring carriers to include their contingency plans and customer services plans in their contracts of carriage;
e. Increasing the number of carriers that must respond to consumer complaints;
f. Enhancing protection afforded to passengers in oversales including increasing the maximum denied boarding compensation airlines must pay to passengers bumped from flights;
g. Strengthening, codifying and clarifying the Department's enforcement policies concerning air transportation, price advertising practices;
h. Requiring carriers to notify consumers of optional fees related to air transportation and of increases in baggage fees;
i. Prohibiting post-purchase price increases;
j. Requiring carriers to provide passengers timely notice of flight status changes such as delays and cancellations; and
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< http://www.gpo.gov/fdsys/pkg/FR-2010-03-10/html/2010-5244.htm>.
See also 76 Fed Reg 23110-23167, DOT-OST-2010-0140, online: Federal Register
<https://www.federalregister.gov/articles/2011/04/25/2011-9736/enhancing-airline-passenger-protections>.

[247] See 112th Congress Report (112-381), The FAA Modernization and Reform Act of 2012 (P.L. 112-95), online: ＜http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt381/pdf/CRPT-112hrpt381.pdf＞

Following that, the *FAA Modernization and Reform Act of 2012*, was enacted on 14 February 2012 and includes a number of provisions relating to passenger rights. The new law creates a firmer statutory basis for the rules adopted by DOT in 2009 and 2011.[248]

In May 2012, DOT informed the 6th International Air Transport Conference that they handled 1,260 complaints (compared to 1,065 in May 2011).[249] More significantly, the major source of passenger complaints (at 25%) stem from the category of "flight problems" which covers cancellations, delays and misconnections.[250] According to the DOT Air Travel Consumer Report of June 2012, up to 86% of reported flight operations arrive "on time", meaning the flight landed less than 15 minutes after the scheduled time shown in the carriers' Computerized Reservations Systems (CRS).[251] Up to January 2015, figures showed 76.8% of reported flight operations arriving on time with 1,480 complaints, including 493 associated flight problems.[252] This illustrates that in the US, flight delays still represent a significant part of passengers' concerns and DOT's passenger protection legislation has not progressed to provide thorough solutions to control delay disputes.[253]

More importantly, under the DOT's Fly-Rights - A Consumer Guide to Air Travel, air carriers are allowed to have their own policies on how to manage delayed

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[248] See 112th Congress Report (112-381), The FAA Modernization and Reform Act of 2012 (P.L. 112-95), online: ＜http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt381/pdf/CRPT-112hrpt381.pdf＞.

[249] See ICAO, Worldwide Air Transport Conference No ATConf/6 -IP/1 Online:＜http://www.icao.int/meetings/atconf6/Documents/WorkingPapers/ATConf6-ip001_en.pdf＞

[250] *Ibid.*

[251] See DOT, " Air Travel Consumer Report of June 2012", online: ＜http://airconsumer.ost.dot.gov/reports/2012/June/2012JuneATCR.pdf＞.

[252] See DOT, " Air Travel Consumer Report of March 2015", online: ＜http://www.dot.gov/sites/dot.gov/files/docs/2015MarchATCR_0.pdf＞.

[253] More recently, the "Enhancing Airline Passenger Protections" as revised again on 8 May 2015 to respond to passengers' complaints. See DOT, "Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2)" (8 May 2015) DOT online: ＜http://www.dot.gov/sites/dot.gov/files/docs/EAPP_2_FAQ_1.pdf＞.

passengers waiting at the airport.[254] This causes confusion for passengers with respect to their rights related to delays. Pursuant to legislation on consumer protection, passengers expect to receive some form of redress relating to their expectations, whereas in the airline industry, such expectations have not been dealt with under the law. This brings up unresolved conflicts between the obligations of the air carriers and the rights and treatment expected by passengers.

3.2.2.2 Passenger Rights in Tarmac Delays

Weather problems occurring in 2006 and 2007 had kept many aircraft sitting for long hours on tarmacs, causing passengers undue discomfort and inconvenience.[255] In December 2009, the DOT issued the "Consumer Rule Limits Airline Tarmac

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[254] On DOT website, readers can find:
"Airlines don't guarantee their schedules, and you should realize this when planning your trip. There are many things that can-and often do-make it impossible for flights to arrive on time. Some of these problems, like bad weather, air traffic delays, and mechanical issues, are hard to predict and often beyond the airlines' control.
If your flight is delayed, try to find out how late it will be. But keep in mind that it is sometimes difficult for airlines to estimate the total duration of a delay during its early stages. In so- called "creeping delays," developments occur which were not anticipated when the carrier made its initial estimate of the length of the delay. Weather that had been forecast to improve can instead deteriorate, or a mechanical problem can turn out to be more complex than initially evaluated. If the problem is with local weather or air traffic control, all flights will probably be late and there's not much you or the airline can do to speed up your departure. If your flight is experiencing a lengthy delay, you might be better off trying to arrange another flight, as long as you don't have to pay a cancellation penalty or higher fare for changing your reservations. (It is sometimes easier to make such arrangements by phone than at a ticket counter.) If you find a flight on another airline, ask the first airline if it will endorse your ticket to the new carrier; this could save you a fare collection. Remember, however, that there is no rule requiring them to do this.
If your flight is canceled, most airlines will rebook you on their first flight to your destination on which space is available, at no additional charge. If this involves a significant delay, find out if another carrier has space and ask the first airline if they will endorse your ticket to the other carrier. Finding extra seats may be difficult, however, especially over holidays and other peak travel times.
Each airline has its own policies about what it will do for delayed passengers waiting at the airport; there are no federal requirements. If you are delayed, ask the airline staff if it will pay for meals or a phone call…"
See The US DOT, "Flyer Right-A Consumer Guide to Air Travel", DOT online:
＜http://airconsumer.ost.dot.gov/publications/flyrights.htm＞.

[255] See US Department of Transport, Enhancing Airline Passenger Protections, [Docket No DOT–OST–2007–0022] online: ＜http://airconsumer.ost.dot.gov/rules/Final%20Rule%20on%20Enhancing%20Airline%20Passenger%20Protections.pdf＞.

Delays",[256] otherwise called the "Tarmac Delay Rules", to prohibit air carriers operating domestic flights from permitting their aircraft to remain on the tarmac for more than three hours, with exceptions for safety, security and air traffic control related-reasons.[257] The "Tarmac Delay Rules" significantly strengthen the protection afforded to passengers by establishing a hard-time limit, after which the US air carriers must allow passengers to deplane from flights.[258]

Furthermore, under 14 CFR 259.4, air carriers are requested to establish their "contingency plans for lengthy tarmac delays", which shall include certain rules applicable to domestic and international flights. Generally, for domestic flights, the covered US air carriers will not permit an aircraft to remain on the tarmac for more than three hours before allowing passengers to deplane[259]; and, for international flights operated by covered carriers that depart from or arrive at a US airport, the carrier will not permit an aircraft to remain on the tarmac at a US airport for more than four hours before allowing passengers to deplane.[260] For all flights and in the case of tarmac delays, air carriers should:

(1) assure adequate food and potable water no later than two hours after the aircraft

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[256] See DOT, "New DOT Consumer Rule Limits Airline Tarmac Delays", Provides Other Passenger Protections, Docket DOT 199-09 (21 December 2009) online: DOT ＜http://www.dot.gov/briefing-room/new-dot-consumer-rule-limits-airline-tarmac-delays-provides-other-passenger＞.

[257] See DOT, "US Department of Transportation Expends Airlines Passenger Protections" (20 April 2011) online: DOT ＜http://www.transportation.gov/briefing-room/us-department-transportation-expands-airline-passenger-protections＞.

[258] In the US, the three hours tarmac delays could be understood better by referring to the following findings:

> […] It's important to realize that 64,393 domestic flights experienced tarmac delays in excess of *one hour* in 2009. Only 1.5% of these flights were delayed in excess of three hours, according to data from the U.S. Bureau of Transportation Statistics (BTS) […] In 2009, more than 58,000 flights were delayed 1-2 hours, and more than 5,400 flights were delayed 2-3 hours. 903 flights were delayed more than three hours, according to data from BTS. It is possible to recognizable a pattern as to where tarmac delays happen.

See Rob Hard, "Does New Fine Simply Create a Hidden Tax on Travel?" (19 April 2010) online: Tourism Review ＜http://www.tourism-review.com/tarmac-rule-travelers-to-pay-the-fines-of-airlines--news2144＞.

[259] See 14 CFR 259.4(1).

[260] See 14CFR 259.4(2).

leaves the gate (in the case of a departure) or touches down (in the case of an arrival) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such services;[261]

(2) assure operable lavatory facilities, as well as adequate medical attention if needed, while the aircraft remains on the tarmac;[262]

(3) provide the passengers on the delayed flight with notifications regarding the status of the delay every 30 minutes while the aircraft is delayed, including the reasons for the tarmac delay, if known;[263]

(4) assure that the passengers on the delayed flight will be notified beginning 30 minutes after scheduled departure time (including any revised departure time that passengers were notified about before boarding) and every 30 minutes thereafter that they have the opportunity to deplane from an aircraft that is at the gate or another disembarkation area with the door open if the opportunity to deplane actually exists;[264]

(5) assure sufficient resources to implement the plan;[265]

(6) assure that the plan has been coordinated with airport authorities (including terminal facility operators where applicable) at each US large hub airport, medium hub airport, small hub airport and non-hub airport that the carrier serves, as well as its regular US diversion airports;[266]

(7) assure that the plan has been coordinated with US Customs and Border Protection (CBP) at each large US hub airport, medium hub airport, small hub airport and non-hub airport that is regularly used for that carrier's international

[261] See 14CFR 259.4(3).
[262] See 14CFR 259.4(4).
[263] See 14CFR 259.4(5).
[264] See 14CFR 259.4(6).
[265] See 14CFR 259.4(7).
[266] See 14CFR 259.4(8).

flights, including diversion airports; and[267]

(8) assure that the plan has been coordinated with the Transportation Security Administration (TSA) at each US large hub airport, medium hub airport, small hub airport and non-hub airport that the carrier serves, including diversion airports.[268]

To ensure air carriers' compliance with the "contingency plans for lengthy tarmac delays" issued to comply with the Tarmac Delay Rules, DOT imposes a fine of up to US$27,500 per passenger for each violation[269], an amount that can reach millions of dollars depending on the size of an aircraft.[270] To date, including the order made in January 2015 to fine Southwest Airlines US$1.6 million, DOT has issued 17 orders assessing a total of US$5.24 million dollars in civil penalties for violations of DOT's Tarmac Delay Rules.[271] The truth is that the fine has triggered negative reaction from the aviation industry.[272] The air carriers' practice to avoid the fine is to cancel or to delay boarding since there are many factors beyond the air carriers' control, such as air traffic control, airport gate availability, runway maintenance or

[267] See 14CFR 259.4(9).
[268] See 14CFR 259.4(10).
[269] It was reported that: "The first fine for violating the DOT tarmac delays rule has been issued to American Eagle totaling US$900,000 (€660,000)." See online: < http://www.iapa.com/index.cfm/travel/blog.article/blog/community/art/US-issues-first-tarmac-delays-fine?C=1>.
The recent case is that DOT fined United Airlines. See DOT Order 2013-10-13 (served 25 October 2013), online: DOT <http://www.dot.gov/sites/dot.dev/files/docs/eo_2013-10-13.pdf>.
[270] The detailed rules should refer to 14 CFR 383.2 (b). In short, large air carriers are subject to a maximum civil penalty of US$27,500 per violation, under 49 U.S.C. 46301 and 14 CFR Part 383. Small businesses or individuals are subject to a maximum penalty of US$1,100. In addition, small businesses and individuals are subject to higher maximum penalties for discrimination, which is US$11,000 per violation, and for engaging in unfair or deceptive practices, which is US$2,500 per violation.
[271] See DOT "US Department of Transportation Fines Southwest US$1.6 Million for Violating Tarmac Delay Rule" (15 January 2015), online: < http://www.dot.gov/briefing-room/us-department-transportation-fines-southwest-16-million-violating-tarmac-delay-rule>.
[272] See Kenneth P. Quinn, Jennifer Trock, Alison Agnew and Philippine Dumoulin, "DOT Moves forward with Controversial Airline Passenger Protection Rules" online: Lexology <http://www.lexology.com/library/detail.aspx?g=3cb47525-111c-4f88-bdfe-417e299fd259>.

weather that can cause delays.[273] Nevertheless, in practice, air carriers' "contingency plans for lengthy tarmac delays" may grant passengers legal grounds to deplane, to be informed of delay information, to be served with food and water, and to have access to lavatory facilities as well as adequate medical attention even though the tarmac delay is beyond the air carriers' control. However, in the absence of explicit statutory language, the air carriers' potential liability for failure to provide free services to passengers during the tarmac delay is unclear.

In spite of the DOT statutes, it is worth noting how the courts viewed passengers' claims resulting from unsatisfactory services during tarmac delays. Before the Tarmac Delay Rules were issued, for instance, in *Biscone v JetBlue Airways Corporation*,[274] the plaintiff boarded a JetBlue aircraft at Kennedy International Airport (JFK) on 14 February 2007 to Burbank, California, but the aircraft was grounded for eleven hours. During the first five hours, the plaintiff remained in her seat with her seat belt fastened because JetBlue's personnel stated that the weather was "holding us up" and that the aircraft could take off on five minutes' notice if passengers were seated. After five hours, JetBlue personnel told passengers that if they wanted to exit the plane and take another flight, they should inform a crew member. The plaintiff, however, alleged that JetBlue's personnel refused to allow any passengers to be released from the plane by stating that there will be no assistance given to passengers to get another flight and a prison sentence of twenty years if anyone tried to force their way off the aircraft. Also, during the confinement, passengers were served meager amounts of water, a few snacks after three hours had passed, and then again after a period of eight hours. In addition, after eight hours, the heating, cooling, and ventilation system was shut down. After ten hours, the captain informed passengers that the toilet tanks were

[273] *Ibid.*
[274] *Biscone v JetBlue Airways Corporation* 2012 NY Slip Op 09019 [103 AD3d 158]

full and they could not "do a No 2" because the tanks would overflow. After eleven hours, buses arrived and took passengers to the terminal, where they waited for another two hours to get their baggage. Approximately, 1,300 other passengers on JetBlue aircraft were similarly affected by JetBlue's actions at JFK that day. Based on the alleged facts, the passenger's five causes of action against JetBlue included "false imprisonment", "negligence and negligence per se", "intentional inflictions of emotional distress", "fraud and deceit" and "breach of contract" to recover damages resulting from a tarmac delay without food, water, clean air and toilet facilities. On the appeal, the passengers' claims were dismissed because they were based on a State tort law, which the court declared was preempted by federal law.

This preemption is referred to airline "services" under the *Airlines Deregulation Act of 1978* ("ADA").[275] Although the US Supreme Court has never explicitly interpreted the meaning of "service" as used in the ADA's preemption provision, there is a general understanding that the ADA's preemption provision does not preempt all state-law tort claims. Some courts have narrowly defined the term "service", finding that state-law tort claims are not preempted. Yet, when federal courts apply a broader definition of "service", some state-law tort claims have been allowed to proceed against airlines.[276] To determine whether a state-law claim related to a "service" within the meaning of the ADA, a court must determine: (1) whether the activity at issue in the claim is an airline's services; (2) if the activity in question implicates a service, the court must then determine whether the claim affects the airline services directly or tenuously, remotely, or peripherally; and (3) if the activity

[275] The Federal Aviation Act of 1958 ("FAA") did not expressly preempt State regulation and contained a "saving clause". In 1978, Congress amended the FAA by enacting the ADA and expressed the preemption provision as "related to a price, route, or service". That is to say, the claims related to "service" should be preempted under the ADA, which is aimed to ensure economic deregulation of the airline industry.

[276] See *Biscone v JetBlue Airways Corporation* 2012 NY Slip Op 09019. The Court's interpretation is at "B. The ADA Preemption Provision", *supra* note 274.

in question directly implicated a service, the court must determine whether the underlying tortuous conduct was reasonably necessary to the services.[277] Where the activity represents "outrageous conduct that goes beyond the scope of normal aircraft operations", the claims should not be preempted.[278] Accordingly, in *Biscone*, the New York State Appellate Court held that the passenger's claims concerning food, water, clean air and toilet facilities and the ability to deplane after a prolonged period on the tarmac relate to and implicate JetBlue's services. Furthermore, the false imprisonment cause of action is preempted by the ADA because the services maintain safety by controlling passengers' movement while the airplanes were grounded on the tarmac due to adverse weather conditions. Finally, intentional infliction of emotional distress cause of action is likewise preempted since it is based on JetBlue's "services" alleged by the plaintiff.[279] Undoubtedly, this case illustrates that under the ADA's preemption provision, there is a gap between passengers' "suffering" and air carriers' responsibility for offering complimentary services to passengers during tarmac delays.

It is worth noting that the ADA's goals aim to place maximum reliance on the competition in providing air transportation services and to encourage more air carriers to access the aviation markets.[280] Under tough competition, ticket fares have declined steadily and the level of service is subject to the air carriers' business strategy.[281] As a

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[277] *Ibid.*

[278] *Ibid.*

[279] See *Biscone v JetBlue Airways Corporation* 2012 NY Slip Op 09019. The Court's interpretation is at "C. The Plaintiff's Claims".

[280] The ADA's five goals include: (1) the maintenance of safety as the highest priority in air commerce; (2) placing maximum reliance on competition in providing air transportation services; (3) the encouragement of air services at major urban areas through secondary or satellite airports; (4) the avoidance of unreasonable industry concentration which would tend to allow one or more air carriers to unreasonably increase prices, reduce services, or exclude competition; and (5) the encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional markets by existing air carriers, and the continued strengthening of small air carriers.
See Library of Congress, "S.2493 - Airline Deregulation Act (95th Congress 1977-1978)" online:
＜https://www.congress.gov/bill/95th-congress/senate-bill/2493＞.

[281] The author's finding is referred to: "Fares have fallen, on average, but they often rise when an airline leaves a city…What the architects of deregulation did not predict at the time was the rise of the frequent-flier programs and the hub-and-spoke system. Both have the effect of a kind of regulation, since they create incentives for consumers to stick with one airline, rather than shop solely on price."

result, the ADA's preemption provision is applicable for air carriers' "service". Air carriers, therefore, have the flexibility to determine their ticketing policy to enhance their competiveness. The quality and amount of service thus become part of the "cost" for air carriers. From the passengers' perspective, some people cherish the memory of the "good old days" of paying high prices with better services.[282] Also, to respond to passengers' complaints on tarmac delays, the DOT's Tarmac Delay Rules stipulate air carriers to assure operable lavatory facilities during tarmac delays, and to assure adequate food and portable water no later than two hours after the aircraft leaves the gate or touches down if the aircraft remains on the tarmac. It is worth emphasizing that the New York State Appellate Court dismissed the *Biscone*'s tort claims in 2012; yet, the JetBlue tarmac delay happened in 2007 and the DOT Tarmac Delay Rules only came into force in 2009. Moreover, the ADA and the Tarmac Delay Rules are both federal statute. The DOT emphasized that the Tarmac Delay Rules required "airlines to live up to their obligations to treat their customers fairly".[283] Thus, it is unclear but interesting to know whether the ADA's preemption provision should be affected by the Tarmac Delay Rules and whether the American courts would place more value on competition than passenger protection in delay caused by unforeseeable factors on the *Biscone* case if it had been filed today.

See Micheline Maynard, "Did ending regulation help fliers?", *The New York Times* (17 April 2008) online: ＜http://www.nytimes.com/2008/04/17/business/17air.html?pagewanted=all&_r=0＞.

[282] The findings were referring to the statements made by a Supreme Court Justice, Stephen Breyer (who worked with Senator Kennedy on airline deregulation in the 1970s) , to make his comments on the impact of airlines deregulation in 2011. He wrote: "So we sit in crowded planes, munch potato chips, flare up when the loudspeaker announces yet another flight delay. But how many now will vote to go back to the "good old days" of paying high, regulated prices for better services?"
Stephen Breyer, "Airlines Deregulation, Revisited", *Bloomberg Business* (20 January 2011) online:＜http://www.bloomberg.com/bw/stories/2011-01-20/airline-deregulation-revisitedbusinessweek-business-news-stock-market-and-financial-advice＞.

[283] See DOT, "New DOT Consumer Rule Limits Airline Tarmac Delays, Provides Other Passenger Protections" (DOT-199-09) (21 December 2009), online: ＜http://www.transportation.gov/briefing-room/new-dot-consumer-rule-limits-airline-tarmac-delays-provides-other-passenger＞.

3.2.3 Contractual Obligations in Delays

Under 14 CFR 253.4(b) and (c), air carriers are obligated to display the full text of their terms and conditions specified in their contract of carriage for public inspection at each of their airport and city ticket offices, and to provide, upon request and free of charge, by mail or other delivery services to passengers, a copy of the full text of the contract of carriage.[284] More importantly, air carriers are required to disclose the rights of the carrier and any limitations concerning delay or failure to perform services, including schedule changes, substitution of an alternate air carrier or aircraft, and rerouting.[285] Furthermore, in response to a passenger's question regarding the air carrier's responsibility once an aircraft returns to the gate, DOT responded as follows:

> After an aircraft returns to the gate, the decision on whether to re-board passengers and operate the same aircraft or to cancel the flight, is an operational matter left to the carrier. The carrier does have a responsibility to follow any policy and procedures in its contract of carriage for rebooking passengers and for providing amenities and refunds. A carrier is not required to re-board a passenger who chooses to deplane. We encourage carriers to announce to deplaning passengers that the flight will or may leave without him/her.[286]

Based on DOT's response and related statutes, air carriers have some discretion in how they will handle delays although DOT imposes certain obligations on air carriers for certain regulatory matters, such as flight and ground safety matters (14 CFR 417),

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[284] The full content of 14 CFR 253.4(b) and (c) shows:
(b) Each air carrier shall make the full text of each term that it incorporates by reference in a contract of carriage available for public inspection at each of its airport and city ticket offices.
(c) Each air carrier shall provide free of charge by mail or other delivery services to passengers, upon their request, a copy of the full text of its terms incorporated by reference in the contract. Each carrier shall keep available at all times, free of charge, at all locations where its tickets are sold within the United States information sufficient to enable passengers to order the full text of such terms.

[285] See 14 CFR 253.5(b)(5).

[286] *Ibid*.

not restricting the refund of the ticket price (14 CFR 253.7), not imposing monetary penalties on passengers (14 CFR 253.7), or filing "On-Time Flight Performance Report" with the Office of Airline Information on a monthly basis (14 CFR 234.4). More importantly, DOT obligates air carriers to display and inform passengers of contractual terms, but also allows air carriers to have flexibility to achieve their marketing strategy in a competitive market. Thus, parallel regimes, including regulatory and contractual obligations, exist to govern air carriers' obligations in the consequences of delays.

Given the above, it is common practice for US air carriers to declare no liability to compensate passengers for flight delays caused by *force majeure* unless local or international law provides otherwise. For instance, United Airlines (UA) expresses in its Rule 24 B) 4) of Contract of Carriage that "*force majeure*" events include:

(1) Any condition beyond UA's control including, but not limited to, meteorological or geological conditions, acts of God, riots, terrorist activities, civil commotions, embargoes, wars, hostilities, disturbances, or unsettled international conditions, either actual, anticipated, threatened or reported, or any delay, demand, circumstances, or requirement due directly or indirectly to such condition;

(2) Any strike, work stoppage, slowdown, lockout, or any other labor-related dispute involving or affecting UA's services;

(3) Any governmental regulation, demand or requirement;

(4) Any shortage of labor, fuel, or facilities of UA or others;

(5) Damage to UA's Aircraft or equipment caused by another party;

(6) Any emergency situation requiring immediate care or protection for a person or property; or

(7) Any event not reasonably foreseen, anticipated or predicted by UA.[287]

That is to say: the "weather", shortage of facilities and any other events beyond UA's control are defined as "*force majeure*" in the UA Contract of Carriage. With regard to the delays or cancellations caused by "*force majeure*" on US Origin Flights or on Non-US Origin Flights, unless the US local or international laws regulate the "*force majeure*",[288] occurrence, UA clearly waives any obligations by referring to Rule 24 D) of the Contract of Carriage, which indicates:

> In the event of a *Force Majeure* Event, UA without notice, may cancel, terminate, divert, postpone, or delay any flight, right of carriage or reservations (whether or not confirmed) and determine if any departure or landing should be made, without any liability on the part of UA. UA may re-accommodate Passengers on another available UA flight or on another carrier or combination of carriers, or via ground transportation, or may refund any unused portions of the Ticket in the form of a travel certificate.[289]

Similarly to UA, Delta Air Lines ("Delta") declares that flight schedules are not guaranteed.[290] Secondly, it is only obliged to refund the unused portion of the ticket and unused ancillary fees, or to reroute passengers on its next flights or to another carrier(s) based on its sole discretion and if acceptable to the passenger, in the event of flight cancellation, diversion, delays of greater than 90 minutes, or delays that will

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[287] United Airlines, *Legal Information*, online:
＜https://www.united.com/web/en-US/content/contract.aspx＞.
See also United Airlines, *Contract of Carriage*, online:
＜http://www.united.com/web/format/pdf/Contract_of_Carriage.pdf＞.

[288] See United Airlines, *Contract of Carriage* Rule 24 A) 2) a) & b).

[289] *Ibid*.

[290] Rules 240 A of the domestic Contract of Carriage and Rules 80 A of the international Contract of Carriage show that:

> Delta will exercise reasonable efforts to carry passengers and their baggage according to Delta's published schedules and the schedule reflected on the passenger's ticket, but published schedules, flight times, aircraft type, seat assignments, and similar details reflected in the ticket or Delta's published schedules are not guaranteed and form no part of this contract.

See Delta Air Lines, *Conditions of Carriage: Domestic General Rules Tariff*, online:
＜ http://www.delta.com/content/dam/delta-www/pdfs/legal/contract_of_carriage_dom.pdf ＞ ; and Delta Air Lines, *Contract of Carriage: International*, online:
＜http://www.delta.com/content/dam/delta-www/pdfs/legal/contract_of_carriage_intl.pdf＞

cause a passenger to miss connections.[291] Finally, the airline assumes no liability if the flight cancellation, diversion or delay was due to *force majeure*. As used in Delta's contracts of carriage, "*force majeure*" means actual, threatened or reported:

(1) Weather conditions or acts of God;

(2) Riots, civil unrest, embargoes, war, hostilities, or unsettled international conditions;

(3) Strikes, work stoppages, slowdowns, lockout, or any other labor-related dispute;

(4) Government regulation, demand, directive or requirement;

(5) Shortages of labor, fuel, or facilities; and

(6) Any other condition beyond Delta's control or any fact not reasonably foreseen by Delta.[292]

From the contracts of carriage of UA and Delta, these two giant American air carriers avoid providing monetary compensation to passengers in case of flight delays or cancellations resulting from "*force majeur*e", which the DOT also leaves to air carriers' discretion under the rules of 14 CFR Part 253.

It is important to emphasize that although neither UA nor Delta undertakes contractual obligations to offer complimentary services to passengers for delays

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[291] Rules 240 B of the domestic Contract of Carriage and Rules 80 B of the international Contract of Carriage show that:

> Delta's Liability in the Event of Schedule Changes, Delays and Flight Cancellations
> In the event of flight cancellation, diversion, delays of greater than 90 minutes, or delays that will cause a passenger to miss connections, Delta will (at passenger's request) cancel the remaining ticket and refund the unused portion of the ticket and unused ancillary fees in the original form of payment in accordance with Rule 260 of these conditions of carriage. If the passenger does not request a refund and cancellation of the ticket, Delta will transport the passenger to the destination on Delta's next flight on which seats are available in the class of services originally purchased. At Delta's sole discretion and if acceptable to the passenger, Delta may arrange for the passenger to travel on another carrier or via ground transportation. If acceptable to the passenger, Delta will provide transportation in a lower class of services, in which case the passenger may be entitled to a partial refund. If space on the next available flight is available only in a higher class of services than purchased, Delta will transport the passenger on the flight, although Delta reserves the right to upgrade other passengers on the flight according to its upgrade priority policy to make space in the class of services originally purchased.

[292] See Rules 240 C of the Delta domestic Contract of Carriage and Rules 80 C of the Delta international Contract of Carriage.

caused by reasons other than *force majeure*, both air carriers still adopt similar, but not identical, contractual obligations for offering assistance or services where there are delays caused by air carriers. For instance:

(1) **Lodging or Hotel** - If a delay is expected to exceed four hours between the hours of 10:00 p.m. to 6:00 a.m. local time, UA provides delayed passengers with one night lodging or reimbursement for one night's lodging in the form of an electronic travel certificate that may be applied to future travel on UA, up to a maximum amount determined by UA.[293] However, in terms of reimbursement, Delta will provide the passenger with a voucher that may be applied to future travel on Delta equal in value to the contracted hotel rate.[294]

(2) **Snacks or Meals** - UA will provide snacks and/or meal vouchers in the event of a delay caused by UA that extends beyond normal meal hours or whenever lodging is furnished. UA is not liable to reimburse the passenger for expenses relating to meals after meal vouchers have been offered.[295] Delta keeps silent when offering "meals" in its contract of carriage, but sets up rules for offering "meals" to delayed passengers in its "International Passenger Rules and Fares Tariff" as amenities/services for delayed passengers.

(3) **Ground Transportation** - UA agrees to provide ground transportation to the place of lodging via public conveyance, but refuses to reimburse passengers for their expenses relating to alternative ground transportation secured by the passengers if they do not accept UA's transportation arrangement.[296] In lieu of lodging or other amenities to divert passengers to alternative airport, Delta only furnishes ground transportation to the destination airport if the destination on

[293] See Rule 24 F)1) of the UA Contract of Carriage, *supra* note 287 at 35.
[294] See Rule 80 C.2.(a) of Delta Contract of Carriage: International, *supra* note 292 at 48.
[295] See Rule 24 F)1) of the UA Contract of Carriage, *supra* note 287 at 35.
[296] See Rule 24 F)3) of the UA Contract of Carriage, *supra* note 287 at 36.

the ticket and the diverted airport destination are within the assigned city groups.[297]

(4) **Communication** – Both UA and Delta do not specify the "amenities/services" for offering communication to delayed passengers in their contracts of carriage; however, to offer free phone calls to delayed passengers is the standard industrial practice, but not a contractual obligations.

The listed "amenities" or "services" offered by UA have been clarified as the "sole and exclusive remedy" for a passenger who has a claim under the contract of carriage. Under UA's Rules, UA even declares that the passenger shall have no other claims in law or equity for actual, compensatory, or punitive damages. On the other hand, Delta indicates that it will provide amenities as essential to maintain the safety and/or welfare of passengers with special needs regardless of the delays caused by any reasons.

Given the comparison of complimentary services offered by UA and Delta, the US air carriers indeed do well to control their contractual obligations to offer services to passengers in delays other than tarmac delay due to no regulatory rules in this regard. In addition, based on the author's experience in handling over one hundred Taiwanese passengers' claims against US air carriers, most passengers understand they have no strong contractual ground to claim pecuniary damages in case of delays caused by bad weather or mechanical reasons. Therefore, these passengers choose instead to claim remedies for unsatisfactory services, which US air carriers typically offer to passengers based on local regulations or for marketing considerations. In response to such claims, US air carriers are willing to offer passengers "goodwill gestures", such as a minimal amount of cash and/or a transportation credit coupon, to settle disputes under the rationale of customer-oriented considerations. In other words,

[297] See Rule 80 C.2.(b) of Delta Contract of Carriage: International, *supra* note 292 at 48.

US air carriers prefer to settle disputes outside of courts and with such things as vouchers instead of going through the trouble and necessity of invoking laws or contracts terms in court. Such practice shows that even in the event of delays caused by *force majeure*, the remedy mechanism is subject to the air carriers' decision based on socio-economic considerations, and such practical handling prevails over even advanced lawmaking or contractual obligations.

3.3 Passenger's Rights Regarding Flight Delays in the EU

Passenger's rights are safeguarded within the territory of the EU under a complex regulatory system. Such complexities are not only caused by the interplay between the EU regulations and the Conventions, but also as a result of different legal interpretations of the civil law system, such as in France and Germany, and in the common law system, as exemplified by the United Kingdom. Nevertheless, these regulations appear to ensure "a high level of protection for passengers"; particularly with Regulation 261/2004 which deems air carriers responsible for offering assistance or services in the event of denied boarding, cancellation or long delays of flights.[298] Under the Preamble of the Regulation 261/2004, the EU declared its goals in formulating the Regulation, including:

> (1) "Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers…"
> (4) "The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers, and to ensure that air carriers operate under harmonized conditions in a liberalized market…"
> (17) "Passengers whose flights are delayed for a specified time should be

[298] See Preamble (1) of the EC, *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights, and repealing Regulation (EEC) No 295/91***,** [2004] OJ L 46/1 [Regulation No 261/2004].

adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions…"

An overview of passengers' rights and a critical analysis of the EU Regulation 261/2004 is given below.

3.3.1 Overview of Passenger Protection

Since the deregulation of air carriers' operations in international air transportation in the EU Member States, the voices of passenger complaints caused by flight cancellations, delays, mishandled baggage, reservation issues and denied boarding have become louder as air transportation increases in the EU Member States. [299] Such complaints implored the EU to promulgate legislation for strengthening passenger rights. As a result, a broad spectrum of passenger rights started to evolve in Europe during the last decade.[300] The European Commission clearly distinguishes passenger protection in two categories: voluntary commitments and legislation.[301] The voluntary commitments concern: (1) improvement of service quality (lower fares, better information, easier complaint procedures); (2) care for delayed passengers; and (3) simpler procedures for lodging complaints and mechanisms for settling disputes out of court.[302] Additionally, the legislation aims to achieve three objectives: (1) enable delayed passengers to be reimbursed for ticket

[299] See European passenger complaint data at "Air transport Users Council Annual Report 2009/2010" online: Air Transport Users Council <http://www.auc.org.uk/docs/306/AUC%20%20Annual%20Report%202009-2010.pdf> (data accessed date: 10 March 2011).
See also "Air Passenger Rights: Consumer Complaints 2005", online: Europa <http://ec.europa.eu/consumers/topics/air_passenger_complaints2005.pdf>(data accessed date: March 11, 2011)

[300] See ICAO, Worldwide Air Transport Conference Working Paper No ATConf/6-WP/55, at 2.

[301] See Summary of EU Legislation, Protection of Air Passengers, online: ＜http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l24235_en.htm＞.

[302] *Ibid.*

fares or to be given alternative flights to continue their journey; (2) establish rights of passengers to require air carriers to improve contract terms clearly setting out the services offered and the conditions applied; and (3) give passengers the information they need to make well-founded choices between airlines, and the regular reports related to airlines' passenger protection.[303] Based on such objectives, the key legislation related to air passenger protection in the EU involves: (1) air carriers' liability in the events of accidents (Council Regulation (EC) No 2027/97, Regulation (EC) No 889/2002); (2) rights of air passengers (Council Resolution of 2 October 2000); (3) common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights (Regulation (EEC) No 295/91, Regulation (EC) No 261/2004); and (4) establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier (Regulation (EC) No 2111/2005, Article 9 of Directive 2004/36/EC).[304]

In addition, the Council of the European Union promulgated Regulation (EC) No 2006/2004 of 27 October 2004 to deal with cooperation between national authorities for the enforcement of consumer protection laws.[305] Regulation (EC) No 785/2004,[306] later amended by Regulation (EU) No 285/2010,[307] laid down insurance requirements for air carriers and aircraft operators. To protect the rights of disabled persons and persons with reduced mobility when travelling by air, Council Regulation (EC) No

[303] *Ibid.*
[304] EUR-Lex Access to European Law, online: ＜http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426816017790&uri=URISERV:l24235＞.
[305] EC, Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) Text with EEA relevance, [2004] OJ L 364/1.
[306] EC, Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, [2004] OJJ L 138/1.
[307] EC, Commission Regulation (EU) No 285/2010 of 6 April 2010 amending Regulation (EC) No 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators, [2010] OJ L 87/19.

1107/2006 was promulgated.[308] This legislation resulted in significant developments in forming the legal framework for air passenger rights in the Member States of the European Community.

Most importantly and interestingly, pursuant to Article 8(3) of Regulation 261/2004, the managing body of the airport may pass on its costs and shares of compliance with Article 8 of the same Regulation to air carriers using the airport.[309] The impact of this rule was seen in *Ross v Ryanair and Stansted Airport* case.[310] In that case, the Court of Appeal of the UK held that Ryanair and Stansted Airport are liable for bearing the cost to provide the disabled passenger with a wheelchair to allow him to board the flight. This case underlines that the airport managing entities are granted a significant position to participate in a risk sharing remedy mechanism to establish comprehensive passenger protection regime. The airports' role in risk sharing to delayed passengers will be discussed in Chapter V.

3.3.2 Remedy Mechanism for Flight Delays in Regulation 261/2004

As far as flight delays are concerned, the EU Regulation 261/2004, which was enacted in February 2004 and came into force on 17 February 2005, provides significant principles and guidelines for compensation and various assistance offered to passengers in the event of denied boarding, cancellation and long delays.[311] It is worth noting that this EU Regulation 261/2004 replaced the previous regulation on

[308] Regulation 1107/2006 was introduced to establish rules for the protection of, and provision of assistance to disabled persons and persons with reduced mobility (PRM) travelling by air, both to protect them against discrimination and to ensure that they receive assistance. See Airports Council International, "Airport & Persons with Disabilities: A Handbook for Airport Operators 2010-Supplement- new EU & US regulations".
See EC, Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Text with EEA relevance), [2006] OJ L 04/1.

[309] See Sarah Prager, "Pioneering Passengers' Rights: Legislation and Jurisprudence from the Aviation Sector" (2011) 12 Issue 2 ERA Forum at 317.

[310] *Robert Ross v Ryanair Ltd and Stansted Airport Ltd* [2004] EWCA Civ 1751.

[311] See EU Regulation 261/2004, *supra* note 14.

the same subject, (EEC) No 295/91, dating back to 1991.[312] Regulation (EEC) No 295/91 had severe limitations in that it gave rights to passengers only in the event of denied boarding (as occurs in overbooking situations). The EU Regulation 261/2004 increased the level of compensation which air carriers must pay to passengers who are denied boarding, but also introduced new rights on compensation and assistance in the event of cancelled flights and long delays, and extended coverage to passengers on charter and domestic flights. However, this Regulation lacks clear definitions for many significant terms, such as "delay".[313] Further, the interaction between the EU Regulation 261/2004 and the Conventions with respect to remedies for delays is unclear. In addition, uncertainty also arises when applying this advanced Regulation, which crafts a remedy mechanism for delays caused by extraordinary circumstance (*force majeure*) and provides no specific rules regarding air carriers' obligations in case of failure to provide required "assistance", which is so called "services" in the US, Taiwan and Mainland China.

3.3.2.1 Interaction between the Conventions and the EU Regulations

As examined in Chapter II, the unification of law sought by the Conventions has been undermined by national laws, with EU regulations providing a good example of this. The interaction between EU Regulation 261/2004 and the Conventions has been a challenging issue in the EU. In the remarkable case, *IATA & ELFAA v Department of*

[312] To protect air passenger rights, the EU started its legislation and the EU Council promulgated the Council Regulation (EEC) No 295/91 of 4 February 1991 to establish common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination. See EC**,** Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, [1991] OJ L 36/5. See also EU, "Protection of Air Passengers", online: Europa <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l24235_en.htm>.

[313] The author interprets that Article 6 of the Regulation provides rules to count air carriers' obligations for delays instead of "definition" of delay.

Transport,[314] the International Air Transport Association (IATA) and The European Low Fares Airline Association (ELFAA), representing the interests of ten low-fare airlines from nine European countries, sought judicial review in an English court against the Department for Transport relating to the implementation of EU Regulation 261/2004. The High Court of Justice decided to refer to the Court of Justice of the European Union ("CJEU") the questions relating to the validity of EU Regulation 261/2004.[315] The CJEU held that national courts do not have the power to declare acts of the Community institutions invalid; and, of direct relevance here, that Article 6

[314] *IATA & ELFA v Department of Transport*, C-344/04, [2006] online: ＜http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004CJ0344&from=EN＞.

[315] The main questions to be clarified by CJEU are:

"(1) Whether Article 6 of Regulation No 261/2004 is invalid on grounds that it is inconsistent with the … Montreal Convention …, and in particular Articles 19, 22 and 29 [thereof], and whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(2) Whether the amendment of Article 5 of the Regulation during consideration of the draft text by the Conciliation Committee was done in a manner that is inconsistent with the procedural requirements provided for in Article 251 EC and, if so, whether Article 5 of the Regulation is invalid and, if so, whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(3) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are inconsistent with the principle of legal certainty, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(4) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are not supported by any or any adequate reasoning, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(5) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are inconsistent with the principle of proportionality required of any Community measure, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(6) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they discriminate, in particular, against the members of the second Claimant organisation in a manner that is arbitrary or not objectively justified, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(7) Is Article 7 of the Regulation (or part thereof) void or invalid on grounds that the imposition of a fixed liability in the event of flight cancellation for reasons that are not covered by the extraordinary circumstances defence is discriminatory, fails to meet the standards of proportionality required of any Community measure, or is not based on any adequate reasoning, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(8) In circumstances where a national court has granted permission to bring a claim in that national court, which raises questions as to the validity of provisions of a Community instrument and which it considers is arguable and not unfounded, are there any principles of Community law in connection with any test or threshold which the national court should apply when deciding under [the second paragraph of Article 234] EC whether to refer those questions of validity to the [Court of Justice of the European Communities]?"

See *IATA & ELFA v Department of Transport*, C-344/04, [2006], para. 20.

of the Regulation cannot be considered inconsistent with Articles 19, 22 and 29 of the Montreal Convention.[316] Article 6 of Regulation 261/2004 provides that, in the event of a long delay, the operating air carrier must offer to assist and take care of passengers. It held that the carrier cannot escape such obligations in the event of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.[317]

Later, in *Rehder v Air Baltic Corp*[318], the Europe Court of Fourth Chamber indicated that the existence of a cause of action under Article 19 of the Montreal Convention could co-exist with a claim under Article 7 of Regulation 261/2004. The rationale for such a conclusion is because the Convention and the Regulation represent different regulatory frameworks.[319] Furthermore, in *Sturgeon*[320] and

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[316] See *IATA & ELFA v Department of Transport*, C-344/04, [2006], para. 20.
See also Section 2.5. A brief analysis was given to interpret the application for Articles 19, 22 and 29 of the Montreal Convention.

[317] See *IATA & ELFA v Department of Transport*, C-344/04, [2006], para. 37.
In addition, the ECJ also held that Articles 5, 6 and 7 of the Regulation are not invalid by reason of a breach of the principle of proportionality as well as the principle of equal treatment.

[318] *Rehder v Air Baltic Corp* C-204/08, [2009] ECR I-6073
online: ＜http://curia.europa.eu/juris/liste.jsf?language=en&num=C-204/08＞.
By referring to the judgment, the fact is summarized as:

> Mr Rehder, who resides in Munich, booked a flight from Munich to Vilnius with Air Baltic, the registered office of which is in Riga (Latvia). The distance between Munich and Villnius is slightly less that 1 500 kilometres. Approximately 30 minutes before the scheduled time of departure from Munich, passengers were informed that their flight had been cancelled. After his booking had been changed by Air Baltic, the applicant took a flight via Copenhagen to Vilnius, where he arrived more than six hours after the flight which he had initially booked should have landed.

[319] See *Rehder v Air Baltic Corp* C-204/08, [2009] ECR I-6073, para. 27.

[320] See *Sturgeon v. Condor, supra* note 46.
In *Sturgeon v. Condor*, Mr. and Mrs. Sturgeon booked return tickets with Condor from Frankfurt (Germany) to Toronto (Canada). After check-in, they were informed that the flight was cancelled, and they spent a night in a hotel. The following day, they checked in at another air carrier for a flight with the same number but different seat numbers. The Sturgeons arrived in Frankfurt some 25 hours after their original scheduled arrival time and they filed a claim for compensation on the basis of flight cancellation. The airline claimed that the flight was not cancelled but merely delayed and the German Court agreed, holding that the plaintiffs were not entitled to any compensation. The CJEU was eventually seized of an appeal on a point of law, including whether a flight delay may be regarded as a flight cancellation for the purpose of the application of the right to compensation laid down in Article 7 of the Regulation or may otherwise give rise to a claim to compensation. The CJEU indicated:

> […]according to Article 2(l) of Regulation No 261/2004, flight cancellation, unlike delay, is the result of non-operation of a flight which was previously planned. In this regard, cancelled flights and delayed flights are two very distinct categories of flights. It cannot therefore be inferred from Regulation 261/2004 that a flight which is delayed may be classified as a 'cancelled flight' merely on the ground that the delay is extended, even substantially.[320]

Nelson[321], the CJEU held that Regulation 261/2004 did not violate Article 29 of the Montreal Convention, which states that non-compensatory damages are not recoverable.[322] To be more specific, in *Sturgeon*, the CJEU ruled that a delayed passenger should also receive compensation according to Article 7 of the Regulation if the delay lasted three hours even though such a delay could not be considered a flight cancellation. In other words, if passengers whose flights are delayed did not

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> [I]t does not expressly follow from the wording of Regulation 261/2004 that passengers whose flights are delayed have such a right [to compensation]. Nevertheless, as the Court has made clear in its case-law, it is necessary, in interpreting a provision of Community law, to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.[320]
>
> [I]t is apparent from Recitals 1 to 4 in the preamble, in particular from Recital 2, that the regulation seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport.[320]
>
> [I]f…passengers whose flights are delayed did not acquire any right to compensation, they would be treated less favourably [than those whose flights had been cancelled] even though, depending on the circumstances, they suffer a similar loss of time, of three hours or more, in the course of their journey. There appears, however, to be no objective ground capable of justifying such a difference in treatment.
>
> Articles 5, 6 and 7 of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, and of cancellation or long delays of flights, must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application, with the right to compensation.

Consequently, the *Sturgeon* decision gave rise to a right for passengers to claim compensation under Article 7 if their flights are "delayed" for more than three hours.

[321] In this thesis, "Nelson" is referred to *Emeka Nelson and Others v Deutsche Lufthansa AG* (C-581/10) and *TUI Travel plc and Others v Civil Aviation Authority* (C-629/10).

The facts for *Nelson v Lufthansa* are summarized from the verdict:

Mr. Nelson booked seats, for his two sons and himself, on flight LH 565 from Lagos to Frankfurt am Main departing at 22:50 on 27 March 2008. At around 02:00 on 28 March, that flight was cancelled owing to a technical defect in the steering mechanism of the nose landing gear of the aircraft. Mr. Nelson and his two sons were then accommodated in a hotel. At 16:00 on 28 March 2008 they were taken from the hotel to the airport, since the plane had been replaced by an aircraft from Frankfurt am Main (Germany). The Lagos to Frankfurt am Main flight finally departed at 01:00 on 29 March 2008. The referring court states that that flight had the same flight number, LH 565, and most of the same passengers as had booked on the flight of 27 March 2008. The plane landed in Frankfurt am Main at 07:10 on 29 March 2008, that is, more than 24 hours later than the original scheduled arrival time.

In this join case, Prof. Haanapel explained this case by accusing that air carriers wish to avoid compensation liability under the EU Regulation 261/2004 because they may also need to undertake the limited compensation for delay under the Montreal Convention at the same time. However, liability under the Convention is fault-based, albeit with a reversed burden of proof vested upon the air carrier whereas compensation under the Regulation does not depend on proof of fault or loss. Furthermore, passengers hardly succeed in their claims under Article 19 of the Montreal Convention because passengers have to prove the quantum of damage occasioned by delay, especially consequential damages.

See Peter Haanapel, "Compensation for Denied Boarding, Flight Delays and Cancellation Revisited" (2013) 62 ZLW 48.

[322] See Thomas Whalen, "EU Regulation No 261 and the US Department of Transportation regulation on Advertising, Tarmac Delays and Customer Services" (2013) XXXVIII Annals Air and Space Law at 511.

acquire any right to compensation, they would be treated less favorably than those whose flights had been cancelled.[323] Especially, passengers suffer a similar loss of time, of three hours or more, in the course of their journey. There appears, however, to be no objective ground capable of justifying such a difference in treatment.[324] In *Nelson*, the CJEU expressed that Article 7 of the Regulation may fall outside the scope of the Montreal Convention.[325] In addition, Regulation 261/2004 seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or subject to long delay, since they all suffer similar serious trouble and inconvenience connected with air transport.[326] The CJEU even indicated the consistency to apply Regulation 261/2004 to favor passenger's protection in cancellation and in delay. That is to say, the CJEU's decisions in *Sturgeon* and *Nelson* support the view that loss of time constitutes an inconvenience which is covered by the Regulation and that inconvenience must be redressed by providing compensation to the affected passengers. As a result, the CJEU intentionally invokes the Regulation 261/2004 to enhance passengers' protection both in cancellation and in delay. The rulings made by the CJEU express that the Regulation 261/2004 renders "broader" passenger protection since the Conventions restrict passengers' claims for damage, such as "mental anguish", "loss of time" or "inconvenience".

Again, in *Emirates Airlines v. Diether Schenkel*,[327] in order to ensure the

[323] See *Sturgeon v. Condor,* para 58.
[324] See *Sturgeon v. Condor,* para 59.
[325] See *Emeka Nelson and Others v Deutsche Lufthansa AG* (C-581/10), para 47.
[326] See *Emeka Nelson and Others v Deutsche Lufthansa AG* (C-581/10), para 72.
[327] *Emirates Airlines – Direktion für Deutschland v. Diether Schenkel,* Case C-173/07, [2008] ECR I-5237.
Dr Schenkel booked his flight in Germany, with Emirates, an outward and return journey from Düsseldorf (Germany) to Manila via Dubai (United Arab Emirates). For the return journey Dr Schenkel had a reservation on the flight of 12 March 2006 from Manila. The flight was cancelled because of technical problems. Dr Schenkel eventually departed from Manila on 14 March 2006 and arrived at Düsseldorf on the same day. Dr Schenkel brought an action against Emirates in the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main), claiming compensation of EUR 600 in reliance

enforcement of the Regulation, the passenger argued that the compensation provided for in the provisions of the Regulation 261/2004 in the event of the cancellation of a flight applied to him. But, Emirates argued that the outward and return flights were to be regarded as two separate flights. In addition, Emirates was not a 'Community carrier' referred to in Article 3(1)(b) of Regulation 261/2004, and was not obliged to compensate the passenger for the cancelled flight. In consequence, the Court held that Article 3(1)(a) of Regulation 261/2004 is to be interpreted as applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight departing from an airport located in a non-member country.[328]

It appears from the mentioned case-law, that the CJEU has favored the application of the Regulation 261/2004 over the international air carrier liability Conventions. Consequently, in the view of the CJEU, the EU has adopted a parallel

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on Articles 5(1)(c) and 7(1)(c) of Regulation 261/2004.

[328] The CJEU held, at para 53, that:

> […] Article 3(1)(a) of that regulation, which provides that the regulation is to apply to passengers departing from an airport located in the territory of a Member State to which the Treaty applies, must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

In order to avoid uncertainty of applying the Regulation, the proposed amendment of EU Regulation 261/2004 provides a clear definition of a "flight" as well as the associated notions of "connecting flight" and "journey". Also, in the amended Regulation, "flight" means an air transport operation between two airports; intermediate stops for technical and operational purposes only shall not be taken into consideration (proposed amended art 2(n)); "connecting flight" means a flight which, under a single contract of carriage, is intended to enable the passenger to arrive at a transfer point in order to depart on another flight, or, where appropriate in the context, means that other flight departing from the transfer point (proposed amended art 2(o)); and "journey" means a flight or a continued series of connecting flights transporting the passenger from an airport of departure to his final destination in accordance with the contract of carriage (proposed amended art 2(p)). As a result, of the proposed amendment to EU Regulation 261/2004 are adopted by the EU, the regulation could be applicable to all passengers, regardless of their individual circumstances, and all international air carriers operating in airports located in EC Members States.

See: *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air,* COM/2013/0130 final - 2013/0072 (COD) (13 March 2013) [EU Proposed Revision].

remedy system, including the Regulation 261/2004 and the Conventions, for passengers to claim remedy for "flight delays". It remains to be seen how the interaction between the Regulation and the Conventions can be settled through case law in the future.

3.3.2.2 Basic Scheme

Due to the significance of Regulation 261/2004 in governing passengers' claims in delays, it is useful to sketch the basic scheme of this Regulation.

(1) The obligations and duties relating to compensation and so forth only attach to "air carriers".[329] The present Regulation has not yet included the airports' obligations to provide complimentary services to passengers in delays.

(2) Regulation 261/2004 is applicable to passengers departing from an airport located in the territory of a Member State, and from an airport located in a third country to an airport situated in the territory of a Member States.[330]

(3) Regulation 261/2004 intends to reduce the frequency of denied boarding against a passenger's will by a combination of two measures:

- First, the air carrier is obligated to call for volunteers to surrender their seats in exchange for advantages before turning passengers away, or before doing anything else. Only if insufficient volunteers come forward, is the air carrier allowed to deny passengers boarding against their will.[331]
- Second, if air carriers or tour operators deny a passenger from boarding, they must pay compensation to the passenger at a dissuasive level: €250 for flights

[329] The provisions of the Regulation do apply to tickets issued under a frequent flyer program or by any other commercial program by air carriers or tour operators.[329] However, the passengers are excluded if travelling for free, or on deals that are not available to the general public.
See Sarah Prager, *supra* note 309 at 303-304.
[330] Regulation 261/2004, arts 1 and 3.
[331] Regulation 261/2004, art 4(1).

less than 1,500 kilometers; €400 for intra-community flights of more than 1,500 kilometers and for other flights between 1,500 and 3,500 kilometers; and €600 for flights longer than 3,500 kilometers.[332]

(4) In the event that a cancellation is within the airline's control, passengers have the right to compensation on the same basis as for denied boarding, unless the air carrier has given them at least two weeks' notice of the cancellation, or has provided alternative flights close to the original timing.[333]

(5) Where a flight is delayed by two, three or four hours – depending on the length of the flight – the air carrier is obliged to provide meals, refreshments, hotel accommodation, transport between the airport and place of accommodation as well as two telephone calls, telex or fax messages, or e-mails, which are the same as the rights and assistance for flight cancellation mentioned above. Also, if the delay is five hours or more, passengers are also entitled to a refund of their tickets under Article 6(c)(iii) and Article 8(1)(a).[334]

(6) Regulation 261/2004 requires air carriers to display at the check-in counters, a clearly legible notice to passengers:

> If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance.[335]

(7) In addition, the air carrier is obligated to provide passengers with written notice to identify its compensation rules and assistance in line with this Regulation, in case of denied boarding and flight cancellation. It shall also provide each passenger affected by a delay of at least two hours, with equivalent notice. In the

[332] Regulation 261/2004, art 7.
[333] Regulation 261/2004, art 5.
[334] The (EEC) Regulation 295/91 legislation does not cover lengthy delays beyond the scheduled time of departure; but, Regulation 261/2004 extends passenger rights to cover this matter.
[335] Regulation 261/2004, art 14(1).

written notice, the contact details of the national designated body that is responsible for the enforcement of this Regulation shall also be given to the passenger.[336]

(8) Under Article 16 of Regulation 261/2004, each Member State is required to designate a body responsible for the enforcement of this Regulation to deal with passenger complaints related to long delays, cancellations and denied boarding. This Regulation created an expedited out-of-court ruling of disputes between passengers and air carriers. Passengers could also inform the European Commission's Directorate-General for Energy and Transport of the contents and follow-up with the complaints which they have addressed to the national enforcement bodies.[337]

(9) Preamble (21), (22) and Article 16 of the Regulation 261/2004 provide that each EU Member State should designate an appropriate administrative body (called: National Enforcement Body, NEB) to handle the enforcement responsibility and implicitly limits judicial redress to courts in Member States under the procedures of their own national laws.[338]

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[336] Regulation 261/2004, art 14(2).

[337] See, e.g. "Air Passenger Rights EU Complaint Form", online: Europa < http://ec.europa.eu/transport/themes/passengers/air/doc/complain_form/eu_complaint_form_en.pdf>.

[338] Preamble (21) & (22) of the Regulation (EC) 261/2004 provide:

(21) Member States should lay down rules on sanctions applicable to infringements of the provisions of this Regulation and ensure that these sanctions are applied. The sanctions should be effective, proportionate and dissuasive.

(22) Member States should ensure and supervise general compliance by their air carriers with this Regulation and designate an appropriate body to carry out such enforcement tasks. The supervision should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law.

Article 16 of the Regulation provides:

1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complain to anybody designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

(10) Preamble (22) also clarifies: "The supervision should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law." That is to say, passengers are able to directly establish causes of action under the Regulation against air carriers.

In sum, in the European Union, air carriers are obligated to compensate passengers for denied boarding, cancellation[339] and long delays depending on the duration of the delay and the length of the flight.[340] However, in case of cancellations or delays caused by extraordinary circumstances, the air carrier is able to defend for not compensating passengers, but is still obliged to provide assistance, including meals, refreshments, hotel accommodation, transport between the airport and place of accommodation as well as two telephone calls, telex or fax messages, or e-mails. Compared with the US legislation and practice discussed previously, air carriers flying into/out of the EU area are shouldering regulatory obligations to offer passengers complimentary assistance whereas air carriers operating in the US provide

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3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.

For instance, the UK CAA indicated: "As the UK's enforcement body, the CAA provides a free mediation services to any passenger having trouble resolving complaints against airlines or airports." See UK Civil Aviation Authority, **"**CAA secures nearly €100,000 compensation for delayed passengers" (23 April 2013) online: UK CAA ＜http://www.caa.co.uk/application.aspx?appid=7&mode=detail&nid=2231＞.

[339] No definition of delay is found under the Regulation; but, cancellation is defined as: "the non-operation of a flight which was previously planned and on which at least one place was reserved". See Regulation 261/2004, art 2 (l).

[340] Article 7 of EU 261 provides:

1. Where reference is made to this Article, passengers shall receive compensation amounting to:
(a) EUR 250 for all flights of 1,500 kilometers or less;
(b) EUR 400 for all intra-Community flights of more than 1,500 kilometers, and for all other flights between 1,500 and 3,500 kilometers;
(c) EUR 600 for all flights not falling under (a) or (b).
In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.
2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked (a) by two hours, in respect of all flights of 1,500 kilometers or less; or (b) by three hours, in respect of all intra-Community flights of more than 1,500 kilometers and for all other flights between 1,500 and 3,500 kilometers; or (c) by four hours, in respect of all flights not falling under (a) or (b), the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

limited services/amenities for delayed passengers based on contractual obligations specified in their contract of carriage. In other words, the EU demands high-level passenger protection by placing regulatory obligations on air carriers to offer passengers complimentary assistance in *force majeure* delays. However, it is subject to air carriers' discretion to do so in the US legislation and practice.

3.3.2.3 Extraterritoriality Concern

"Extraterritoriality" is referred to as a court's ability to exercise judiciary power beyond its territorial limits.[341] Under Article 12 of the Convention on International Civil Aviation (the "Chicago Convention"), every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.[342] In addition, under the same convention, States exercise sovereignty over activities and actors within their territorial boundaries, including the aircraft registered under their nationalities.[343] Accordingly, the aircraft invites the extraterritoriality concern in case this aircraft violates the third country's rules and regulations relating to the flight and maneuver of

[341] See *Black's Law Dictionary*, 8th ed., *sub verbo* "extraterritoriality" and "extraterritorial jurisdiction".

[342] Convention on International Civil Aviation, 7 December 1944 (Doc 7300) online: ICAO＜http://www.icao.int/publications/pages/doc7300.aspx＞.
See also Article 12 of the Chicago Convention which provides:

> Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

[343] For instance, Articles 17-21 of the Chicago Convention provide rules for "nationality of aircraft"; and, Article 13 provides:

> The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

the aircraft, but the registered national law of aircraft becomes the governing law in the territory of this third country. Thus, an aircraft flying over the sovereign territory of many States may also trigger conflicts of applying national laws for activities related to the aircraft.

In practice, the extraterritoriality concern has been addressed by aviation industry to implement Regulation 261/2004. In terms of high-level regulatory passenger protection, Regulation 261/2004 expresses to apply to passengers departing from an airport located in the territory of a Member State, and from an airport located in a third country to an airport situated in the territory of a Member State.[344] The real case is that Taiwanese passengers suffering long delays caused by the Icelandic volcano eruption insisted on applying Regulation 261/2004 in the Taiwan jurisdiction against the air carriers that operated the route between Taiwan and Europe. Furthermore, similar rules can also be found in the US 14 CFR 259.4, indicating a US carrier and any foreign carrier operating passenger services (scheduled or charter) using any aircraft with a design capacity of thirty or more passenger seats to adopt a contingency plan for lengthy tarmac delays. Such provisions raise the question whether Regulation 261/2004 or the US national law for passenger protection in delays trigger an "extraterritoriality concern".

To date, there has been no specific case-law which supports the "extraterritoriality concern" and this indeed causes significant impact to air carriers,[345]

[344] See Regulation 261/2004, arts 1 and 3.

[345] This issue arose in the *Volodarskiy v Delta* case. This case combined two complaints, one from the Volodarskiy family and the other from the Cohen family against Delta in the Northern District of Illinois for Delta's failure to comply with Regulation 261/2004. The Volodarsky family departed from London's Heathrow Airport bound for Chicago, but the flight was delayed at Heathrow for more than eight hours. For the Cohens, they are New Jersey residents who were confirmed passengers on a Delta flight from Paris, France to Philadelphia, but their flight was cancelled nearly three hours after the scheduled departure time, and the Cohens were delayed more than twenty-four hours in arriving in Philadelphia. The delays happened in the airports of the EU Member States, so these passengers made a direct claim under the EU Regulation 261/2004, which requires air carriers to provide standardized compensation to passengers for certain delays and cancellations of flights departing from or arriving at airports in the EU Member States. Delta raised three arguments to dismiss the Plaintiffs' claim. Delta's

the US passenger protection rules are adopted by air carriers from third countries. For instance, Taiwan air carrier, EVA Air, declares that: "This Customer Service Plan is introduced in accordance with the requirements of the US Department of Transportation (DOT) set forth in 14 CFR Section 259.5 and is applicable for flights to and from the US."[346] Yet, EVA also operates flights between Taipei and Paris[347], and passengers are able to apply the EU Regulation to protect their passenger rights. That is to say, passengers flying aircraft to or from the US and the EU are able to claim under these passenger protection legislations. As a result, in cases of delays caused by weather, similar to Eyjafjallajökull, an application of "extraterritoriality" powers could take place in the EU and the US where the courts could exercise their judicial powers to implement high-level passenger protection over aircrafts from third countries.

3.3.2.4 Assistance Requirements

Under Articles 6 and 9 of Regulation 261/2004, passengers who are involuntarily denied boarding, or whose flights are cancelled or delayed, are entitled to the following forms of care for free:

(1) meals and refreshments in reasonable relation to the waiting time[348];

(2) hotel accommodation in cases:

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first argument was that the EU Regulation does not provide for enforcement outside of the EU Member States. Secondly, even if such a claim could be filed in a US court, Delta contended that a direct EU 261/2004 claim would be preempted by both the ADA and the Montreal Convention. Finally, Delta argued that prudential considerations, such as international comity, supported dismissal of the Plaintiffs' amended complaint.
Gennadiy Volodarskiy v Delta Airlines, Inc. 987 F. Supp. 2d 784 (2013)
Online:
＜http://www.gpo.gov/fdsys/granule/USCOURTS-ca7-13-03521/USCOURTS-ca7-13-03521-0＞.

[346] EVA announces its Customer Services Plan in compliance with the US DOT statute. See EVA Air, online: ＜ http://www.evaair.com/en-gb/book-and-manage-your-trip/customer-service-contingency-plan/customer-service-plan/＞.

[347] See EVA Air, online:＜http://www.evaair.com/fr-fr/index.html＞.

[348] Regulation 261/2004, art 9(1)(a).

- where a stay of one or more nights becomes necessary, or

- where a stay additional to that intended by the passenger becomes necessary[349];

(3) transport between the airport and place of accommodation (hotel or other)[350]; and

(4) two free telephone calls, telex or fax messages, or e-mails.[351]

The air carrier shall also pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.[352] In practice, European air carriers incorporate their regulatory obligations in their contract terms. Thus, European air carriers not only declare their limited liability for delay damages specified in the Montreal Convention, but also clearly distinguish their obligations for offering assistance to passengers in cases of cancellation and delay within their contracts of carriage.[353]

By comparing the conditions of carriage of two remarkable European air carriers, British Airways (BA) and KLM Royal Dutch Airlines (KLM), it shows that passengers flying different European air carriers may be offered slightly different assistance in long delays, including *force majeure* delays. Such distinctions also illustrate how air carriers form their own way to balance their regulatory obligation of protecting passengers. More significantly, however, air carriers' handlings confuse passengers who will make their claims for remedy if their flight connection is with a non-European air carrier and then a European air carrier, with long delays affecting both sides.

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[349] Regulation 261/2004, art 9(1)(b).
[350] Regulation 261/2004, art 9(1)(c).
[351] Regulation 261/2004, art 9(2).
[352] Regulation 261/2004, art 9(3).
[353] The term, "assistance", is quoted from the EU Regulation 261/2004, which aims to establish common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. However, in this thesis, the assistance shares the same meaning of "services" which have been adopted by the legislation of the US, Taiwan and Mainland China. In addition, Article 9 of the EU Regulation 261/2004 identifies the required assistance as "Right to care". Substantially, it is air carriers to undertake the obligations to provide assistance to delayed passengers.

Taking the "General Conditions of Carriage" of British Airways (BA) as an example, BA indicates its remedy rules for delays and cancellations as follows:

9b) Remedies for delays and cancellations:

9b1) We will take all reasonable measures necessary to avoid delay in carrying you and your baggage;

9b2) These measures may, in exceptional circumstances and if necessary to prevent a flight being cancelled, include arranging for a flight to be operated:

- by another aircraft;
- by another airline or by both.

9b3) If we:

- cancel a flight;
- delay a flight by five hours or more;
- fail to stop at your place of stopover or destination; or
- cause you to miss a connecting flight on which you hold a confirmed reservation;

you can choose one of the three remedies set out immediately below.

Remedy 1

We will carry you as soon as we can to the destination shown on your ticket on another of our scheduled services on which a seat is available in the class of services for which you have paid the fare. If we do this, we will not charge you extra and where necessary, will extend the validity period of your ticket.

Remedy 2

We will carry you to the destination shown on your ticket in the class of services for which you have paid the fare at a later date at your convenience and within the validity period of your ticket on another of our scheduled services on which a seat is available. If we do this, we will not charge you extra.

Remedy 3

We will give or obtain for you an involuntary fare refund.

> We will give you additional assistance, such as compensation, refreshments and other care and reimbursement, if required to do so, by any law which may apply. We will have no further liability to you.[354]

As given the above, BA only allows each passenger to choose one out of the three selected remedies to end its contractual obligations in case of delays of more than five hours. However, Article 2c) of the BA's General Conditions of Carriage specifies: "If these conditions of carriage are inconsistent with any tariffs or laws which apply to your contract of carriage with us, the tariffs or laws will apply"; yet, Article 2d) clarifies: "If these conditions of carriage are inconsistent with our regulations, these conditions of carriage will apply."[355] That is to say, unless this EU Regulation 261/2004 provides more detailed rules for air carriers' obligations in case of cancellations or delays, BA's remedy mechanism specified in their General Conditions of Carriage has limited BA's contractual obligations to compensate passengers for delays. Clearly, BA attempts no compensation to passengers in *force majeure* delays beyond reimbursing, refunding, and rerouting plus required assistance, such as refreshments.

In addition to the "General Conditions of Carriage", BA issues the "flight

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[354] See 9b3) of Conditions of Carriage of British Airways, online: ＜ http://www.britishairways.com/en-ca/information/legal/british-airways/general-conditions-of-carriage ＞.
BA also declares more detailed information under "Flight Cancellation Compensation" on its website, referring to Regulation 261/2004 as the grounds for passengers to claim their rights in case of cancellations and long delays.
See British Airways, "Flight Cancellation Compensation", online:
＜http://www.britishairways.com/en-gb/information/legal/flight-cancellation-compensation＞.

[355] The quoted content is:
2) Differences between these conditions of carriage and tariffs and laws
If these conditions of carriage are inconsistent with any tariffs or laws which apply to your contract of carriage with us, the tariffs or laws will apply.
2d) Differences between these conditions of carriage and our regulations
If these conditions of carriage are inconsistent with our regulations, these conditions of carriage will apply.
See British Airways, "General Conditions of Carriage" online: ＜ http://www.britishairways.com/en-ca/information/legal/british-airways/general-conditions-of-carriage ＞.

cancellation compensation" to specify assistance under the sub-title called "right to care", indicating:

> Where a flight has been cancelled, or is subject to a long delay, passengers are entitled to refreshments and meals in a reasonable relation to their waiting time as well as means of contacting two people outside the airport. These provisions apply according to the duration of the expected delay and the distance of the flight as follows:
>
> - Delay of two hours or more for flights of 1,500 km or less
> - Delay of three hours or more for all flights within the EU of more than 1,500 km and all other flights between 1,500km and 3,500 km
> - Delay of four hours or more for all other flights
>
> In addition, the operating carrier will provide hotel accommodation if necessary and provide transport between the airport and place of accommodation. Passengers will be advised of the arrangements for obtaining refreshments, transport and hotel accommodation, by the carrier.

By reading such provisions, BA clearly combines the obligations for delay specified in Article 6 and required assistance in Article 9 of Regulation 261/2004 as conditions to offer required assistance to passengers in cancellations and long delays. BA, however, limits passengers to contacting "two people outside the airport" if a delay remains for more than two hours, which Article 9 of Regulation 261/2004 does not go as far. Furthermore, with regard to the "if necessary" to offer hotel accommodations, it is BA's "discretion" to make its own judgments. Accordingly, BA's discretion could cause the "differences" from other air carriers in offering required assistance to passengers taking BA's flights.

Another example, under KLM's "General Conditions of Carriage for Passengers and Baggage", "*force majeure*" means "extraordinary circumstances" which could not

have been avoided despite all reasonable due care and attention exercised.[356] In addition, in case of *force majeure*, KLM limits passengers' rights to a refund of their air tickets, which are sold at specific fares, but to instead issue a credit voucher corresponding to the paid fare including tax of their non-refundable and/or non-changeable ticket.[357] This credit voucher is valid for one year, to be used for a subsequent journey on the air carrier's flights and subject to the applicable administration fees. With regard to required assistance as well as compensation, on its website, KLM separately advises passengers of comprehensive obligations under "Assistance and Compensation - in case of cancellations, delays, downgrading and denied boarding"[358]. By referring to the "Delay Assistance" under the "Assistance and Compensation" provisions, in the event that a flight is delayed beyond the scheduled time of departure for two hours or more, KLM offers:

(1) meals and/or refreshments in reasonable relation to the waiting time;

(2) hotel accommodations in cases where an overnight stay or a stay in addition to that which passenger originally intended becomes necessary (transport included);

(3) one prepaid phone card or the cost of two phone calls (limited to 5 minutes each), fax messages or e-mails.[359]

Comparing Regulation 261/2004, between BA's "flight cancellation compensation" and KLM's "Delay Assistance", the distinctions in offering "required assistance" are:

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[356] See KLM "General Conditions of Carriage for Passengers and Baggage", KLM online: < http://www.klm.com/travel/tw_tw/images/General_Conditions_of_Carriage_2013_tcm630-430603.pdf >.

[357] See Article 3.1 and 3.3 of KLM's "General Conditions of Carriage for Passengers and Baggage".

[358] See KLM and Air France, "Assistance and Compensation- in case of cancellations, delays, downgrading and denied boarding", KLM online: < http://www.klm.com/travel/es_es/images/comp_and_assist_ENG_28_10_2013_tcm622-221268.pdf>.

[359] *Ibid.*

(1) In terms of offering hotel accommodation, it is subject to air carriers' discretion for "the necessary" free services. Nevertheless, BA and KLM still adopt slightly different standards for hotel accommodation; for instance, BA only expresses "if necessary", but KLM specifies as "where an overnight stay or a stay in addition to that which passenger originally intended becomes necessary".

(2) Article 9 of Regulation 261/2004 only requests air carriers to provide "two telephone calls, telex or fax messages, or e-mails". BA restricts the means of communication by allowing a passenger to contact "two people outside the airport", but KLM specifies one prepaid phone card or the cost of two phone calls, which are limited to five minutes each.

In summary, in spite of the requirements in Regulation 261/2004 and court cases for air carriers to shoulder compulsory obligations to ensure the passengers' "assistance"; yet, these European air carriers make flexibilities through specific conditions in their conditions of carriage to perform their obligations for offering free assistance.

3.3.3 Air Carriers' Defenses - Extraordinary Circumstances

As discussed, European air carriers are obligated to offer free assistance to passengers in instances where delays are caused by "extraordinary circumstances". However, by referring to the CJEU's case-law, the notion of "extraordinary circumstances" under Regulation 261/2004 may be inconsistent with "*force majeure*" in the US practice. That is to say, it is possible for US air carriers to successfully defend not compensating passengers for inadequate services, but the same defensive strategy may not be applicable for the European air carriers in the EU territory. How is that possible? The following analysis explains the "why and how".

3.3.3.1 The Meaning of Extraordinary Circumstances

The meaning of "extraordinary circumstances" is referred to in the Preamble (14) of Regulation 261/2004:

> As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

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"extraordinary circumstances" since it is subject to the courts to determine the event in which delay could not have been avoided even if all reasonable measures had been taken.

In practice, Regulation 261/2004 grants air carriers a defense for not compensating passengers under the "extraordinary circumstances", but most jurisdictions choose "*force majeure*" to provide similar defense for air carriers. Thus, it is interesting to note that in KLM's "General Conditions of Carriage for Passengers and Baggage", KLM uses "*force majeure*" to replace "extraordinary circumstances", and defines "extraordinary circumstances" as: "which could not have been avoided despite all reasonable due care and attention exercised." Compared with the scope of *force majeure* defined in UA's and Delta's contracts of carriage,[360] KLM's definition of *force majeure*/extraordinary circumstances is unclear and seems to allow KLM to interpret the meaning. Yet, as mentioned in Section 3.3.2.1, the "extraordinary circumstances" under the Regulation 261/2004 should be subject to the CJEU's case-by-case review to clarify the scope of "extraordinary circumstances". Such legal practice, again, adds to the complexities and uncertainties in legislation and practice to determine the remedy mechanism for "*force majeure*" delays.

3.3.3.2 The CJEU's interpretation of Extraordinary Circumstances

As mentioned in Section 3.2.3, the Rule 24.B)4) of UA's Contract of Carriage indicates that "*force majeure*" events include "any event not reasonably foreseen, anticipated or predicted by UA". Moreover, in Delta's contracts of carriage, "*force majeure*" includes "shortage of facilities" and "any other condition beyond Delta's control or any fact not reasonably foreseen by Delta". In practice, the technical maintenance reason can be established as the "*force majeure*" defense for these two

[360] See Section 3.2.3 for reference.

US air carriers for not compensating passengers. On contrast, the technical maintenance reason is not recognized by the CJEU to constitute a defense of "extraordinary circumstances" under Regulation 261/2004. For example, in the leading case, *Wallentin-Hermann v Alitalia* [361], after checking in, Mrs. Wallentin-Hermann and two other passenegrs were informed of their Alitalia flight cancellation five minutes before the scheduled departure time. They were redirected to another air carrier and they missed their connecting flight. The cancellation of the Alitalia flight was a result of a complex engine defect in the turbine which had been discovered the day before during a routine check. Alitalia had been informed of the defect during the night preceding that flight. Mrs. Wallentin-Hermann requested that Alitalia pay her €250 compensation pursuant to Articles 5(1)(c) and 7(1) of the Regulation 261/2004 due to the cancellation of her flight and also €10 for telephone charges. Alitalia rejected her request. The CJEU dismissed the air carrier's arguments and stated that "extraordinary circumstances" may be regarded as covering only circumstances which are not inherent to the normal exercise of the activity of the air carrier concerned and are beyond the actual control of that carrier on account of its nature or origin.[362] That is to say, the CJEU ruling is generally understood to mean that the technical maintenance issue in *Wallentin-Hermann* did not constitute a defense of "extraordinary circumstances".

More interestingly, in the *Wallentin-Hermann* case, the CJEU clarified the

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[361] *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, Case C-549/07 [2008] ECR I-11061 online: ＜http://curia.europa.eu/juris/liste.jsf?&num=C-549/07＞.

[362] The Court pointed out that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. The resolution of a technical problem which comes to light during aircraft maintenance or is caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity and cannot therefore constitute as such an "extraordinary circumstance" within the meaning of Article 5(3) of Regulation 261/2004.
See European Commission Legal Services, Summaries of Important Judgment C-549/07 *Wallentin-Hermann v. Alitalia*, Judgment of 22 December 2008, online: ＜ http://ec.europa.eu/dgs/legal_services/arrets/07c549_en.pdf＞.

interaction between Article 5(3) of Regulation 261/2004 and Article 19 of the Montreal Convention. The CJEU confirmed that the concept of extraordinary circumstances is not defined in the other articles of the Regulation 261/2004, and the scope of extraordinary circumstances must be determined by case-law after considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part.[363]. Accordingly, the CJEU emphasized that the Community attempted to ensure a high level of protection for passengers and take into account the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers.[364] Article 5(3) must therefore be interpreted strictly.[365] Hence, the CJEU viewed that although a technical problem in an aircraft may be amongst the shortcomings specified in the Preamble (14) of the Regulation, the circumstances surrounding such an event can be characterized as "extraordinary" within the meaning of Article 5(3) of Regulation 261/2004 only if they relate to an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.[366] In consequence, in *Wallentin-Hermannm*, the CJEU rules that technical problems which came to light during maintenance of the aircraft or on account of the failure to carry out such maintenance cannot constitute "extraordinary circumstances" under Article 5(3) of Regulation 261/2004.[367] Furthermore, the CJEU also held that not all extraordinary circumstances confer exemption; and, the air carrier must establish that even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able to prevent

[363] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 16 and para 17.
[364] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 18.
[365] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 20.
[366] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 23.
[367] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 25.

the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.[368] The air carrier, then, was able to establish that that carrier has taken "all reasonable measures" within the meaning of Article 5(3) of Regulation 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that Regulation. As a result, Article 5(3) of the Regulation could be interpreted as: a technical problem "may" constitute an extraordinary circumstance provided it stems from an event which is not inherent in the normal exercise of the activity of the air carrier concerned, and is an event which is outside the carrier's control.[369] Comparing with Article 19 of the Montreal Convention, air carriers 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. From a lawyer's perspective, the CJEU made the Regulation 261/2004 hold a higher standard than "the all reasonable measures" under the Montreal Convention because air carriers bear tough burden of proof to show "beyond doubt" that they had deployed all its resources in terms of staff or equipment and the financial means at its disposal to prevent from delays caused by technical defects.

Furthermore, in the *Nelson* case, the flight was cancelled owing to a technical defect in the steering mechanism of the nose landing gear of the aircraft. The CJEU clarified that the air carriers are only exempt from paying compensation if they can prove that the cancellation or long delays are caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier's actual control.[370] It means that the CJEU has added a new twist to "which are beyond the air carrier's actual

[368] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 40 and para 41.
[369] See *Wallentin-Hermann v. Alitalia Lines Aeree Italian, SpA*, para 44.
[370] *Nelson v Deutsche Lufthansa AG*, Case C-581/10 & C-629/10. [2012] paras 39-40.

control" to narrow the scope of "which could not have been avoided even if all reasonable measures had been taken". The CJEU confirmed that the technical defects in *Nelson* did not constitute a defense of "extraordinary circumstances". Again, in the newly released verdict for *Lans v KLM* case, KLM still is not allowed to defend for no compensation in flight delay because of technical problems which came to light during the maintenance of the aircraft or on account of failure to carry out such maintenance cannot be regarded as "extraordinary circumstances" under Article 5(3) of the EU Regulation.[371]

In summary, identifying extraordinary circumstance is a challenging task and can create conflicts between air carriers and passengers, for instance in the case of "technical problems". Unfortunately, the EU advanced legislation to address remedy mechanism for "delays" has not yet succeeded in resolving disputes between air carriers and passengers; indeed, revisions are needed to clarify the uncertainty flowing from Regulation 261/2004. That said, this provides a good example to demonstrate the limitation of lawmaking around delays caused by *force majeure* or extraordinary circumstances. Eventually, the lawmaking faces great challenges in addressing contradictions between regulatory obligations and air carriers' own conditions in their contracts, and conflicts between passengers' expectation and air carriers' risk control strategy.

3.3.4 Further Amendments to Regulation 261/2004

Both Regulation 261/2004 and the CJEU emphasized that the Community determined to ensure a high level of protection for passengers and to take into account the requirements of consumer protection.[372] However, passengers still raise their

[371] Corina van der Lans v Koninklijke Luchtvaart Maatschappij NV ('KLM'), Case C-257/14 [2015] paras 33-37

[372] See ICAO Worldwide Air Transport Conference (ATConf/6-IP/1) at 4. The EU legislation for

complaints under such high-level protection umbrella by referring to the survey requested by the Directorate General of Energy and Transport in 2009.[373]

In addition, the "meteorological conditions incompatible with the operation of the flight" should be the most obvious "extraordinary circumstances" exemption for air carriers not to compensate passengers in the event of cancellations or delays by referring to the Preamble (14) of Regulation 261/2004. The impact of natural disaster, other than bad weather, usually interrupts more flights than technical defects to a single flight. Taking the 2010 Icelandic volcano event as an example,[374] ten million passengers were affected and stranded abroad; 107,000 flights were cancelled over the eight days travel ban and this accounts for 48% of total air traffic.[375] Since the volcano ash crisis was an unprecedented event, air carriers sufferred unexpected financial expenses resulting from this natrual disaster, and were not willing to provide the unlimited "care" or assistance specified in the Regulation 261/2004 to passengers stranded at airports. As a result, neither passengers nor air carriers were happy with the Regulation, and serious complaints from passengers arose because the air carriers offered different assistance, such as hotel accommodation, to passengers during the long delays caused by the Eyjafjallajökull volcano eruption.[376] Following these events, the European Commission indicated that "Member States and the Commission

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passenger protection was summarized as:

> Regulation 261/2004 provides different protections to passengers. First, a right to care, or assistance: in case of flight delays and cancellations, the airline must minimize the discomfort to passenger (catering, hotels, communication means, etc.). Second, the Regulation gives passengers a right to compensation, in cases of flight cancellations and depending on flight distance, of up to EUR 600, unless the cancellation is caused by "extraordinary circumstances". It should be noted that the exemption allowed for under "extraordinary circumstances" only applies to compensation obligations, and not to assistance.

[373] See ICAO Worldwide Air Transport Conference (ATConf/6-IP/1) at 5, and the footnote no11.

[374] VASAG Input to ICAO's 2010-2012 International Volcanic Ash Task Force, online: ＜ https://www.wmo.int/aemp/sites/default/files/IVATF%20Science-VASAG%20WP%20%26%20IP.pdf ＞.

[375] GEO Talks, "Eyjafjallajökull Eruption" online: ＜http://www.geotalk.info/#!eyjafjallajkull-case-study/c1qwm＞.

[376] Based on the author's handling experience, some air carriers offered two nights free hotel accommodation and some air carriers only offered one night hotel accommodation.

need to reflect on how to ensure that, in the future, this vital support which in the case of the volcanic crisis was provided solely by part of the industry is correctly shared and financed.[377]

On 24 September 2013, the Council of the European Union released its latest proposals to amend Regulation 261/2004.[378] Its main goal is to confirm and clarify rights and ensuring a better application of the Regulation,[379] such as ensuring that levels of compensation are identical for all delays, cancellation and denied boarding.[380] There is no indication whether these proposals will be accepted; yet, the revision process of EU Regulation 261/2004 on air passenger rights is still far from complete. For instance, by referring to the updated status of amendment for this EU Regulation made by the European Regions Airlines Association, it declares that:

> "Regulation (EC) 261/2004 was introduced less than a decade ago as an attempt to pave the way for European rules to protect air passengers in the events of flight cancellations, denied boarding and delays. As widely acknowledged by passengers' and airline associations, as well as by National Enforcement Bodies, the regulation was badly written, unclear and hard to implement and enforce in a consistent and equal way across Europe, leading to further uncertainties for operators and consumers alike. The long-awaited proposal for revision of Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of

[377] See European Commission, "Non-paper Proposed Informal Guidelines on the application of Some Articles of (EC) Regulation 261/2004" online: ＜ http://ec.europa.eu/transport/themes/passengers/air/doc/2011_ash-cloud-crisis-guidelines-for-interpretation.pdf＞.

[378] See The Council of the European Union, "Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air" (September 2013) Aviation 150 CONSOM 163 CODEC 2019.

[379] See European Commission, Brussels, (7 May 2014) SWD(2014) 156 final Online: ＜http://ec.europa.eu/transport/themes/passengers/air/doc/swd%282014%29156.pdf＞.

[380] See Jochem Croon, "Revision of EU 261/2004-Some New Elements" (25 October 2013) Fifth Mcgill Conference on International Aviation Liability and Insurance.

flights was published by the European Commission on 13 March 2013…"[381]

Nevertheless, passengers' complaints together with the amendments to the EU Regulation 261/2004 support the author's argument that the "right vs liability" legal framework rooted in the EU legislation has so far not been able to satisfy passengers' expectations in delay caused by f*orce majeure* or extraordinary circumstances. A novel solution is needed and should be free from the existing uncertainties under current legal framework.

3.4 Conclusion

As examined in this chapter, both the US DOT statute and the EU Regulation 261/2004 do not allow passengers to claim monetary compensation from air carriers for delays resulting from *force majeure.* Air carriers, however, are required to provide free assistance to passengers in case of cancellation and long delays even though such

[381] See "Passenger Rights" (14 March 2016), European Regions Airlines Association, online: < http://www.eraa.org/policy/passenger-rights/passenger-rights > . The following information is interesting to note and to understand the complexities of amending the EU Regulation 261/2004:

> **"Latest update 14/03/2016:** European air transport industry's major associations representing airspace users, airports, air navigation service providers, and manufacturers have written a joint letter (available via the downloads button on this page) to the Transport Ministers of the Netherlands (current holding the EU Presidency), Spain and the UK stating that:
> 'The air transport industry is a major contributor to the European economy, employment, innovation, connectivity, regional development and social cohesion. In addition, the liberalised internal market has brought many benefits to consumers. The industry contributes more than €450 billion to European GDP annually, employs more than 7 million people, and transports 860 million passengers and 7.5 mtonnes of freight to, from and within Europe each year.
> However, for a number of years the air transport industry has been hampered by a political dispute between the United Kingdom and Spain over Gibraltar. Unfortunately, and unacceptably, this deadlock has led to major delays in advancing some of the most important European air transport files – to the detriment of consumers.
> The industry believes that this situation has now become unsustainable. As recognized by the recent EU Aviation Strategy, the European air transport industry is simply too important an enabler for Europe as a whole to be adversely affected by a political dispute which it did not instigate and over which it has no control. In the past it has been possible to find solutions which were acceptable to the governments of Spain and the United Kingdom and which enabled legislative initiatives to progress, without prejudice to respective political positions'.
> The associations therefore call on the EU Transport Council to put this topic as a priority on the agenda of their upcoming meeting on 7 June in the hope that it will be possible to find an acceptable solution for the air transport industry."

delays are beyond the air carriers' control under Regulation 261/2004. In contrast, the US grants flexibility to national and foreign air carriers to determine their contractual duty of offering complimentary services in *force majeure* delays, and only demands air carriers to undertake regulatory obligations of offering passengers free services in narrowly defined tarmac delay situations.

As far as *force majeure* is concerned, the US allows air carriers to define the scope of *force majeure* in their contracts of carriage which was illustrated in UA's and Delta's contracts of carriage; however, the CJEU case-law adopts a restrictive definition of "extraordinary circumstances" to ensure a high-level of passenger protection. As a result, the CJEU's decisions in the leading case, *Wallentin-Hermann*, and later in *Sturgeon* and *Nelson* cases, confirmed that the technical problems did not constitute a defense of "extraordinary circumstances" under the EU Regulation 261/2004, but held that loss of time constitutes an inconvenience that needs to be compensated. Conversely, US air carriers are able to avoid liability where delays are caused by technical defects by referring to their contract terms, which are well disclosed to the passengers. That indeed shows a significant distinction in applying US and EU law for governing air carriers' obligations in delays caused by *force majeure* or by "extraordinary circumstances".

Furthermore, in the US, while passenger protection legislation restricts passengers' claims in *force majeure* delays, passengers still try to make their claims against the air carriers based on certain consumer rights with possible causes of action under the national law. But as the *Biscone* case shows, this may not succeed even in an egregious case that involved an 11-hour tarmac delay with virtually no services. Even though Regulation 261/2004 grants passengers more generous assistance, European air carriers can specify their own rules on complimentary assistance, which makes such assistance distinct from one air carrier to another. For passengers

suffering the consequences of delays caused by *force majeure*, this is a complex, confusing and potentially unfair web of regulatory and contractual rights and obligations which varies according to the numerous permutations of nationality of the air carrier, nature of the flight and location of the delay.

In 2013, IATA concluded in its Working Paper for the ICAO's 6th International Air Transport Conference that: "in a business with thin profit margins, the cost of complying with multiple or inconsistent consumer protection rules can be detrimental".[382] In the same year, scheduled commercial international and domestic operations accounted for approximately 3.1 billion passengers[383], which is a 0.8 billion passenger increases compared with 2010.[384] The US, Brazil, China and the EU are ranked among the most important markets for air travel in 2014.[385] In the US, which is the biggest aviation market, American and foreign air carriers transported more than 850 million passengers between the US and the rest of the world in 2014.[386]

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[382] See IATA, "Consumer Protection: A Jointed up Approach Required between Governments and Industry", ICAO Worldwide Air Transport Conference (ATConf/6-WP/68) at 2.

[383] See ICAO Safety Report for 2014, online:
< http://www.icao.int/safety/Documents/ICAO_2014%20Safety%20Report_final_02042014_web.pdf >.

[384] See US DOT Bureau of Transportation Statistics, Passenger: All Carriers-All Airports online:
<http://www.transtats.bts.gov/Data_Elements.aspx?Data=1 >
It is also worth noting that on the World Statistics Day, 20 October 2010, Narjess Teyssier, Chief Economic Analysis & Policy Section of Air Transport Bureau of the International Civil Aviation Organization, released: "Aviation Statistics & Data: A vital Tool for the Decision making Process" to share statistics: 2.3 billion passenger; 39 million tonnes of cargo; 920 airlines; 4200 airports; 62000 aircraft in services; 35 billions kilometres of network; 170 air navigation services providers."

[385] US, Department of Transportation, *Passenger and Freight Reports*, online:
< http://www.dot.gov/policy/aviation-policy/us-international-air-passenger-and-freight-statistics-report >.

[386] See DOT, *US International Passenger and Freight Statistics*, "Summary for the Month of March 2010 and 12 months ended March 2010", Office of the Assistant Secretary for Aviation and International Affairs, July 2010, online: DOT < http://www.dot.gov/sites/dot.dev/files/docs/US%20International%20Air%20Passenger%20and%20Freight%20Statistics%20Report%20for%20March%202010.pdf > (data accessed date: March 10, 2011).
According to ICAO's statistics, the European region shared 41% of the total international passenger traffic up to 2010.
See Narjess Teyssier, "Aviation Data – 37th Session of the ICAO Assembly" (29 September 2010) online: ICAO < http://www.icao.int/Newsroom/Presentation%20Slides/ICAO%20Aviation%20Data%20Presentation_NT_29_Sep2010.pdf>.

Such figures also show that the US and the EU are able to demonstrate the developed countries' view on current consumer protection stream in air transportation. Moreover, it is interesting to note that according to an ICAO study, information available as of March 2013 suggested that "Regulation 261/2004 has had a limited impact on the occurrence of long delays, or on the number of cancellations".[387] In addition, according to the US DOT's Air Travel Consumer Report, the first half of 2012 had the lowest rates of canceled flights; however, passenger complaints about airline services increased during the same period.[388] The facts suggest that current advanced passenger protection legislation has not provided sufficient support and solution to settle delays disputes, or at the very least, there is significant room for improvement with the legal framework in place in the US and the EU. Such improvement should be implemented through an alternative solution, which will be discussed in detail in Chapter V.

[387] See ICAO, "Effectiveness of Consumer Protection Regulations" Worldwide Air Transport Conference (ATConf/6-IP/1) at 9.
[388] *Ibid.*

CHAPTER IV
NATIONAL RESPONSES: TAIWAN AND MAINLAND CHINA

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NATIONAL RESPONSES: TAIWAN AND MAINLAND CHINA

Following the analysis of the remedy regimes for flight delays in the US and the EU in the previous chapter, this chapter examines different approaches to passenger delay claims in Taiwan and Mainland China, both of which are growing aviation markets in East Asia. In such a developing area, the refusal of Taiwanese and Mainland Chinese passengers to embark or disembark from an airplane illustrates passengers' dissatisfaction with air carriers' handling of *force majeure* delays. To meet passengers' expectations, some verdicts could be made in favor of passengers and this has caused inconsistency with the national legislation. Such inconsistency is due to political sensitivities and socio-economic and cultural influences, which are quite different from the strict adherence to the rule of law as observed in the US and the EU. Thus, the particularity of the distinction between law and practice in the growing aviation markets provides a different angle with which to evaluate the proposed alternative solution for handling passengers' claims for *force majeure* delays that is the ultimate objective of this thesis.

In this chapter, the author will identify the distinctiveness of the remedy mechanisms for *force majeure* delays in Taiwan and Mainland China in three parts:

(1) The first part will examine how Taiwan and Mainland China passengers' claims are affected by the political sensitivities surrounding the "One-China" policy as well as the special socio-economic and cultural influences that affect the application of the Conventions and national legislation in passenger protection.

(2) The second part will compare legislation to offer compensation and services in *force majeure* delays; and, will illustrate the distinctions in court cases in response to passengers' claims for *force majeure* delay in Taiwan and Mainland China. Particularly, a brief analysis will explain why judges in Taiwan and

Mainland China seek to satisfy passengers' "expectations" in *force majeure* delays where positive law appears to foreclose any such recourse. This phenomenon suggests the transformation of passengers' expectations into the essence of passenger dignity, which is then embedded as a legal norm.

(3) Since the controversial "cross-Taiwan-Strait" ("cross-Strait") air transportation has not yet been defined as an "international" or a "domestic" route, the third part will examine the probable case results when: (a) Taiwanese or Mainland Chinese passengers file a lawsuit against air carrier(s) for *force majeure* delay in either jurisdiction; and (b) foreign passengers file a lawsuit against a Chinese air carrier in Taiwan for *force majeure* delay in connection with "cross-Strait" flights. These differences will impact global passengers seeking delay remedies if they travel to East Asia with connecting flights in Mainland China and/or Taiwan. Thus, it is no longer an issue of just passengers traveling between Taiwan and Mainland China.

The analysis will demonstrate the particular uncertainty and legal contradictions in remedies for flight delays caused by *force majeure* resulting from socio-economic, political, and cultural values in Taiwan and Mainland China. More importantly, these uncertainties and legal contradictions will add to the difficulty of establishing a "harmonized" legal framework for answering the question at the heart of this thesis: Who should be responsible for damage and/or inconvenience resulting from flight delays caused by *force majeure*, such as weather or other unforeseeable factors?

4.1 Passenger Protection in Taiwan and Mainland China

Mainland China represents the world's second largest economy and is

increasingly playing an important and influential role in the global economy,[389] whereas Taiwan is ranked twenty-second.[390] Furthermore, the vital economic power held by Mainland China and Taiwan corresponds with growth in international air transportation in Eastern Asia. According to IATA, "routes within or connected to "China" will be the single largest driver of growth".[391] Thus, it is impossible to discuss flight delay claims in international air transportation by excluding Taiwan and Mainland China. Nevertheless, political sensitivities as well as socio-economic and cultural values do have a deep effect on the legal practice relating to passenger delay claims in Taiwan and Mainland China. An analysis of passenger protection in Taiwan and Mainland China will underscore the reality that the present legal framework has its limitations to solve disputes related to Taiwan and Mainland China.

4.1.1 Political Influence in Passenger Protection

The term "Mainland China" is used to define a geographic area under the direct jurisdiction of the People's Republic of China (PRC), and excludes the Special Administrative Regions (SARs) of Hong Kong and Macau.[392] Taiwan, with the

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[389] See The World Bank, "China Overview" (25 March 2015), online:
＜http://www.worldbank.org/en/country/china/overview＞.

[390] See CIA, *World Factbook* (13 April 2015), online:
＜https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html＞.

[391] IATA indicated that:

> The emerging economies of Asia-Pacific, Latin America and the Middle East will see the strongest passenger growth. This will be led by routes within or connected to China, which are expected to account for 193 million of the 831 million new passengers over the forecast period (159 million on domestic routes and 34 million traveling internationally). Passenger growth within the Asia-Pacific region (domestic and international) is expected to add around 380 million passengers over the forecast period.

See IATA, "China accounts for nearly one in four additional passengers" online:
＜http://www.iata.org/pressroom/pr/pages/2012-12-06-01.aspx＞.
See also IATA, "Airlines Expect 31% Rise in Passenger Demand by 2017" online:
＜http://www.iata.org/pressroom/pr/pages/2013-12-10-01.aspx＞.

[392] Hong Kong and Macao are two Special Administrative Regions of the PRC, where different legal systems apply. To avoid confusion, the author does not include Hong Kong in the transsystematic analysis. See also Jessika Li-Juan Ko, "Liability aspects of air transport between Taiwan, Hong Kong and Mainland China" (LL.M. Thesis, Institute of Air and Space Law, McGill University, 1995) at 23-25.

official name of the Republic of China ("ROC"), represents an independent nation governing the island of Taiwan as well as Penghu, Kinmen, Matsu and other minor islands. Taiwan is situated adjacent to Mainland China and at the crossroads between North Asia and South-East Asia.[393] As discussed in Chapter II, since 1949, the Taiwan and the PRC's governments have been claiming to be the sole legitimate government of "China". As a result, the political factors play a role in governing international air transportation between Taiwan and Mainland China. Why is this the case, and how does it affect passenger protection? A brief analysis is given below.

4.1.1.1 The "One-China" Policy

The "One-China" policy can be traced back to Japan's defeat in the Second World War, when Japan surrendered the sovereignty of Taiwan to the ROC under the Kuomintang ("KMT") in 1945.[394] As a result of the KMT's Chiang Kai-shek losing the civil war to Mao Zedong's Communist forces during the Chinese Civil War from 1945 to 1949, the Chinese Communist Party established the PRC (Mainland China) in 1949, and claimed to be the government of the whole of China, including Taiwan.[395] KMT's Chiang Kai-shek set up the government-in-exile in Taiwan and also declared it to be the "legal" government of China. Hence, both the KMT and the PRC insisted on the "One-China" policy, where there is only "one" China in the world and that Taiwan is part of that "China".[396] In May 1949, Taiwan declared *Martial Law* and

[393] Taiwan is located in "Eastern Asia, islands bordering the East China Sea, Philippine Sea, South China Sea, and Taiwan Strait, north of the Philippines, off the southeastern coast of China." Taiwan's population is about 23 million on just 35,980 square kilometres of land. See CIA, *World Factbook* (13 April 2015) online: ＜https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html＞.
[394] *Ibid.*
[395] See Ministry of Culture, Taiwan Encyclopedia, "One China" online: ＜http://taiwanpedia.culture.tw/en/content?ID=3908＞.
[396] *Ibid.* The Taiwan Ministry of Culture presented the meaning of "One-China" as: "In sum, the PRC intended to create the impression that both sides of the Taiwan Strait adhered to the One-China Policy while Taiwan media insisted that different "One-China Policies were proposed by each side".

implemented a system of military control across Taiwan.[397] From then on, both sides severed all connections with each other, including all forms of transportation and communications. Substantially, there were two entities, the ROC (Taiwan) and the PRC (Mainland China) declaring their representation of "China".

For close to two decades, the vast majority of States recognized the KMT government in Taiwan as the legal government representing China. However, due to the changing Cold World politics, and the surreal situation of denying the existence of close to a billion people on the Chinese Mainland, States began to derecognize Taiwan and switch diplomatic relations to recognize the government in Beijing.[398] Ever since the United Nations (the "UN") expelled the ROC (Taiwan) on 25 October 1971 in its Resolution 2758,[399] Taiwan has no longer been recognized as a contracting "State" to international conventions. Nevertheless, it is worth noting that in 2013, weekly, Taiwan has "roughly 150 scheduled flights to and from Europe, and 400 to and from the US".[400] In addition, Taiwan has conducted aviation agreements with fifty-one States and Regions[401], and twenty-two States officially recognize Taiwan as a "State".[402] Such reality and the "One-China" policy indicate Taiwan's special legal status under international public law; and, this special legal status allows Taiwan to

[397] See National Archives Administration, National Development Council, "Say Good-bye to Martial Law", online: ＜http://www.archives.gov.tw/Publish.aspx?cnid=948&p=748＞ (in Chinese).
[398] Warren I. Cohen "The United States and China During the Cold War" online: The Gilder Lehrman Institute of American History ＜http://www.gilderlehrman.org/history-by-era/seventies/essays/united-states-and-china-during-cold-war＞.
[399] See UNGA, *Restoration of the lawful rights of the People's Republic of China in the United Nations*, UN Doc A/RES/2758 (XXVI) (25 October 1971).
[400] See National Association of Secretaries of State, *NASS Resolution In Support of Taiwan's Participation as an Observer in the International Civil Aviation Organization*, 26 July 2013, NASS online:＜http://www.nass.org/about-nass/nass-resolutions/＞.
[401] See Ministry of Transportation and Communications, online: ＜http://www.motc.gov.tw/ch/home.jsp?id=723&parentpath=0,1,717＞. (in Chinese)
[402] See Ministry of Foreign Affairs, online: ＜ http://www.mofa.gov.tw/AlliesIndex.aspx?n=0757912EB2F1C601&sms=26470E539B6FA395 ＞ . (in Chinese)

exercise "sovereignty" in the air of Taiwan's territory.[403] Meanwhile, the "One-China" policy has remained even after the UN 1971 Resolution and the changes in the international treatment of Taiwan by other States.

4.1.1.2 The "One-China" Policy and International Conventions

The "One-China" policy claimed by both Taiwan and Mainland China is the source of complexities for civil aviation law between the two countries. Indeed, the two jurisdictions hold differing views regarding the application of air law Conventions for the determination of passengers' claims against international air carriers, in particular with reference to the judicial interpretation of who is a "High Contracting Party" under the Conventions.[404] For instance, due to Taiwan's political status, its national law remains silent on the application of the Warsaw or Montreal Conventions to govern passenger protection for domestic and international air transportation. However, some judges still allow international air carriers to invoke

[403] The Chicago Convention stipulates that every State has "complete and exclusive sovereignty over the airspace above its territory". In addition, the International Court of Justice has confirmed that the principle of exclusive sovereignty over the space above a State's territory is a "firmly established and longstanding [tenet] of customary international law".
See *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6 [*Chicago Convention*], art 1.

[404] Article 1(2) of the Warsaw Convention provides:

> 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.

Article 1(2) of the Montreal Convention provides:

> 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 States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

Taiwan is not considered as the "High Contracting Party" or "State Party" defined in Article 1(2) of the Conventions. Please refer to Section 2.2 of this dissertation.

the Conventions as the governing law if the contract of carriage includes terms and conditions to that effect.

In *Chen Family vs Northwest Airlines Taiwan Branch*, four passengers travelled as a family from Taipei to the United States for holidays. When the family arrived at Dulles Airport, Washington D.C., they found that Northwest Airlines had lost two of their bags. One of the lost bags was found the next day, and the other was lost.[405] After the passengers returned to Taiwan, they filed a lawsuit against Northwest Airlines Taiwan Branch to claim: (1) pecuniary remedy of New Taiwan Dollars 180,000 for damages to baggage under Articles 634, 638 and 657 of the Taiwan *Civil Code*; (2) mental anguish compensation as a result of inconvenience caused by loss of personal belonging of New Taiwan Dollars 250,000 under Article 227-1 of the *Civil Code*; and (3) punitive damages of New Taiwan Dollars 70,000 under Articles 7 and 51 of the Taiwan *Consumer Protection Act*. Northwest Airlines Taiwan Branch argued for the application of air carriers' limited liability for lost baggage at US$20 per kilogram under the Warsaw Convention, which had been specified in the "Conditions of Carriage" and shown to passengers in their e-ticket. Since the passengers could not prove the air carrier and/or its agents' intention or gross negligence to cause the loss of baggage, Northwest Airlines was liable for the total compensation amount at US$640 (US$20x32KG) (about NT$21,862). The Taipei District Court supported the air carrier's view and clearly indicated that even though Taiwan was not a contracting State of the Warsaw Convention, the interpretation of air carriers' limited liability under the Convention should apply.

From a contractual perspective, since the passengers accepted the conditions of

[405] *Chen family vs Northwest Airlines* (1995.12.2) Taipei District Court (Case No: 94 Shaw Jean Shan No 5) See Judicial Yuan, online: ＜http://jirs.judicial.gov.tw/Index.htm＞ (in Chinese).
The author represented Northwest Airlines in this lawsuit, and addressed all issues which were reviewed by the court.

carriage with Northwest Airlines, they were bound by the air carriers' limited liability for lost baggage under the Warsaw Convention. In addition, Article 93-1 of the Taiwan Civil Aviation Act provided that air carriers' limited liability for lost baggage was New Taiwan Dollars 1,000 per kilogram and the maximum should be less than NT$20,000 (about US$667). With the facts at hand, Northwest Airlines Taiwan Branch paid the passenger NT$21,862 in compensation. The Taipei District Court also dismissed the passengers' claims for mental anguish and punitive compensation because the plaintiffs did not prove Northwest Airlines' intention or gross negligence to cause the loss of baggage. In this case, the Taipei District Court applied the limited liability under the Warsaw Convention based on "contract terms".

In contrast, in *53 Passengers vs Japan Asia Airways*[406] (hereinafter referred to as JAA EG-209 case), the judge of the Taipei District Court held a different view of applying the Warsaw Convention and the 1999 Montreal Convention regarding a flight delay caused by a snow storm in January 2006.[407] In this case, fifty-three Taiwanese passengers filed a lawsuit against Japan Asia Airways ("JAA") for the EG-209 flight from Narita Airport in Tokyo to Taipei because the flight was delayed for over fifteen hours due to a snowstorm. The delay time included the deicing process of the airplane and the safety of air traffic control. These fifty-three passengers from Taiwan claimed compensation for infringement of their dignity plus punitive compensation from JAA because JAA failed to arrange accommodation during their long wait at the Narita Airport terminal in Tokyo. The passengers alleged that it was JAA's obligation to provide free accommodation since this was listed as

[406] *53 Passengers vs Japan Asia Airways* (2006.12.11) Taipei District Court (Case No: 95 Su Zi No 2168)
See Judicial Yuan, online:＜http://jirs.judicial.gov.tw/Index.htm＞ (in Chinese).

[407] *53 passengers vs. Japan Asia Airways* (1996.12.11) Taipei District Court (Case No: 95 Sue No 2168,) See online: ＜http://jirs.judicial.gov.tw/Index.htm＞ (in Chinese).
The author handled this litigation for Japan Asia Airways in 2006. The case was finally settled in the appeal court. JAA and passengers came up amicable settlement with mutual respect instead of pecuniary remedy.

one of the air carriers' services required by Article 4 of the Taiwan *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers*.[408] In this particular case, the judge recognized that passengers and JAA were aware that the air tickets specified the application of the Warsaw Convention. However, the judge held that the Taiwan *Civil Code* should be the governing law instead of the Warsaw Convention because passengers claimed for damages due to JAA's failure to perform its duty of protecting passengers by not offering complimentary accommodation, which was not an issue governed under the Warsaw Convention. Most importantly, the judge held that no evidence proved that the passengers had consented to the exclusive application of the Warsaw Convention as the governing law, and there were no "trade practice" (Chinese: 交易習慣) that could make passengers be bound by contractual terms imposed by JAA. As a result, JAA could not invoke the liability regime created by the Warsaw Convention in accordance with the contract terms specified in the air tickets, and the court ordered that JAA pay NT$7,000 (about US$233) in compensation for infringement of dignity. A detailed analysis of infringement of dignity will be

[408] Article 4 of the *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers* provides that air carriers are granted the right to seek for government agencies' assistance to prevent itself from passengers' refusal of disembarking because air carriers are obligated to offer passengers the following services free of charges:

a. Necessary communications;
b. Necessary meals or accommodations;
c. Necessary articles to keep out the cold or first-aid articles; or
d. Necessary connecting flights or other vehicles for transportation needed.

According to Article 4, paragraph 2, a carrier shall attend to the rights and interests of passengers in a reasonable manner; and, if air carrier cannot offer the foregoing services owing to local conditions, the carrier shall explain to passengers in detail the reasons, and properly handle the situation.

Meanwhile, under Article 5 of the above-mentioned Regulation, if air carrier fails to properly handle any dispute arising between passengers and such carrier in the course of transportation, or after the completion thereof, or if air carrier did not advise the delay time or did not offer the required services, the Taiwan CAA may, with the approval from the Ministry of Transportation and Communications, take necessary action to restrict or suspend all or part of the air routes served by the civil air transport enterprise. This Taiwan Regulation expresses that the visible involvement from the administrative agencies was to ensure passenger protection in domestic and international air transportation.

Detailed analysis for air carriers' obligations of offering services to passengers under the Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers will be provide in Section 4.2.

discussed in Section 4.2.2.3.

The Taipei District Court indeed held different views in the *Chen Family* and JAA EG-209 case regarding the applicability of the Warsaw Convention for passengers' claims even though Northwest's and JAA's air tickets specify that claims are subject to the Convention. As a result, these two cases demonstrate the uncertainty to rely on the contractual terms indicating that the Warsaw Convention or the Montreal Convention is applicable for an international passenger who has a connecting flight in Taiwan to claim flight delay damage in Taiwan.

4.1.1.3 The "One-China" Policy and Cross-Strait Flights

After the abolishment of Taiwan *Martial Law* on 15 July 1987, Taiwan and Mainland China gradually resumed institutionalized peace talks between either side of the Taiwan Strait, which transformed their relationship into one of extensive people-to-people and economic exchanges.[409] Increasingly, more "cross-Strait flights" or "non-stop flights" under "charter arrangements" became "scheduled flights"[410] between Taiwan and Mainland China. These were facilitated by a number of discussions[411] made between representatives of Taiwan and Mainland China. As a result, in 2008, Taiwan and Mainland China for the first time concluded a

[409] The Martial Law's official name is "Chieh Tzu No 1 issued by the Taiwan Garrison Command Headquarters". See Executive Yuan "The Republic of China Yearbook 2012", online:
＜http://www.ey.gov.tw/en/cp.aspx?n=A9A791A000CA8566＞(in Chinese).

[410] The "charter arrangements" were only arranged for a certain period during the Chinese New Year for people to "go home" to celebrate the new year and to the Chinese, it is one of the most important festivals. However, more and more people requested the two governments to allow scheduled flights due to amicable relationship and market demand. Finally, the scheduled cross-Strait flights started on 31 August 1999.
See Ministry of Transportation and Communications, online:
＜http://www.motc.gov.tw/ch/home.jsp?id=723&parentpath=0,1,717＞(in Chinese).

[411] The "discussions" are sustainably served the function of "negotiations" for bilateral air transportation agreement between two legal entities. Due to political sensitivity to recognize the sovereignty in each government entities, both Taiwan and Mainland China declared such negotiations as "discussions".

comprehensive "Cross-Strait Air Transport Agreement"[412] to commence "scheduled" charter flights.[413] In 2009, the "Supplementary Agreement to the Cross-Strait Air Transport Agreement" (the "Supplementary Agreement") provided rules of taxation and governing law for cross-Strait air transportation.[414] In the following years, from 2010 to 2015, both sides conducted ten official meetings and signed more than twenty-seven agreements. Among these agreements, the Supplementary Agreement for Air Transportation, effective on 30 April 2009, open wider air routes for cross-Strait air transportation.[415] In July 2015, there were maximum 890 scheduled flights per week between Taiwan and Mainland China, which is a significant development in the air transportation traffic across the Taiwan Strait.[416] More importantly, international flights from many countries are able to connect with the "cross-Strait flights" for travel between Taiwan and Mainland China. For instance, a Canadian living in Toronto now is able to fly to Taipei with a stop at Beijing. However, it was impossible before 2010 due to the no stable "cross-Strait flights" between Taiwan and Mainland China.

In spite of great progress in economic relations and booming "cross-Strait flights", the "One China" policy still remains a political issue that affects even today's legal practice. Such a reality has created a pressing issue, which up to now is

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[412] See: Mainland Affairs Council (MAC), "Summary of Past Cross-Strait Talks", online: MAC <http://www.mac.gov.tw/public/MMO/MAC/Summary%20of%20Past%20Cross-Strait%20Talks%206-3.pdf> (in Chinese).

[413] It is political presentation. Substantially, the "scheduled" charter flights perform the nature of scheduled flights, but Taiwan government intentionally used this term to declare the cross-Strait flights not based on a routine arrangements.

[414] See: Mainland Affairs Council (MAC), online: MAC ＜http://www.mac.gov.tw/ct.asp?xItem=67145&CtNode=5710&mp=1＞(in Chinese).

[415] The Supplementary Agreement added more detailed rules to govern cross-Strait flights in accordance with the principles specified in Articles 1, 3, and 4 of the "Cross-Strait Air Transport Agreement" signed on 4 November 2008.
See: Mainland Affairs Council, statistics online:
＜http://www.mac.gov.tw/public/Data/54110213171.pdf＞ (in Chinese).

[416] See CAA, "Press Release: Increased Scheduled Cross-Strait Flights from 840 to 890 Per Week" (3 July 2015), online: ＜http://www.caa.gov.tw/big5/news/index01.asp?sno=828＞ (in Chinese).

unresolved: What is the liability regime that should be applied for delay remedies for passengers flying between Taiwan and Mainland China, or even for an international passenger who is connecting in either Taiwan or Mainland China?[417] As will be briefly explained below, in the flight scenarios as outlined before, it is hard to apply either the international liability regime or the domestic air liability regime to compensate passengers who are on flights that originate, or connect in Taiwan.

In order to benefit from the limited liability regime specified in the Conventions and to avoid the challenge of directly applying the Conventions, national air carriers from Taiwan and Mainland China have adopted the liability regime specified in the Conventions as part of their conditions of carriage. For instance, Section 17.7.2 of the conditions of carriage of EVA Air, a Taiwanese air carrier, indicates the application of the Montreal Convention or the Warsaw Conventions if "international flights" are involved.[418] Furthermore, Article 15.11 of the General Conditions of Carriage provided by Air China, a Mainland China carrier, indicates that:

> International Carriage as defined in the Convention, is subject to the liability rules of the Convention. Where International Carriage is not subject to the liability rules of the Convention, our liability for any Damage with respect to the carriage of Passengers and Baggage, shall be as set forth in the Montreal Convention.[419]

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[417] See Paul Stephen Dempsey and Kuan-Wei Chen, "Aviation Safety and Security require Global Uniformity: Taiwan, The Gap in the Global Aviation System" (2013) XXXVIII Annals Air and Space Law 515.

[418] Section 17.7.2 of General Conditions of Carriage of EVA Air shows:

In case of passenger delay, the carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible for it to take such measures. The carrier may rely upon the defense of contributory negligence.

Where the Montreal Convention applies:

-Liability is limited to 4,694 SDRs.

Where the Warsaw Convention applies:

-Liability is limited to 16,600 SDRs

See General conditions of Carriage of EVA Air, online:
＜http://www.evaair.com/en-us/conditions-of-carriage/＞.

[419] See Air China General Conditions of Carriage, online: http://www.airchina.com.cn/en/investor_relations/international_trans/08/15645.shtml＞

Chinese version of Article 15.11of the General Conditions for Carriage for Passengers and Baggage provides: 属于公约界定的国际运输,应当适用公约的责任规则。不属于公约界定的国际运输,对由于运输造成的旅客和行李的任何损害,我们按照蒙特利尔公约的相关规定承担赔偿责任。

The conditions of carriage of EVA Air and Air China illustrate that the application of the Conventions technically relies on air carriers' voluntary agreements to harmonize conflicts of law in air carriers' liability, including flight delays. However, such voluntary agreements are subject to review case-by-case in different jurisdictions, as was discussed in the *Chen Family* and JAA EG-209 cases. Also, there are no guarantees that such voluntary agreements will apply to passengers who are on international flights, which means from other countries to Mainland China or Taiwan with connecting flights in cities located in Mainland China and Taiwan.

More importantly, in order to maintain good relations and in recognition of the booming air transportation markets between Taiwan and Mainland China, during the discussions of the "Cross-Strait Air Transport Agreement", the "Supplementary Agreement" and amendments to the "Supplementary Agreement", there were discussions on the serious and complicated issues regarding the application of Taiwan law to govern disputes caused by Mainland China citizens in Taiwan, or the law of Mainland China to solve disputes involving Taiwanese citizens in Mainland China.[420] The decision was to give certain principles instead of detailed rules of law to govern legal issues related to cross-Strait air transportation; for instance, Principle No 11 only indicates that "air carriers engaged in cross-Strait air transportation should be subject to the rule of *lex situs*".[421] However, the absence of specific rules under the

[420] However, two governments from Taiwan and Mainland China treat the process of discussions for the cross-Strait air transport agreements and related to governing law for disputes arising from cross-Strait flights are top secrets. To avoid political sensitivity, the parties to sign such agreements are Straits Exchange foundation, representing Taiwan, and Association for Relations Across the Taiwan Strait, representing Mainland China. Since two contracting parties are registered as "private entity" under jurisdiction law, the agreements should be subject to approval from legislatures to enforce legal binding.

[421] There are a total of fourteen principles specified in the "Supplementary Agreement" signed on 26 April 2009 by the Straits Exchange Foundation, representing Taiwan, and an Association for Relations Across the Taiwan Straits, representing Mainland China. These fourteen principles include: (1) air routes; (2) supervision of carriage; (3) assigned air carriers; (4) assigned cities for cross-Strait flights; (5) air fares; (6) representative offices; (7) tax waiver; (8) currency exchange; (9) flight safety; (10) licensing; (11) governing law; (12) coordinator agency; (13) communication and disputes resolution; and (14) signatures with legal binding.

"Supplementary Agreement" causes confusion to resolve passengers' complaints or claims against air carriers. In addition, the "Supplementary Agreement" provides no specific rules for Taiwan government officers to exercise their power although cross-Strait flights substantially alleviated the hostile relationship between Mainland China and Taiwan. For instance, in 2009, the Taiwan CAA and the Taiwan Air Police Bureau hesitated to apply the Taiwan *Civil Aviation Act* to force eighty Mainland China citizens to leave Taiwan UNI Air's airplane when they refused to disembark the airplane.[422] Further analysis of applying Taiwan law and Mainland China law governing passengers' delay claims will be discussed in Section 4.3 of this dissertation.

4.1.2 Socio-economic and Cultural Influence in Passenger Protection

In addition to political dimensions affecting passenger delay claims, socio-economic and cultural influences also affect passengers' claims for monetary compensation (pecuniary claim) and better services or apology (non-pecuniary claim). Briefly speaking, the socio-economic influences on passengers' claims for remedies mainly result from legislation aimed at enhancing "consumer rights". On the other hand, most passengers' claims of a non-pecuniary nature are rooted in cultural values linked to "respect" or for failure to provide "expected services". Surprisingly, Taiwan passengers' expectations for better services may have turned into a threat to flight safety. For example, on 23 July 2014, TransAsia Airways Flight 222 (GE222), a scheduled domestic passenger flight, crashed into buildings during its approach to

[422] There is another example, on 20 April 2010, fifty-four Mainland China passengers refused to disembark from Shanghai Airlines' aircraft after arriving Taiwan.
See Apple Daily News, "Twenty-one Passengers Requested EVA to Refund Ticket Fare Due to Six Hours Delay" (23 September 2010) online:
＜http://www.appledaily.com.tw/appledaily/article/headline/20100923/32833328＞ (in Chinese).

land in bad weather at Magong Airport, Penghu Island, Taiwan, killing 44 people.[423] According to a Taiwan local press release, some Taiwanese viewed the GE222 accident as a "tragedy of Taiwanese culture of refusal to disembark" because the air carrier originally had allowed the pilot to take off in bad weather just to avoid passengers' claims for remedies.[424] From the passengers' perspective, after passengers checked in at the airport, TransAsia Airways started the process of undertaking contractual obligations, including duty of protection and performing air transportation. Regardless of whether people's view reflects the facts, this accident provides an example of the cultural influence over flight delay behavior and claims in Taiwan and Mainland China.

The influence of socio-economic and cultural values on passengers' claim will be considered in order to have a more comprehensive view of how they might affect flight delay claims.

4.1.2.1 Socio-economic Influence

A. Taiwan

Taiwan has transformed itself from a recipient of US aid in the 1950s and early 1960s to an aid donor and major foreign investor with investments primarily centered in Asia.[425] At the moment, Taiwan has a developed capitalist economy that the World

[423] On 23 July 2014, TransAsia Airways Flight 222, a scheduled domestic passenger flight, crashed into buildings during approach to land in bad weather at Magong Airport, Penghu Island, Taiwan. The aircraft carried fifty-four passengers and four crew members on board; only ten survived. Flight 222 was scheduled to depart from Kaohsiung at 16:00 local time, but it was weather-delayed and took off at 17:43. At 18:11, owing to the weather, the flight crew requested to enter a hold. About forty minutes later, the aircraft was approaching runway 20, and then the aircraft began to deviate left of the runway centerline and began to lose altitude. At 19:06, the flight crew expressed their intention to go around, but the aircraft crashed into two homes in the township of Huxi.
See Aviation Safety Council, "GE222 Accident Investigation Report" (1 August 2014) online: ASC ＜ http://www.asc.gov.tw/asc_ch/news_list_2.asp?news_no=552＞. (in Chinese).

[424] Apple Daily News, "Tragedy of Taiwanese Culture of Refusal of Disembarking" (25 July 2014) online: ＜http://www.appledaily.com.tw/realtimenews/article/new/20140725/439975/＞ (in Chinese).

[425] David W. Wang, "US Aid and Economic Progress in Taiwan" (March 1965) Vol 5 Asia Survey 152-160.

Bank ranks seventeenth in "Ease of Doing Business" (out of 189 economies) in the world in 2014.[426] Since the 1990's, the economy of Taiwan has adopted economic liberalization with successive regulatory reforms in order to achieve the full-scale economic liberalization and internationalization in the 2000s.[427]

With rapid economic development, consumer protection legislation caught people's attention and a law-making lobby was launched in 1980 by a private foundation, the Consumers' Foundation, Chinese Taipei ("CFCT"). The CFCT was formed as a means of "self-defense" for consumers against enterprises who refused to compensate victims who suffered damage caused by their products.[428] The CFCT movement evolved into a social movement to challenge a lack of consumer protection law.[429] The movement also urged the Executive Yuan, the executive branch of government in Taiwan, to declare that protecting consumers was an imperative obligation of the government. As a result, in 1982, the Executive Yuan proceeded with drafting a consumer protection law. After five years, the consumer protection legislation proposed by the Executive Yuan was only an administrative guideline called the "Consumer Protection Proposal", which could not meet the requirements or expectations of the CFCT and the public in general.[430] In that same year, the

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Online: ＜http://www.jstor.org/discover/10.2307/2642405?uid=3739808&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=21104722532127＞.

[426] Doing Business in Taiwan, China, World Bank Group, online: ＜http://www.doingbusiness.org/data/exploreeconomies/taiwan,-china/＞.

[427] Asia-Pacific Economic Cooperation & OECD, "Chinese Taipei's Self-Assessment Report for the APEC-OECD Integrated Checklist on Regulatory Reform" (11-12 September 2006) online: ＜http://www.apeccp.org.tw/doc/APEC-OECD/2006-11/2006ChecklistReport.pdf＞.

[428] In the summer of 1979, more than two thousand people from central Taiwan suffered untimely death or body injury caused by poisonous cooking oil. The oil manufacturer evaded from its legal liability by disposing its property. In late 1979, counterfeit liquor made a professor blind. These cases made people aware of their rights by setting up a foundation to promote a fair society through defending the rights of all consumers by supporting the consumer movement in general, and campaigning at the national level for policies related to consumer concerns. See Consumers' Foundation, Chinese Taipei (CFCT), "About Consumers' Foundation, Chinese Taipei" online: ＜http://www.consumers.org.tw/unit110.aspx＞. (in Chinese)

[429] *Ibid.*

[430] See legislative record of the Legislative Yuan for reviewing the Consumer Protection Act. (Vol 77

Executive Yuan and the CFCT separately submitted their own consumer protection bills to the Legislative Yuan for legislative review. The Legislative Yuan gave the bills low priority and held them for six years. It was not until 1994, after Mainland China promulgated its *Consumer Protection Act* and under pressure from sixty-six lawmakers in the Legislative Yuan, that the Legislative Yuan finally worked with the CFTC and scholars to put together Taiwan's *Consumer Protection Act*. This Act adopted various aspects of consumer protection legislation from different countries.[431] Taiwan's *Consumer Protection Act* became a landmark in giving power to consumers to defend their civil rights after the long drawn out law making process.[432]

Taiwan's *Consumer Protection Act* does not provide a cause of action for passengers to claim monetary compensation from air carriers for damage resulting from *force majeure* flight delays. However, passengers are eager to invoke the *Consumer Protection Act* in making their claims for damages. In so doing, passengers refer to air carriers' refusal to release correct flight information to facilitate their choice of rerouting, and air carriers' breach of due care detrimental to their health during long delays. In addition, the courts in Taiwan follow a broad application of the *Consumer Protection Act* allowing complainants to achieve higher compensation amounts where complainants have applied for various claims including those relating to bodily injury and/or mental anguish.[433] Such legal practice encourages passengers

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No 102) (in Chinese).

[431] By referring to legislative record of the Legislative Yuan (Vol 77 No 102), the consumer protection legislation of the US, Japan, South Korea, Austria, (West) Germany, and Sweden are used as reference. See also Wu Chen-Hsu, "Comparative Study for Consumer Protection Legislation in Mainland China and Taiwan" (Taipei: National Taiwan University Master Thesis, 1999) at 2 & 37 (in Chinese).

[432] Under Taiwan's Consumer Protection Act, consumer protection is categorized into four main areas:
(1) consumers' health and safety from using products or services,
(2) fair standardized contract governing consumers and merchants,
(3) specific protection for extraordinary purchase and sale, such as mail order purchase, door-to-door sales, and contracts of installment sales, and
(4) consumer information governing rules.

[433] See *Three patients v. Taiwan Adventist Hospital* (2003) Supreme Court Verdict (case no: 92 Tai-Shan No 1453, 92 年臺上字第 1453 號) online: ＜http://jirs.judicial.gov.tw/Index.htm＞(in Chinese).

to file their complaints against air carriers under the consumer protection law to claim pecuniary damage, and even to claim for punitive compensation, which is up to three times the amount of actual damages as a result of injuries caused by the willful act of misconduct of business operators.[434] In fact, passenger and consumer protection have practically become synonymous in Taiwan because of the socio-economic transformation and its influence on consumer protection legislation. That also explains why in the 1990s, Taiwanese passengers were enlightened by the stream of consumer protection law-making and then refused to disembark from airplanes as an attempt to exercise what they viewed as their passenger/consumer rights. This refusal to disembark will only increase as domestic and international air transportation continue to grow dramatically along with the economy as well as with the

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In this particular case, the Supreme Court held that the patient's families were entitled to claim alimony, funeral expenses and mental suffering compensation from a hospital because the medical team members had negligence not to conduct allergy tests before the injection which caused the patient's death.

[434] See *Tan Fa Tan Lin Building Management Committee v. Chun Goo Security Service Ltd.* Supreme Court (case no: 101Tai-Shan No 744, 101 年臺上字第 744 號) online:
＜http://jirs.judicial.gov.tw/Index.htm＞(in Chinese).
The rationale for the Supreme Court to favor the apartment building management committee against the security company as well as the employed security staff are based on the following two underlined provisions:
Article 7 of the Taiwan Consumer Protection Act provides that:

> Business operators engaging in the design, production or manufacture of goods or in the provisions of services shall ensure that goods and services provided by them meet and comply with the contemporary technical and professional standards of the reasonably expected safety prior to the sold goods launched into the market, or at the time of rendering services. Where goods or services may endanger the lives, bodies, health or properties of consumers, a warning and the methods for emergency handling of such danger shall be labeled at a conspicuous place. Business operators violating the foregoing two paragraphs and thus causing injury to consumers or third parties shall be jointly and severally liable therefor, provided that if business operators can prove that they are not guilty of negligence, the court may reduce their liability for damages.

Article 51 of the Taiwan Consumer Protection Act provides that:

> In a litigation brought in accordance with this law, the required consumer may claim for punitive damages up to three times the amount of actual damages as a result of injuries caused by the willful act of misconduct of business operators; however, if such injuries are caused by negligence, a punitive damage up to one time the amount of the actual damages may be claimed.

Furthermore, on 2 June 2015, the amended Article 51 of the Taiwan Consumer Protection Act provides the punitive damages up to five times the amount of actual damages as a result of injuries caused by the willful act of misconduct of business operators.
See Taiwan Consumer Protection Committee, Press Release for Passing Third Readings on Amending the Consumer protection Act, online:
＜ http://www.cpc.ey.gov.tw/News_Content.aspx?n=3840722B002ADEAB&s=C24DA92907D96559 ＞ (in Chinese).

accompanying increase in flight delays due to air traffic control and/or inclement weather conditions.

B. Mainland China

In terms of the socio-economic influence on passenger claims in Mainland China, it is worth noting that following 1949, the economy of Mainland China was mainly operated by State-owned enterprises and conducted as a centrally-controlled planned economy.[435] Accordingly, Mainland Chinese hardly had any awareness of what consumer protection is. Mainland China's change, which resulted in a booming economy, was spearheaded by Deng Xiaoping's cross-the-river-by-touching-the-stones economic reform in late 1978.[436] This led the Communist Party of China to adopt a version of a market economy in 1992.[437] As a result of such slow but measured economic policy development, the concept of "consumer protection" is relatively new under Mainland China's legal system. Consumer protection legislation was originated by a case that happened in the winter of 1992 when two girls were shopping in a supermarket in Beijing. They were forced to have a body search simply because a salesperson suspected that they might have stolen goods. In the end, the supermarket compensated the two girls with 2,000 RMB (about US$326) for mental suffering after they had launched a lawsuit.[438] Mainland Chinese, thereafter, were enlightened to be able to protect their consumer rights by "fighting" for them, which is justified as "self-help" (自力救濟).

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[435] Nicholas C. Howson, "China's Company Law: One Step Forward, Two Steps Back – A Modest Complaint", (1997) Berkeley Law Scholarship Repository, online: ＜http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2868&context=facpubs＞.

[436] See "Deng Steers China with Exploring Spirit", Xinhua News Agency, 17 August 2004, online: <http://www.china.org.cn/english/features/dengxiaoping/104243.htm>.

[437] See Yang Sher-Hsuing, *Marx's Economic Philosophy* (Taipei: Wu-Nan Publisher, 2001) at 205 (in Chinese).

[438] See Dailynews online: ＜http://dailynews.sina.com/bg/chn/chnpolitics/phoenixtv/20130422/18104474920.html＞(in Chinese).

Based on the obligation to fulfill commitments made to the World Trade Organization (WTO) before 2001, Mainland China was in a race to promulgate consumer protection laws.[439] Mainland China's *Consumer Protection Act* was promulgated on 31 October 1993 and went into force on 1 January 1994.[440] This Act specifies consumers' nine rights and business operators' seven obligations; for instance, providing accurate information and respecting customers' dignity.[441] Since joining the WTO, Mainland China has started to face challenges in establishing a transparent legal infrastructure to effectively enforce consumer rights in a rapidly expanding economy, which recently changed from a centrally-planned economy model to a market economy model in early 2000.[442] To be more specific, in order to

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[439] *Ibid*, See A. Brooke Overby, "Consumer Protection in China After Accession to the WTO" (2005-2006) 33 Syracuse Journal International Law and Commerce, at 353. See also Will Martin, Deepak Bhattasali, Shantong Li, "China's Accession to the WTO: Impact on China", online: ＜http://siteresources.worldbank.org/INTEAPREGTOPINTECOTRA/Resources/chapter+1.pdf＞.

[440] The content of the Consumer Protection Act can be found online: ＜http://www.6law.idv.tw/6law/law-gb/中華人民共和國消費者權益保護法.htm＞(in Chinese).
It is worth mentioning that according to a press released on 22 April 2013, the 12th Standing Committee of the National People's Congress announced to revise the Consumer Protection Act to meet with the updated life style after the Act has been promulgated for about twenty years. See online: ＜http://dailynews.sina.com/bg/chn/chnpolitics/phoenixtv/20130422/18104474920.html＞(in Chinese).

[441] The consumers' major rights include: (1) the right of inviolability of personal and property safety, (2) the right to obtain true information regarding goods and services, (3) the right of free choice of goods and services, (4) the right of a fair deal, (5) the right to demand compensation when personal injury or property damage occurs, (6) the right to organize association to protect consumer rights; (7) the right to acquire knowledge concerning consumption and concerning the protection of consumer's legitimate rights and interests, (8) the right that their human dignity, national customs and habits are respected when purchasing and using goods and when receiving services, and (9) the right of supervision, including the right to raise charges against State organizations and functionaries and to raise criticism of and proposals for protections of consumer rights and interests.[441] The business operators' seven obligation include: (1) guaranteeing that goods and services meet requirements for personal and property safety, (2) providing accurate information and avoiding false or misleading propaganda, (3) using their real names, marks and labeling price, (4) providing invoices, (5) guaranteeing quality, (6) avoiding unfair and unreasonable business, and (7) respecting customers' dignity. Moreover, under Article 49 of the Consumer Protection Act, in addition to the actual damage, the affected consumer is entitled to claim for punitive damages, which is equivalent to the same amount of his/her claim if the consuming activity involved cheating.
See A. Brooke Overby, *supra* note 439 at 352; see also Wang Hsin-Win *Interpretation and Standard Case Study for Mainland China Consumer Protection Act* 1st ed (Beijing, 2007).
The claim of punitive damages in Mainland China's Consumer Protection Act is a common law concept, which is very different from Mainland China's contractual liability under the civil law system. A Taiwanese academic wrote an article to criticize the punitive damages in Mainland China's Consumer Act. See Tai Jie-Jei, "A Study on Legal Issues of Punitive Damages in Mainland China's Consumer Law", online: ＜http://backcpc.gov.tw/KMOuterPath/6310/中國大陸《消費者權益保護法》之懲罰性賠償金制度研究.pdf＞ (in Chinese).

[442] During the period from 1953 to the end of the 1970s, Mainland China practiced central planning

participate in the WTO, Mainland China had to comply with international rules. At the same time, Mainland China had to hold back the development of her own social values under the mentality of dictatorship of the proletariat. As a result, Mainland China has been struggling to balance both local and global consumer protection policies as well as trade liberalization. These two unique factors have formed a contradiction in consumer protection from both local and global regimes. In addition, such factors have also deeply influenced Mainland China's air passenger protection for domestic and international flights resulting in adopting two different flights standards of consumer protection.

It is worth noting that after the Consumer Protection Act was issued, the deadly industrial poison melamine found in the baby milk formula underlined the difficultly to properly implement the Act. Dozens of infants were killed and thousands of babies were hospitalized after they were fed milk powder that was laced with a deadly amount of melamine; this news sent shockwaves across the nation and left people wondering what is to come next.[443] This case seriously damaged consumers' trust in enterprises with economic strength. Particularly, under the communist mentality, the major enterprises are mostly State-owned and individuals should respect and obey the Party's "will".[444] Mainland Chinese believe that to protect consumer rights, consumers should act aggressively to ensure their voices are heard "immediately".

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under the direction of the State Planning Commission (SPC). Beginning in 1978, the Chinese government changed the economic system gradually towards a market economy, allowing non-State enterprises to produce and compete with State enterprises. In 1998, the SPC was renamed the State Development Planning Commission (SDPC). In 2006, it was renamed as the National Commission for Development and Reform (NCDR), with the term planning omitted perhaps to convey to the world that China was no longer a centrally planned economy.
See Gregory C. Chow "Economic Planning in China" (June 2011) Princeton University online: ＜http://www.princeton.edu/ceps/workingpapers/219chow.pdf＞.

[443] See Zeng Ren-Quan, "From Deadly Powered Milk to Poisonous Sunflower Seeds" (15 June 2004) online: ＜http://asianresearch.org/articles/2147.html＞.

[444] See Chen Yun, " Strictly Obey Party's Discipline", online: Communist Party of China ＜http://cpc.people.com.cn/BIG5/69112/83035/83317/83595/5738041.html＞(in Chinese).

Along with the booming economy, international air transportation grew with economic development in Mainland China.[445] Simultaneously, the flights flourishing along with the economic development caused serious delays because of the over loads on air traffic controls; for instance, only 18.3% of flights departed on time at Beijing International Airport in June 2013;[446] and in 2014, the average 73 minutes flight delay at the Beijing International Airport were the shortest delay time for all the airports in Mainland China.[447] Similar to Taiwan in the 1990s, with the awareness of consumer rights or passenger protection, since 2000, Mainland Chinese applied the "unruly behavior" of refusal to disembark from an airplane, or walked onto the runway[448] to seek monetary compensation and better services for flight delays. To the Mainland Chinese, the "unruly behavior" may be illegal, but could be the most

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[445] The author's conclusion is made by referring to the following reference:

> In 2010 there were 1,394 routes connecting China to urban agglomerations around the world. On average there were 3.8 outbound flights per day along these routes. A total of 191 of these routes were connecting China to cities of more than 10 million inhabitants, with 6.4 outbound flights per day available to passengers. Frequencies are higher to the most economically important destinations. For example, passengers benefited from 19 outbound flights per day between Beijing and Hong Kong International Airport, and from 4.4 flights from Shanghai to Paris Charles de Gaulle Airport, providing high-speed access for business and leisure purposes throughout the day. Many of these city-pair connections are only possible because of the traffic density provided by hub airports.

See "Economic benefits from Air Transport in China", Oxford Economics 2011, online: ＜http://www.iata.org/policy/Documents/Benefits-of-Aviation-China-2011[1].pdf＞.

[446] To prevent collisions, it is a common practice for the Air Traffic Controler (ATC) to enforce air traffic separation rules to ensure that each aircraft maintains a minimum amount of interval space around an aircraft at all times. Many aircraft also have collision avoidance systems to provide additional safety by warning pilots when other aircraft get too close. Therefore, each aircraft will wait on the ground for instruction from the ATC to take off or to land when aircraft is approaching the airport at destination. More importantly, the military controls most of the aerospace in Mainland China and leaves limited routes for civil aviation to use. Due to more and more flights flying from and to big cities in Mainland China, each aircraft need to wait longer for taking off or for landing because of the lack of qualified air traffic controllers and due to the limited aerospace for air traffic controllers to guide aircraft. Thus, the flight delay caused by air traffic control is one of factors beyond air carriers' control.

According to "Flight States", the rate of on-time was less than 30% in both Beijing International Airport and Shanghai Airport. See Economic Daily News, News Release, "Beijing Airport, the Global Champion of Flight Delay" (15 July 2013) online:
＜http://udn.com/NEWS/MAINLAND/MAI1/8028536.shtml＞.

[447] Caronc.com, "2014 On-time Rate Report", Caronc online:
＜http://cdn.feeyo.com/vedio/2015/CADA_2014veryzhun.pdf＞ (in Chinese).

[448] Chinanews Release, "Civil Aviation Administration of China Investigated Two Passengers Walking into Flight Control Zone", (15 April 2012) online:
＜http://www.chinanews.com/gn/2012/04-15/3820439.shtml＞(in Chinese).

efficient means to implement their consumer rights *en masse*.

4.1.2.2 Cultural Influence

Fundamentally, both Taiwanese and Mainland Chinese have at their root a proud five thousand years culture that is deeply influenced by Confucian philosophy and moral values. Confucianism viewed merchants as holding the lowest status in Chinese society because merchants do not create real value but act as middlemen to transfer goods, and merchants only focus on profits without morals. Confucianism had led the Chinese to have a low respect for and less trust in merchants, and to restrain from commercial activities.[449]

Nevertheless, Taiwan adopted the system of Western modernization and governance during the Japanese colonial period[450]. As a result, Taiwanese are more aware of the rule of law but strongly believe that what is known as ”reasonable ground” (Chinese: 正當理由) should prevail over the law under the traditional mentality of Confucianism. What is the “reasonable ground”? The notion of reasonable ground can be referred to Article 148, paragraph 2 of the *Civil Code*, which provides: “a right shall be exercised and a duty shall be performed in accordance with the means of good faith.” In other words, the meaning of “reasonable ground” is conceptualized by evaluating whether exercising the rights or performing duties meet with the principle of “good faith” (Chinese: 誠實及信用). Good faith, a general principle of law in many civil law traditions, is an abstract and uncertain concept that is usually interpreted by cultural values, such as in the Confucian

[449] By referring to Chapter 12 of the Confucian Analects, the Master (Confucian) said: “He who acts with a constant view to his own advantage will be much murmured against.” Such view has been interpreted that Confucius did not respect merchants. Therefore, the social position of merchants has been considered less respected for a long period of time.

[450] Under the Treaty of Shimonoseki of 1895, Japan occupied Taiwan and applied the system of law of the European continent. This legal system continued to apply even after Japan surrendered Taiwan to the Nationalist Government in 1945. See Jessika Li-Juan Ko, *supra* note 106, at 1&17.

tradition. Moreover, Articles 149 and 150 of the *Civil Code* provide "self-help" clauses to support the application for good faith in legal practice.[451] Thus, after the *Consumer Protection Act* came into force, the *Consumer Protection Act* as well as the traditional Confucian culture jointly played a significant role in the way that Taiwanese passengers make their claims against air carriers in flight delay. When the Taiwanese realized that air carriers did not pay attention to satisfy their expectations, the quick solution was to exercise "self-help" by accusing the air carriers of not respecting their dignity. The Taiwanese, therefore, also apply the concept of "self-help" provided by the *Civil Code* and the *Consumer Protection Act* to strengthen their bargaining power to claim compensation from the air carriers in case of delays.

In Mainland China, even though Mao Zedong substantially destroyed the traditional Confucian values during the Cultural Revolution from 1966 to 1976, Mainland Chinese are reviving the cultural values that were constructed by Confucianism to fix her moral deficiencies while developing the market economy.[452] Thus, the essence of consumer protection or passenger protection is reflected in the rebuilding of "dignity" of a passenger based on cultural values. Meanwhile, Articles 128 and 129 of the *General Principles of the Civil Law of the People's Republic of*

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[451] Article 149 of the Civil Code provides:

> A person acting in defense of his own rights or the rights of another against immediate unlawful infringement thereof is not liable to compensate for any injury arising from his action. But if anything is done in excess of what is required for necessary defense, he is still liable to make a reasonable compensation.

Article 150 of the Civil Code provides:

> A person acting to avoid an imminent danger menacing the life, body, liberty or property of himself or of another is not liable to compensate for any injury arising from his action, provided the action is necessary for avoiding the danger and does not exceed the limit of the injury which would have been caused by the said danger.
>
> Under the circumstances specified in the preceding paragraph, if the person so acting is responsible for the occurrence of the danger, he is liable to compensate for any injury arising from his act.

[452] See Chang Chin, "Enlightenment of Constructing Morality based on the Confucian Moral Thought under the Socialist Market Economy" (26 September 2014) International Confucian Association, online: < http://www.ica.org.cn/nlb/content.aspx?nodeid=367&page=ContentPage&contentid=5812 > (in Chinese).

China (hereinafter referred to as the "GPCL") also provide the "self-help" clauses.[453] The Chinese, therefore, exercise "self-help" means to satisfy their expectations and claim for remedies in delays.

For example, in 2012, after three hours of waiting in the plane cabin, a few Mainland Chinese defiantly opened the cabin door to disembark from Dragon Airlines' airplane at Haneda Airport in Tokyo to draw the attention of the Japanese aviation police.[454] In the same year, twenty-eight Mainland Chinese passengers did not accept Shenzhen Airlines' arrangements for accommodation and stomped onto the runway to stop an Emirates airline's aircraft from taking off at Shanghai Pudong Airport due to a delay in their flight that was caused by a thunderstorm.[455]

As air transportation has grown in Mainland China, the flight delay issue has become a major problem, and the delay time documented at the Beijing Capital International Airport is listed as the number one problem among global international airports in 2013.[456] Surprisingly, in 2014, the accumulated flight delay time among all airports in Mainland China was up to 183 years, and 232 years if the waiting time of passengers and flight attendants were to be totaled.[457] The figures show serious delays in Mainland China, and these delays no longer satisfy passengers' expectations of enjoying speedy international air transportation. Thus, conflicts between air carriers

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[453] The self-help clauses include: (1) Article 128 of the GPCL provides the "self-refuge" (正當防衛), which means that a person acting in defense of his own rights or the rights of another against immediate unlawful infringement thereof is not liable to compensate for any injury arising from his action; and (2) Article 129 of the GPCL provides "self-refuge" (緊急避難), which means that a person acting to avoid an imminent danger menacing the life, body, liberty or property of himself or of another is not liable to compensate for any injury arising from his action, provided the action is necessary for avoiding the danger and does not exceed the limit of the injury which would have been caused by the said danger.

[454] See China.com.cn website news on 6 December 2010, online: ＜http://travel.fznews.com.cn＞(in Chinese).

[455] See China News online: ＜ http://www.chinanews.com/gn/2012/04-15/3820439.shtml ＞ (in Chinese).

[456] See online: ＜http://finance.people.com.cn/n/2013/0822/c1004-22659646.html＞(in Chinese).

[457] See Caronc.com, "2014 On-time Rate Report", *supra* note 447.
In short, the total accumulated flight delay time for delayed passengers was about 1,603,080 hours (183x365x24) in 2014.

and passengers are increasing with no solution in sight.

Given these particular political, socio-economic and cultural factors, passenger protection in Taiwan and Mainland China should be approached without exclusively relying on statutes or other formal legal procedures.

4.2 Remedy for *Force Majeure* Delays in Taiwan and Mainland China

Given the influence of politics, the socio-economy and culture on passenger protection as a background understanding, this section compares legislation and practice to illustrate the distinctions and differences in passenger claims for flight delay remedies in Taiwan and Mainland China.

4.2.1 Legislation in Taiwan and Mainland China

Rooted in the civil law system, legislation in Taiwan and Mainland China provides legal grounds for passengers to claim monetary compensation and complimentary services in flight delays, including delays caused by *force majeure*.

4.2.1.1 Monetary Compensation

A. Taiwan

Article 654 of the Taiwan *Civil Code* and Article 91(2) of the Taiwan *Civil Aviation Act* govern air carriers' civil liability, indicating that an air carrier shall be liable for causing damage to passengers as a result of flight delay.[458] If the delay of the transportation is due to *force majeure*, unless otherwise provided by a trade usage, the liability of the carrier of passengers shall be limited to the "increased necessary

[458] Both paragraph 2 of Article 91 of the Taiwan Civil Aviation Act and paragraph 2 of Article 654 of the Taiwan Civil Code provide that:

"If the delay of the transportation is due to *force majeure*, unless otherwise provided by the trade custom, the liability of the carrier of passengers shall be limited to the increased necessary expenses paid by the passenger due to the delay of the transportation."

expenses" paid by the passenger as a result of the transportation delay. The main reason for air carriers to compensate passengers for their "increased necessary expenses" was to quell passengers' protestation of unsatisfactory services in *force majeure* delays.[459] Neither the *Civil Code* nor the *Civil Aviation Act* provides the definition of *force majeure*. By referring to Article 18 of the "Standard Contract for Domestic Air Passenger Transport", the illustrated *force majeure* events include weather changes, mechanical failure (emphasized)[460], demands of competent authority or any other necessary factors. Accordingly, by referring to the terms under the standard contract, the pecuniary remedy under the *Civil Code* and the *Civil Aviation Act* govern passengers' claims regardless of whether it is international or domestic air transportation.[461] That is to say, passengers are entitled to claim monetary compensation from air carriers in case of delays, but the monetary compensation is specifically limited to the "increased necessary expenses" paid by the passenger as a result of *force majeure* delay.

B. Mainland China

After Mainland China took its seat at the United Nations in 1971,[462] the country participated in international activities and has ratified the Montreal Convention of

[459] The author on behalf of air carriers involved in negotiations with lawmakers to amend the proposed Article 91(2) of the Civil Aviation Act in 1997. Air carriers suggested to adopt the liability regime of the 1929 Warsaw Convention to govern air carriers' liability for delay. However, the voices of consumer protection highly caught people's attention and lawmakers hesitated to adopt the rules of the Warsaw Convention.

[460] The CJEU's decisions in *Sturgeon* and *Nelson* confirmed that the technical problems did not constitute a defense of "extraordinary circumstances" under the EU Regulation 261/2004. However, in Taiwan, the technical defects are considered as "*force majeure*".

[461] The "Standard Contract for Domestic Air Passenger Transport" was approved by the Consumer Protection Committee to provide passenger protection by referring to Article11-1 of the Taiwan Consumer Protection Act.

[462] On 25 October, 1971, the United Nations General Assembly voted to admit the People's Republic of China (Mainland China) and to expel the Republic of China (Taiwan). This result came after the United States dropped its support for the Nationalist party claim of the Republic of China to represent China, which happened 22 years later since the P.R.C. was founded in 1949. See The United Nations General Assembly Resolution 2758. The content could be found online at:
＜http://www.taiwandocuments.org/un2758-XXVI.htm＞.

1999.[463] Article 184 of the *Civil Aviation Act* therefore provides that:

> Where the provisions of an international treaty concluded or acceded to by the People's Republic of China are different from those of this Act, the provisions of that international treaty shall apply, except the provisions for which reservation has been declared by the People's Republic of China. In respect of cases, which are not provided by the law of the People's Republic of China or by the international treaties concluded or acceded to by the People's Republic of China, international practice may apply.

As a result, international treaties and practice governing air carriers' limited liability should prevail over domestic statutes if the international elements are taken into account. Under Article 19 of the Montreal Convention, the air carrier is able to raise the defense of non-liability vis-à-vis passengers in delays 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 – in other words, *force majeure*. The same defense also is given by Article 107 of the *General Principles of Civil Code*[464] and Article 126 of the Civil Aviation Act.[465] No specific definition for *force majeure* is found under the *Civil Aviation Act*, but Article 153 of the *General Principles of Civil Code* indicates that "*force majeure*" means any objective conditions, which are unforeseeable, unavoidable and insurmountable.

For domestic air transportation, Article 128 of the *Civil Aviation Act* provides that air carriers' "limited liability" for domestic air transport is subject to the statute issued by the CAAC with authorization from the State Council.[466] Accordingly, the

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[463] The Montreal Convention of 1999 came into force in Mainland China on 31 July 2005.

[464] Article 107 of the General Principles of Civil Code provides:
> There is no civil liability for not performing contract due to *force majeure* or for causing damage to others, unless otherwise provided by law.

[465] Article 126 of the Civil Aviation Act provides:
> Air 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.

[466] Paragraph 1, Article 128 of the Civil Aviation Act provides that:
> The limits of carrier's liability in domestic air transport shall be formulated by the competent civil

Regulations for Domestic Air Carriers' Limited Liability was issued in 2006, and provide that maximum compensation for each passenger is RMB400,000 (about US$64,450), which is applicable for flight delays.[467] However, Article 107 of the *General Principles of Civil Code* and Article 126 of the *Civil Aviation Act* are applicable for air carriers to defend for no liability to compensate passengers in *force majeure* delays.

4.2.1.2 Complimentary Services

A. Taiwan

As mentioned in Section 1.1 of this dissertation, international air carriers agreed to offer complimentary services to passengers in exchange for the "Anti-Disembarking Clause" because it was necessary to establish a legal ground to stop unruly passengers in order to save on operation costs. In consequence, the *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers* (the "*Regulations Governing the Mediation of Disputes*"), promulgated by the Taiwan CAA on 4 April 2002, assumes that air carriers do carry an obligation to provide complimentary services to passengers if any aircraft will not be able to depart according to scheduled time when: (1) a flight is expected to be delayed for more than fifteen minutes in cases of domestic routes, or for more than thirty minutes in cases of international routes; or, (2) when air route or place of takeoff and/or landing will be changed.

Under Article 4 of the *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers*, the

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aviation authority under the State Council and put in force after being approved by the State Council.

[467] See Article 3 of the "Regulations for Domestic Air Carriers' Limited Liability" (Chinese: 國內航空運輸承運人賠償責任限額規定).

air carrier shall in a timely manner provide free of charge the following services as dictated by actual situations and the needs of passengers:

(1) Necessary communications;
(2) Necessary meals or accommodations;
(3) Necessary articles to keep out the cold or first-aid articles; or
(4) Necessary connecting flights or other vehicles.[468]

Most importantly, paragraph 2 of this Article 4 clearly indicates:

> A carrier shall attend to the rights and interests of passengers in a reasonable manner; and if the provision of any of the foregoing services is not possible owing to local conditions, the carrier shall forthwith explain to passengers in detail the reasons therefor, and properly handle the situation.

Under this regime, air carriers interpret complimentary services to be "amenities" rather than "obligations" in cases of flight irregularities. If the air carrier cannot offer the aforementioned services due to "local conditions", the carrier must explain to the passengers in detail the reasons and properly manage the situation. In case of any violation of the offering of services as specified in this Article 4, the Taiwan CAA may, with the Ministry of Transportation and Communications' approval, take action necessary to restrict or suspend all or part of the air routes served by the air carrier.[469] That is to say, air carriers provide complimentary services to delayed passengers for

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[468] See also *supra* note 11.

[469] See Article 5 of the "Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers", which indicates:

> If a carrier fails to properly handle any dispute arising between passengers and such carrier in the course of transportation or after the completion thereof or if Article 3 or Article 4 hereof is violated, the CAA may act in accordance with Article 57 of the Civil Aviation Act.

Article 57 of the Civil Aviation Act provides:

> CAA may provide personnel to inspect a civil air transport enterprise and monitor its operations including employees and equipment. The civil air transport enterprise shall not refuse, avoid or impede such inspections, and will be notified of deficiencies if any; and shall improve within a certain period of time when so advised by the CAA.
>
> If no improvement has been made within the specified period, or the civil air transport enterprise refuses, avoids or impedes inspections, the CAA may, with Ministry of Transportation and Communications approval, take action necessary to restrict or suspend all or part of the air routes served by the civil air transport enterprise.

the most part to achieve the administrative purpose of avoiding disputes between air carriers and passengers at airports; the CAA clearly indicates that the Regulation is "for the purposes of maintaining the operation of airports and preserving the nation's image."[470]

B. Mainland China

The *Civil Aviation Act* of China provides no provision on air carriers being required to shoulder obligations of providing complimentary assistance or services for delays in international flights. However, air carriers are entitled to cancel, interrupt, change, postpone and delay flights without advanced notice to passengers if the causes are unforeseeable or beyond air carriers' control under Article 57(3) of the *Regulations for International Air Transportation of Passengers and Baggage*, which was issued by the CAAC on 8 December 1997 and went into effect on 1 April 1998.[471] Accordingly, air carriers should "assist" passengers for their meals and accommodations while air carriers reroute or refund passengers.[472] More importantly,

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[470] See Article 2 of the "Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers", which indicates:
For the purposes of maintaining the operation of airports and preserving the nation's image, the Civil Aeronautics Administration of the Ministry of Transportation and Communications (hereinafter referred to as the "CAA") shall render assistance in mediating any and all disputes arising out of the transportation between civil aviation passengers (hereinafter referred to as "passenger" or "passengers") and an aircraft carrier (hereinafter referred to as "carrier" or "carriers").
CAA may commission the airport operator to mediate any and all disputes arising out of the passenger and carrier in the preceding paragraph.
The commissioned airport operator and matters, and the legal basis for such commission in the preceding paragraph shall be publicly announced and published in a government gazette.

[471] See Article 57 of the Regulations for International Air Transportation of Passengers and Baggage The content could be found at:＜ http://www.caac.gov.cn/B1/B6/200612/t20061220_888.html＞ (in Chinese).

[472] See Articles 60 and 68 of the Regulations for International Air Transportation of Passengers and Baggage
In addition, according to Article 61 of the said Regulations, air carriers are liable for offering passengers free meals, beverage, accommodations and any other necessary services if:
(1) air carriers cancelled the confirmed reservations;
(2) air carriers did not make the flights stop at agreed connected points or destinations;
(3) air carriers did not reasonably perform the flights based on the released schedules;
(4) air carriers failed to provide passengers the reserved seats; and
(5) air carriers made passengers miss their connected flights.

passengers have to bear their own costs for meals and accommodations arranged by air carriers if such delays happened at departure.[473] That is to say, air carriers are not liable for rendering free services to passengers in *force majeure* delays that happened to international flights with departures originating from Mainland China.

Under Articles 57 and 58 of the *Regulation Governing Domestic Air Transport of Passenger and Baggage*, the air carriers' obligations to provide services, such as meals or accommodations, for domestic flights are distinguished according to the cause of delays:

(1) Complimentary services: delay or cancellation caused by maintenance, flight arrangements, operations and crew affairs before departure;[474] and, any delay or cancellation caused to transit passengers after their departure and before arrival at the destination;[475]

(2) Chargeable services (at passengers' cost): delay or cancellation caused by weather, accident, air navigation control, security, passengers' behavior or any other reasons which are not attributable to the air carrier.[476]

As given the above, any services will be charged to the passengers if the delay is caused by *force majeure*, such as weather. In reality, passengers do not expect to pay for meals or accommodation even though delays or cancellations caused by weather or any other reasons are beyond the air carriers' control. Yet, more and more delays seriously affect air transportation in Mainland China and create antagonistic relations between air carriers and passengers.

In later days, the "Compensatory Guide Advice of Flight Delay" was made effective on 1 July 2004 to settle serious complaints for flight delays and to avoid

[473] See Article 60(4) of the Regulations for International Air Transportation of Passengers and Baggage.
[474] See Article 57 of the *Regulation Governing Domestic Air Transport of Passenger and Baggage*.
[475] See Article 59 of the *Regulation Governing Domestic Air Transport of Passenger and Baggage*.
[476] See Article 58 of the *Regulation Governing Domestic Air Transport of Passenger and Baggage*.

passengers not disembarking from airplanes or staying over at the airport.[477] Particularly, this "Compensatory Guide" provides that air carriers are liable for paying passengers a fixed amount of monetary compensation for delays within four to eight hours and for delays lasting more than eight hours, whereas for *force majeure* it is excluded.[478] Furthermore, the "Compensatory Guide" aims to prevent passengers' refusal of disembarking, and is not legally binding on air carriers as air carriers are still allowed to set up their own remedy rules concerning monetary compensation.[479] That is to say, the compensation amount is subject to the air carriers' discretion with a likely amount of 100 to 500 Renminbi and with no relation to the length of delay.[480] Mainland China's scholars have however commented on this "Compensatory Guide" as: "he cries wine and sells vinegar".[481] The significant legal argument arising from this "Compensatory Guide" was that such a monetary compensation does not apply to *force majeure* delays, so there is a gap in the compensation of passengers.[482]

Pressured by legislation and due to serious flight delay complaints from passengers, eleven national air carriers concluded a "gentleman's agreement", the "Agreement for Contingency of Consumer Protection for Shanghai Air Passenger Transportation", to support the consumer protection policy made by the Shanghai City

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[477] The Chinese of the "Compensatory Guide Advice of Flight Delay" is called: "航班延誤經濟補償指導意見". See Compensatory Guide Advice of Flight Delays, online: Baidu ＜http://baike.baidu.com/view/4004389.htm＞ (in Chinese).

[478] See Zhu Ziquin and Chen Juan, "Analysis of China's Legislation for Flight Delay", (9 September 2008) Administration and Law Journal, at 86 (in Chinese).

[479] *Ibid*.

[480] In 2004, China Eastern compensated its passengers with 100 Renminbi for its MU2553 flight that was delayed for three hours and forty-five minutes. Shanghai Airlines compensated its passengers 300 Renminbi for its FM 380 flight that was delayed for one hour and thirty-five minutes. See online: ＜http://sh.eastday.com/eastday/shnews/fenleixinwen/xiaofei/userobject1ai353125.html＞.(in Chinese)

[481] The Chinese proverb is literally "displaying the head of a goat, yet selling dog meat" "掛羊頭賣狗肉". It is referred to the facts that surface seen is not necessarily true. In the other words, the Compensatory Guide is only for reference and not to be treated seriously. As a result, air carriers are free to make their own decision for compensation rules.

[482] Hsu Ling-Gi, Legal Analysis on Compensatory Guide Advice of Flight Delay, see: wiki.carnoc online: ＜http://wiki.carnoc.com/wiki/航班延誤經濟補償指導意見的法律分析/index.html＞(in Chinese).

Minhang Government in 2006.[483] In this gentleman's agreement, air carriers agree to advise passengers with flight information within twenty minutes after confirmation of flight cancellation, delay and rerouting.[484] If the rescheduling of flight, cancellation or delay is attributed to the air carrier's fault, the air carrier should offer pecuniary remedy at RMB100 (about US$16) or equivalent value services to passengers in case the delay is more than four hours, and offer RMB200 (about US$32) to passengers in case the departure is postponed to the next day under the condition that the delay is attributable to the air carriers' activities.[485] It is significant to emphasize that this gentleman's agreement should be interpreted from the "Confucian tradition" instead of a "legal perspective", and the key word here is "gentleman" not "agreement". In other words, on one hand, air carriers tried to support the government's consumer protection policy and on the other hand, to comfort passengers by offering "goodwill gesture" to passengers in delays caused by air carriers' handlings. Air carriers do not promise to offer services or monetary compensation for *force majeure* delays under such a "gentleman" agreement. As a result of this combination of sources, it can be said that in Mainland China, the failure to provide services should not be interpreted as an air carrier's breach of contractual obligation. Thus, passengers cannot sue air carriers to obtain compensation if air carriers fail to serve passengers under *force majeure* delays.

4.2.2 Practice in Taiwan and Mainland China

Bearing the legislation in mind, the following analysis of legal practices in

[483] The Agreement includes twelve articles to form guideline for air carriers to handle disputes arising from cancellation, delay, rerouting and overbooking related to the domestic air transportation. The details can be found at Shanghai City Minhang Government online:
＜http://www.mh315.org/News/NewsItem.aspx?id=40298＞ (in Chinese).

[484] See Article 5, paragraph 1 of the Agreement for Contingency of Consumer Protection for Shanghai Air Passenger Transportation.

[485] See Article 5, paragraph 2 of the Agreement for Contingency of Consumer Protection for Shanghai Air Passenger Transportation.

Taiwan and Mainland China will demonstrate contradictions between the rule of law and how courts have responded. This discrepancy between law and practice will further demonstrate the need for a novel approach to addressing the conflict between air carriers' risk control and passengers' expectations.

4.2.2.1 Taiwan: JAA EG - 209 Case

Based on the author's experiences, if the delays were caused by *force majeure*, air carriers generally object strongly to any claim of obligation for compensation, but accept to offer a "goodwill gesture", like a small amount of cash or transportation credit coupon, as a signal of respect to passengers. In so doing, many disputes have been settled before the court in Taiwan. However, up to now, there is only one judgment by a Taiwan court for passengers' claims resulting from *force majeure* delay, and this is the JAA EG-209 case. In that case, fifty-three Taiwanese passengers refused to accept JAA's explanations for not offering hotel accommodation during their overnight stay at the Narita Airport in Tokyo due to a snowstorm. These passengers decided to sue JAA for their mental anguish under infringement of dignity to express their anger at JAA's unsatisfactory services.[486]

The fifty-three Taiwanese passengers framed their request as compensation for the "mental anguish" they suffered during the delays, defining their claim as an infringement of their dignity under Article 227-1 of the Taiwan *Civil Code*. Additionally, the passengers sought monetary compensation equivalent to the services that JAA failed to provide to them, relying on Article 4 of the *Regulations Governing*

[486] In this case, the author represented JAA and argued that there was no liability to compensate passengers for unsatisfactory services because "local conditions" made it impossible to provide the services. Surprisingly, in this particular case, the judge concluded that JAA should compensate the fifty-three Taiwanese passengers with the equivalent value for the free meals and accommodation in which JAA failed to provide to the passengers during the 15 hours delay. That is to say, the judge held that air carriers' "amenities" (services) had turned into "obligations" and gave rise to a "remedy" in the event that air carriers failed to provide satisfactory services to passengers.

the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers discussed above. Accordingly, each passenger claimed a total of NT$25,358 (about US$818), including NT$20,000 (aboutUS$645) for mental anguish and NT$5,358 (about US$173) for meals, telephone calls, transportation and hotel fees.

JAA raised the defence that there was no infringement of passengers' dignity and that there was no obligation for compensating passengers for inadequate services. Regarding services, JAA argued that it did provide passengers with meals, beverage, pillows, and blankets, but that it could not find enough hotel rooms for 205 delayed passengers flying the EG-209 flight due to the snowstorm which was considered the heaviest snow fall in the past twenty years in the Tokyo area. JAA provided evidence to prove the difficulty of finding available hotel rooms: according to local news releases, there were more than 10,000 passengers staying in the airport terminals because of the snowstorm. More importantly, JAA emphasized that air carriers are not liable for services that are not available because of "local conditions" by referring to the exception provided by Article 4, paragraph 2 of the Taiwan *Regulations Governing the Mediation of Disputes Arising from the Transportation between Civil Aviation Passengers and Aircraft Carriers*.

In the judgment, the judge adopted a creative interpretation of what was called the air carriers' "subordinated obligation" (Chinese:附隨義務) to provide services to passengers under "contract law", which is a borrowed concept from "*Schutzpflicht*" (the State's duty of protection) under the German civil law.[487] Following the doctrine of subordinated liability, the judge held that passengers are entitled to be compensated an "equivalent amount" of the economic value of particular services which the air

[487] "Schutzpflicht" means the contractor's obligation for offering protection to the other party during the performance of main contractual obligation. See Tseng Shin-long, Analysis of Compensation Law, (Taipei: San Min Book Co. Ltd., 2003) at 775.

carrier failed to deliver to the passengers in case of a flight delay caused by *force majeure*. In other words, such compensation is considered as "a loss" resulting from the air carriers' breach of contractual obligations to protect passengers, and that involves infringement of passengers' dignity. The dignity referred to is the subjective feeling of the passengers; in the JAA EG-209 case, passengers claimed that they felt embarrassed to sleep at the airport terminal surrounded by other passengers. In sum, the Taiwan judge justified her rationale to support the protection of passenger dignity mainly because:

(1) Providing passengers with necessary meals, drinks, accommodation, communications, cold weather outfit, medication, and so on, is part of JAA's "subordinated obligation" to take care of passengers during the delay period; and, it is because compared to passengers who are not residents in a foreign country, the air carrier has the manpower and resources at airports to find and provide such necessities;

(2) Even though JAA provided meals, drinks, and cold weather outfits, there were passengers who indeed had suffered from hunger, thirst, cold and mental embarrassment when they had to sleep on the terminal floor of the airport during flight delay caused by bad weather. These passengers, therefore, suffered infringements of their "human rights" as a result of bodily and mental anguish and the embarrassment of being looked at by curious onlookers with raised eyebrows at the airport terminal;

(3) JAA could not provide sufficient evidence to prove that they had tried its best to find hotel accommodation for the Taiwanese passengers during the long wait, especially after JAA had arranged transportation for its own Japanese citizens to go home when the snow stopped. JAA had failed to perform its "subordinated obligation" to take care of the Taiwanese passengers; therefore, JAA committed a

breach of contract and even infringed on the dignity of the Taiwanese passengers, which is considered an infringement of "rights" under Article 227-1 of the *Civil Code*.[488]

(4) The loss of comfort to rest at a hotel, which is the absolute damage of infringed dignity, should be assessed by commercial exchange value; hence, by referring to the "equivalent monetary saving made by JAA's inability of offering services" proposed by passengers, and then rendered every passenger NT$7,000 (about US$233) as the pecuniary remedy for mental anguish.[489]

It is interesting to note that passengers still filed the appeal against JAA after having the verdict partially made in their favour. Nevertheless, during the appeal, passengers decided to withdraw the appeal and settled with JAA mainly because passengers finally appreciated JAA's "respect" for the passengers.[490] However, although this case is insufficient to form a "precedent" in Taiwan, it has deeply affected air carriers' handlings of passengers' claims in *force majeure* delays. This JAA EG-209 case provides an example to show how the judge granted what she considered as a "fair remedy" to Taiwanese passengers in *force majeure* delay by

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[488] Article 227-1 of Taiwan *Civil Code* provides that:

> If the creditor's personality has been injured by reason of the debtor's non-performance, the debtor shall be bound to compensate for the injury in compliance *mutatis mutandis* with the provisions of Article 192 to Article 195 and Article 197.

Article 195 of the Taiwan *Civil Code* provides that:

> If a person has wrongfully damaged to the body, health, reputation, liberty, credit, privacy or chastity of another, or to another's personality in a severe way, the injured person may claim a reasonable compensation in money even if such injury is not a purely pecuniary loss. If it was reputation that has been damaged, the injured person may also claim the taking of proper measures for the rehabilitation of his reputation.
>
> The claim of the preceding paragraph shall not be transferred or inherited, except a claim for compensation in money has been promised by contract or has been commenced.
>
> The provisions of the preceding two paragraphs shall be mutatis mutandis applied when a person has wrongfully damaged to another's status based on the relationship to their father, mother, sons, daughters, or spouse in a severe way.

[489] Passengers assessed NT$3,372 for one night hotel fee, NT$843 for communication fee, NT$843 for breakfast cost, and NT$300 inter-city transportation fee. The total amount is NT$5,358.

[490] Based on the ethic rules, the author is not allowed to release detailed information in this regard.

ignoring the "local conditions" specified in the CAA Regulation to balance passengers' protection and air carriers' risks. As a result, in case of delays caused by *force majeure*, air carriers operating in Taiwan are willing to settle disputes with passengers by offering passengers the "goodwill gesture", which could be a small amount of cash or transportation credit coupons. After offering the "goodwill gesture" to passengers without arguing "right vs. liability", the author has settled flight delay claims with more than one hundred Taiwanese passengers redress against international air carriers. Such successful experience inspires the author to initiate a novel approach of resolving passengers' claims resulting from *force majeure* delays.

4.2.2.2 Mainland China: Cases in Taiyuan and Hefei

In terms of passenger protection under domestic air transportation in Mainland China, two remarkable cases for *force majeure* delays claims, which were made by the Taiyuan Intermediate Court and by the People's Court of Hefei Suburb, will illustrate the contradictions between the law and judicial views of satisfying passengers' expectations of fairness.

The case before the Taiyuan Intermediate Court involved a domestic flight from Tianjin to Taiyaun. The flight was delayed a total of 34 hours, first because the plane was hampered by bad weather at Dalian on 12 June thus preventing the plane from its on time departure at Taiyaun, and second by mechanical failure at Tianjin itself between 12 and 13 June 1998. When the plane was finally ready to receive passengers at Tianjin to depart for Taiyaun, sixteen passengers refused to embark and filed a claim against China Eastern Airlines.[491] These passengers claimed RMB400 (about

[491] Shanchin City Press Release, " First Collective Civil Lawsuits against Air Carriers for Unsatisfactory Services" (7 January 2013) online: ＜ http://ctc.2windao.com:8888/sysfiles/345/367/20130107102753/e345_367_20130107102753_0901.html＞ (in Chinese).

US$65) in damage for not receiving communication, transportation, meals, medication, carrying of baggage and for lost work pay as well as mental anguish under the Chinese *Consumer Protection Act*.[492] The air carrier argued there is no liability for *force majeure* delays under Article 126 of the *Civil Aviation Act*, which should be the governing law and not the *Consumer Protection Act*.[493] Also, the air carrier defended its no liability position under Articles 57 and 58 of the *Regulation Governing Domestic Air Transport of Passenger and Baggage* since the air carrier offered complimentary meals and hotel accommodation to passengers during their long waiting period.

The Taiyuan Intermediate Court accepted the air carrier's argument and held that passengers should have invoked the *Civil Aviation Act* instead of applying the *Consumer Protection Act* to claim for their damages. Furthermore, the Taiyuan Intermediate Court concluded that if passengers claim damages from an air carrier through a lawsuit, the air carrier is able to benefit from the lack of liability defense under Article 126 of the *Civil Aviation Act*, which provides that "the carrier is not liable if it proved that it and its servants or agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures." As a result, passengers are not able to claim consequential damages or punitive damages under the *Consumer Protection Act* if the delay resulted from *force majeure*

[492] See Tun Lan-Chin "Comments on Verdict Made by Taiyuan Intermediate Court", online: ＜http://news.carnoc.com//list/113/113697.html＞. (in Chinese) The Civil Aviation Administration of China had demanded the air carrier submit a detailed report, and to apologize to the concerned passengers. The passengers refused to accept the air carrier's explanation and apology, and went on to file a lawsuit against the air carrier.

[493] Articles 41 to 45 of Mainland China's Consumer Protection Act provide very detailed compensation for consumers, such as medication fee, nursing fee, salary reduction caused by absence from work, living equipment fee, living supplements, disability supplements, living expenses for dependents, funeral expenses, and compensation for death. Consumer's dignity is also clearly protected. In addition to compensation, consumers are able to claim for recovering their reputation, removing negative impact and calling for an apology. Personal dignity has become an important issue in handling air passengers' protection, but only Mainland China's Consumer Protection Act clearly indicates it as one of the consumers' rights to claim.

or any factor beyond human control.

Interestingly, the Taiyuan Intermediate Court still granted each passenger RMB200 to comfort the passengers' mental anguish because passengers were not satisfied by the air carrier's services and chose not to continue their flight from Tianjin to Taiyaun.[494] In other words, the RMB200 is the judge's compassion to the passengers despite what is clearly stated in the law; the judge did not provide any further reasoning for granting the amount to passengers.

A similar approach was adopted by the People's Court of Hefei Suburb in a lawsuit brought on by eleven passengers against China Southern Airlines and Anhui Civil Aviation Authority in 2002.[495] In this particular case, eleven passengers bought air tickets to take China Southern Airlines' flight (CZ3800) to fly from Hefei to Guangzhou through Mount Huangshan on 9 May 2001. The departure time was scheduled for 18:40, but passengers were advised of flight delay after being checked-in and waiting at the boarding gate. Around 21:00, passengers were advised by the airport broadcasting that the flight would only departure at 21:55, but finally advised the passengers to board at around 23:30. Passengers refused to fly at midnight and requested the air carrier to reschedule their flight to the next morning and then to offer free meals and accommodation for the night. China Southern Airlines satisfied passengers' requests to provide complimentary meals and accommodation, and to arrange a flight for next morning. However, the next morning, sixteen passengers refused to take the flight and claimed a refund of their ticket fares. Later, passengers filed the lawsuit against China Southern Airlines to claim for ticket fare at RBM6,730 (about US$1,085), and against Anhui Civil Aviation Authority to claim for recovering mental anguish at RBM11,000 and demanding a public apology for restraining

[494] *Ibid.*
[495] See Tun Lan-Chin, China Air Law: cases and issues studies (Beijing: Legal Publisher, 2007) at 108-119 (in Chinese).

passengers' activities at the airport. During the litigation, China Southern Airlines proved that the delay was caused by a thunderstorm at Guangzhou. China Southern Airlines also proved that they spent RMB70,000 to call up another airplane to replace the late arrival airplane which was stuck in bad weather, and had offered meals and accommodation to passengers. The Court of Hefei Suburb also accepted that China Southern Airlines had taken all the necessary measures to avoid passengers' damages. However, the Court still held that the air carrier should refund the ticket fare at RBM6,730 (about US$1,085) to each plaintiff because they terminated the contract due to late delivery by expressing their refusal to take the replacement plane. The court also held that the passengers had no grounds to claim mental anguish or a public apology from the air carrier and the Anhui Civil Aviation Authority. The rationale was made because the long delay was caused by severe weather at the destination airport and by navigation control, which were beyond human control. As a result, despite finding that the delay was beyond the air carrier's control, the Court of Hefei Suburb tried to partially satisfy passengers' expectations.

These two judgments indicate that unsatisfactory services can be the basis for a remedy for delays caused by *force majeure* in Mainland China even if the air carrier has a valid legal defense. As such, the two judgments show that what air carriers can expect in practice may be in contradiction with the legislation. As a result, air carriers can be exposed to liability for *force majeure* delays even though Article 126 of *Civil Aviation Act* provides that "the carrier is not liable if it proved that it and its servants or agents have taken all necessary measures to avoid the damage or that is was impossible for it or them to take such measures."

4.2.2.3 Dignity as a Source for Remedies

As examined above, the referred two verdicts made by the Taiyuan Intermediate

Court and the People's Court of Hefei Suburb demonstrated the Mainland Chinese judges' openness to satisfy passengers' expectations in *force majeure* delays. Comparing with the CJEU decisions in *Sturgeon* and *Nelson*, the Court provided detailed reasoning to justify the remedies for time loss or inconvenience resulting from flight delays caused by technical defects, which is not extraordinary circumstances in the EU but is *force majeure* in Mainland China. Neither Mainland China nor the CJEU expressed dignity as a cause of action in judgments. However, in the JAA EG-209 case, the Taiwan judge applied Article 227-1 of the Taiwan *Civil Code* (delict) to order JAA to compensate fifty-three Taiwanese passengers by holding that: (1) JAA infringed Taiwanese dignity by making them sleep at the Narita Airport where JAA was capable of looking after the passengers; and (2) JAA broke its duty of protection to offer hotel accommodation to passengers in delays caused by *force majeure*, which is required by the Taiwan CAA regulation. That is to say, dignity becomes a legal ground for claiming remedy in flight delays. Meanwhile, it begs the questions: What is "dignity"? And, how does dignity become a legal ground for remedy in *force majeure* delays? Undoubtedly, the notion of dignity is extremely difficult to conceptualize, and the causality between unsatisfactory services and the infringement of dignity is even harder to conceptualize. A brief analysis demonstrates dignity as the source of passenger protection, but also highlights the difficulty to validate dignity as a source in unified legal framework.

A. What is "Dignity"?

There is no doubt that delays inconvenience all passengers; yet, not all of the affected passengers will suffer mental anguish or feel that they have endured an infringement of their dignity. What, then, is passenger "dignity"? Taking the JAA EG-209 case as an example, the judge kept silent in response to JAA's arguments on

clarifying the notion of dignity, for instance: Why would more than 7,000 passengers of different nationalities sleeping on the floor and laughing at the fifty-three Taiwanese passengers who were also sleeping on the same floor at the same airport? Should the dignity of certain passengers be infringed by other passengers who were laughing at them while they slept on the same floor?

It is obvious that dignity cannot be explained in a few lines. In Chinese society, the notion of dignity could involve interaction between socio-economic and cultural values. In cultural values of Chinese society, the principle of "helping the weak and aiding the needy" (Chinese:濟弱扶傾；南朝·梁·周興嗣《千字文》:"桓公匡合，濟弱扶傾。") is an ancient ethical principle under Confucianism that has been practiced since 502 AD. In reference to the verdict granted in favor of Taiwanese passengers in the JAA EG 209 case, it would appear that the judge simply assumed that JAA, like any other air carriers, held superior economic power and therefore they (air carriers) were in a better position than an individual passenger to find food and hotel accommodation. In other words, the judge held that JAA was the enterprise with strong economic power and should be responsible for undertaking the conscientious duty of "helping the weak and aiding the needy". Accordingly, JAA's failure in offering passengers satisfactory services was equivalent to a breach of the ancient ethical principle of "helping the weak and aiding the needy" that underlie Chinese society and culture.[496] As a result, JAA should be liable for breaking this ethical principle, which has been embodied as a "good faith" to perform a duty (i.e.: subordinated obligation). JAA's failure of implementing the duty to care was viewed as an "infringement of dignity" under the concept of "delict", which is also recognized by the Taiwan *Civil Code*.

[496] See Taiwan Confucian Association, online: ＜http://taiwankongzi.org/Association_Idea＞(in Chinese).

As observed by Prof. Patrick Glenn in his "Legal Traditions of the World", the Confucian legal tradition is different from the West, which is religion inspired and is contributed by secular law-makers.[497] In East Asia, "it is a secular, largely informal, legal tradition, through informed by great learning".[498] Under Confucianism, the "Li" (禮) and "Fa" (法) are the internal and external domains of "law" to rule the society. Yet dignity is recognized by deep-rooted beliefs and traditional culture to achieve an individual's social duties as well as public services.[499] To be more specific, dignity in Confucianism is there to motivate a balanced relationship between the public and the individual.[500] The significant reference is Confucian's motto: "Never impose on others what you would not choose for yourself."[501] In other words, dignity cannot be evaluated by "price", and the accepted practice of dignity is to offer "mutual respect" between and among human beings. Such "mutual respect" should be the philosophy for human beings to deal with conflict of interest, especially in cases where no one can be blamed, such as for example in flight delays caused by *force majeure*. Meanwhile, there is a strong belief that "justice (or "law") should be the last defense against moral responsibility" (Chinese: 司法是道德最後一道防線). That is to say: Under the Chinese traditions or cultural values, the judge is expected to render "moral fairness" to the weak in order to retrieve "mutual respect" between the strong and the weak. Such cultural values explain why the Taiwan judge invoked the infringement of dignity, as a cause of action under Article 227-1 of the *Civil Code*, to justify passengers' claims in the face of inadequate or unsatisfactory services. The judge's

[497] See H. Patrick Glenn, *Legal Traditions of the World* 5th Ed. (Oxford: Oxford University Press 2014) at 326.
[498] *Ibid.*
[499] See Lee Ming-Huei, *Confucianism Tradition and Human Rights* (Guiyang: Guizhou People's Publisher 2000) online: ＜http://www.confucius2000.com/admin/list.asp?id=3330＞ (in Chinese).
[500] This is a conclusion made by the author referring to the article made by Lee Ming-Huei. *Ibid.*
[501] The Chinese is said: "已所不欲，勿施於人". Frankly speaking, it is the essence of "mutual respect" because what you treat people, people will reflect the same. If you intend the other's respect, you must offer your respect to the other in exchange.

justification is to transform "dignity" into a "legal claim", which can then be evaluated and litigated before a court of law. It seems dignity is losing its foundations in human ethics and has become infused with economic values and can be traded as a "good", such as a complimentary service, in legal practice.

On the contrary, in the West, dignity and human rights are related but distinct concepts, and deeply influenced by Kant's political theory. To be more specific, American professor Jack Donnelly distinguishes human dignity and human rights as:

> Human dignity, for Kant, is universal; possessed by every human being. It is inherent. (Man's moral and immoral actions also give him another sort of moral worth, but this achieved moral state is independent of his inherent worth. Dignity identifies man's special moral status. And the inherent dignity of humanity within each person lies at the foundation of both personal morality and political right, where it is expressed in the form of human rights. Other conceptions of human dignity are also compatible with the vision of human dignity expressed in the Universal Declaration, as we will see below. The Kantian conception, however, is a historically important source of the idea that human rights rest on the inherent dignity of the human person, and it was clearly one of the inspirations for the Universal Declaration.[502]

Furthermore, in most of (the languages) of Europe, the same word is used to express "a right" and also "law", whereas "right" is formed as a correlation to "duty".[503] The infringement of a right or breach of duty (through law) should be punished and/or remedied in order to achieve fairness. When injury happens, dignity, in its essence of "beyond all price" and with the basic concept of "mutual respect", is hardly recoverable from the perspective of legal intervention. However, human dignity seems to have a need to be recognized and safeguarded by statutory law.[504] In

[502] See Jack Donnelly, "Human Dignity and Human Rights" - Protection Dignity: An Agenda for Human Rights, Research Project on Human Dignity for Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (2009) at 22.
[503] See John Chip Gray, *The Nature and Sources of the Law* (New York: Columbia University Press 1909) 9. Online: ＜https://archive.org/stream/natureandsource00graygoog#page/n10/mode/2up＞.
[504] See Department of Justice Canada, *Human Dignity and Genetic Heritage-Protection of Life Series,*

most cases, a respect for dignity is seen as the source or an essence of all other fundamental human rights.

Apparently, "mutual respect" as the essence of dignity achieves the overlapping consensus in East Asia and the West. "Mutual respect" also makes sense to compare a cause of action involving the "infringement of dignity" in the JAA EG-209 case with the time lost or inconvenience suffered as interpreted by the CJEU for the *Sturgeon* and *Nelson* cases. Furthermore, "mutual respect" even provides a convincing rationale for the Taiyuan Intermediate Court and the People's Court of Hefei Suburb to grant a pecuniary remedy to comfort passengers' emotions for the long delays beyond air carriers' control.

B. Remedies for Unsatisfactory Services

In *Biscone,* the US Appeal Division dismissed passengers' claims against JetBlue based on their failure to provide food, water and facilities during a tarmac delay based on the preemption rules provided by Airlines Deregulation Act. This result is very different from the JAA EG-209 case, which the Taiwan judge rendered every passenger NT$7,000 (about US$233) as the pecuniary remedy for mental anguish resulting from the loss of comfort to rest at a hotel. In other words, Taiwan judge supported remedies for unsatisfactory services but the US judges kept opposite view.

In Mainland China, the legal practice responding to unsatisfactory services demonstrates different angle. For instance, in a lawsuit brought on by eleven passengers against China Southern Airlines and Anhui Civil Aviation Authority in 2002, the People's Court of Hefei Suburb held that China Southern Airlines should refund ticket fare at RBM6,730 (about US$1,085) to passengers. The facts are: (1) the

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A Study Paper, A Study Paper (1991) online:< http://www.lareau-legal.ca/Human.pdf>. At 23, it is noted that "section 4 of the Quebec Charter of Human Rights and Freedoms guarantees that: [e]very person has a right to the safeguard of his dignity".

delays were caused by weather and then by air traffic control; (2) China Southern Airlines has tried to avoid damage to passengers; (3) passengers demanded and enjoyed complimentary services during *force majeure* delay; and (4) passengers decided not to continue their flights after the rerouted flight was arranged the next morning as requested. The People's Court of Hefei Suburb concluded that passengers had no grounds to claim mental anguish at RMB11,000 and a public apology from the air carrier and the Anhui Civil Aviation Authority. That is to say, the People's Court of Hefei Suburb viewed no non-pecuniary remedy but offered passengers the remedy equivalent to ticket fare as damage for time loss or for unsatisfactory trip. This judgment provided a remedy (with ticket fare) to meet the passengers' expectations after taking into account the rules for terminating the air transportation contract. However, the judge's rationale to satisfy the passengers' expectation was based on the guidelines of respect and protection of "human dignity", and on principles adopted by the Supreme Court in 2001.[505] In other words, since long delays have become

[505] To resolve personal views for legal transformation to protect one's dignity, in 2001, the PRC Supreme Court issued certain legal interpretations and guidelines in respect of rendering pecuniary or non-pecuniary remedies for infringement of dignity under the "delict" claims. The Mainland China Supreme Court particularly indicated that the "human dignity" (Chinese:人格權) has been well accepted and practiced at the present time, and the enhancement of the Chinese citizen awareness of their rights protection proved that their society is transforming into a "modern society [under the] rule of law". Furthermore, the PRC Supreme Court recognizes that dignity infringement or mental injury should be recovered through "consolation money" (Chinese:慰撫金) under the condition that the infringer agrees there is no other appropriate means to make the restitution except with cash. However, consolation money to be rendered should be granted by the collegial panel in order to reduce a judge's subjectivity and arbitrariness when making a ruling. To be more specific, the assessment of consolation should refer to:

> Mental injury is intangible, and is non-quantifiable in nature. Monetary compensation for moral damage is not the "price tag" for indemnification. There is no relationship between mental damage and the currencies, which exist in the field of the equivalent in exchange for a commodity. Yet, mental damage should be evaluated by referring to the development of a particular State economy, culture and social values, and by referring to the perspective of the administration of justice to make a subjective assessment of the extent of the mental damage, consequences and harmful behavior plus adding on imputed liability and morally reprehensible laxity. That is to say that the amount of compensation should be determined by the exercise of discretion from a collegial panel. However, in order to minimize or reduce the subjectivity and the arbitrariness of discretion, Articles VIII and X of "The Interpretation for Number of Issues on the Determination of Damages for Delict Liability in the View of the Supreme Court" have provided us with a number of principles. As given, the interpretation for Article 8, bearing civil liability for moral damage is one of the means. Taking monetary compensation as an approach is used only after other forms of civil liability for infringement is not sufficient to compensate victims of mental damage…

increasingly more common in Mainland China due to booming air travel, the judge's decision could be affected by the "social emotion" to enhance passengers' protection against long flight delays.

Furthermore, another type of undermining passengers' dignity is "discriminatory services"[506], which is a serious infringement of human dignity. For instance, based on an accusation of "discriminatory treatment", KLM refused to make any compromise with six Chinese passengers' request to make a public apology and to offer pecuniary remedy. These six passengers were separated from their group travel when KLM rerouted all delayed passengers to another code-shared airplane due to mechanical failure in the original airplane. These six passengers accused KLM of intentionally selecting them to deny boarding; thus, these "discrimination claims" were brought up to attract people's empathy. The Mainland Chinese also asserted that KLM should compensate them by referring to the EU Regulation; particularly, their complaints brought back anguish that were complex and deeply influenced by "the Eight-Power Allied Forces"[507]. The argument for "discrimination" was sensitive and perhaps easier to gain sympathy in the Chinese society, in which KLM changed its attitude and decided to satisfy its passengers' expectation from a business risk control

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In practice, the legal interpretations and guidelines for rendering pecuniary or non-pecuniary remedies for infringement of dignity plays a very important role in Mainland China.
See The Legal Interpretations of Rendering Remedies for Personality Infringement of the Supreme Court, online: ＜http://baike.baidu.com/view/438776.htm＞ (in Chinese).

[506] The general meaning of "services" is usually referred to "an act of help or assistance". However, the legal meaning of "services" relates to "a person or company whose business is to do useful things for others". In short, the legal meaning of services is to "business" which should be reimbursed after delivery of the services.
See The Collins English Dictionary, 21st Century Edition, *sub verbo* "services". See also Black's Law Dictionary, 8th Edition, *sub verbo* "services".

[507] The Eight-Power Allied Forces, aggressive troops sent by Britain, the United States, Germany, France, Tsarist Russia, Japan, Italy and Austria. The Eight-Power Allied Forces killed innocent Chinese and raped women. In the end, the Qing Imperial government was forced to sign the Boxer Protocol of 1901 to compensate the eight countries' expenses and costs related to their activities. The Western powers had forced the Qing Imperial government to accept wide foreign control over the country's economic affairs. The Chinese dignity was seriously destroyed by this incursion into Chinese internal affairs and territory. Up to date, Chinese still keep the memory and try to take revenge for such big insult. See "Boxer Rebellion", online: ＜http://www.history.com/topics/boxer-rebellion＞.

consideration. This case illustrates how passengers from Mainland China claimed money for pecuniary to a public apology for non-pecuniary remedy based on dignity infringement as a form of justification that involves social and cultural values.[508]

In sum, the mentioned verdicts made by Taiwan and Mainland China courts and passengers' behaviors to protect their dignity evidence that the notion of dignity has gradually lost its role as a moral percept and invisibly influenced jurisdiction to support passengers' claims in *force majeure* delays. However, the currency value rendered for mental anguish or for infringement of dignity in *force majeure* delay is a "symbolic" remedy instead of "substantial" remedy. Comparing the result made by the US Appeal Division for *Biscone* case, passengers in Taiwan and Mainland China are better protected due to the consideration of human dignity instead of "rights vs liability" norm. Perhaps, from the concept of rule of law, there is no concrete rationale or reasoning for air carriers to render small amount of pecuniary remedy to passengers in *force majeure* delays. However, the author's experience in handling severe passenger complaints supports that most of the passengers demand were for "respect" or "care" when they were so frustrated in long delays. The "consolidation money" comfort passengers' emotion because of its "symbolic" remedy, which is a psychological comfort to share risks, instead of recovering what they lost. Therefore, risk sharing, which needs to be emphasized here, rooted in mutual respect mentality becomes the core philosophy of resolving disputes in case of *force majeure* delays. Yet, the remedy offered for infringement of dignity illustrates the difficulty for lawmaking to provide a unified mechanism to satisfy passengers' expectations which

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[508] See "Nationalism", online: Standford Encyclopedia of Philosophy ＜http://plato.stanford.edu/entries/nationalism/＞.

In relation to attempts to address historical or international injustices, it is quoted:

> In recent years the focus of the debate about nationalism has shifted towards issues in international justice, probably in response to changes on the international scene: bloody nationalist wars such as those in the former Yugoslavia have become less conspicuous, whereas the issues of terrorism, of the "clash of civilizations" and of hegemony in the international order have come to occupy public attention.

socio-economic and cultural influence should take into consideration.

4.3. Uncertainty for Delay Claims Related to Cross-Strait Flights

Already, it has been demonstrated that there are contradictions in the legislation and practice related to air carriers' obligations for *force majeure* delays. Even more uncertainty will come from the application of Taiwan law and Mainland China law governing passengers' delay claims in different jurisdictions. Furthermore, such uncertainty of legal practice will affect a foreign passenger's claims against either Taiwanese or Mainland Chinese air carriers for *force majeure* delays related to cross-Strait flights. A brief analysis of the uncertainty is given below.

4.3.1 Claims Brought by Taiwanese or Mainland Chinese

Under the One-China policy, the cross-Strait flights are announced as "special flights", meaning they are neither international nor domestic flights, in Taiwan.[509] Yet, for Mainland China it treats the cross-Strait flights as "special domestic flights" by referring to the definition for cross-Strait shipping routes.[510] The two inconsistencies of categorizing the nature of cross-Strait flights in Taiwan and Mainland China triggers confusion in the application of rules of conflicts of law to solve passengers' claims resulting from air transportation related to cross-Strait flights. In addition, both Taiwan and Mainland China promulgated particular laws for choosing the governing law, forum and enforcement of judgments in relation to civil disputes.

[509] See BBC, News Release, "Taiwan KMT: Cross-Strait Flights are 'Special Flights'" (19 October 2013) online: < http://www.bbc.com/zhongwen/trad/china/2013/10/131019_taiwan_china_flight > (in Chinese).
[510] Article 3 of the Regulation for Governing Cross-Strait Shipping Routes

4.3.1.1 Taiwan

In taking civil action against air carriers for flight delay on a cross-Strait flight, a Taiwanese or Mainland Chinese is allowed to file a civil suit in a Taiwan court under Article 97 of the Taiwan *Civil Aviation Act* if the contract of carriage was either concluded in Taiwan or/and the destination of the cross-Strait flight was in Taiwan.[511] In civil matters between people who have household registrations in the Taiwan Area or the Mainland Area, Taiwan law generally applies except as otherwise provided for in the *Act Governing Relations between the People of the Taiwan Area and the Mainland Area* (the "*Act Governing People's Relationship*").[512] Article 45 of the *Act Governing People's Relationship* provides:

> Where the place of act or the place of occurrence of the fact of a civil matter includes the places in both the Taiwan Area and the Mainland Area, the place of act or the place of occurrence of the fact shall be deemed in the Taiwan Area.

Furthermore, Article 43 of the *Act Governing People's Relationship* indicates:

> Where the provisions of the Mainland Area shall apply in accordance with the provisions of this Act, if the Mainland Area does not have any express provision or its provisions provide that the laws of the Taiwan Area shall govern, the laws of the Taiwan Area shall apply.

Based on these provisions, a Taiwanese or Mainland Chinese passenger is entitled to invoke Taiwan law to resolve civil disputes resulting from cross-Strait flights before a Taiwan court.

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[511] Article 97 of the Civil Aviation Act provides that:
Litigation over damage provided for in Article 91 shall be under the jurisdiction of the court at the place where the contract of carriage was concluded or at the destination of the flight.
Article 91, paragraph 2 of the Civil Aviation Act provides that:
The aircraft operator shall be liable for causing damage to passengers because of flight delay, provided that the aircraft operator can prove the delay is caused by force majeure. The liability shall be limited to the necessary extra expense incurred to the passengers through the flight delay.

[512] See paragraph 1, Article 41 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area. And, the definition of the People of the Taiwan Area and the Mainland Area can be found at Article 2 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area.

Once a Taiwan court has rendered a judgment, it is enforceable in Mainland China in accordance with the *Supplementary Provisions of the Supreme Court's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Area* unless provides otherwise.[513] Nevertheless, there are no known cases that have provided confirmation of the Mainland China courts' recognition of the verdicts made by Taiwan courts in relation to remedies for unsatisfactory services rendered to passengers in *force majeure* delays. Although both the legislation and practice are in favor of Taiwanese passengers against foreign air carriers, there is no case to ensure the same practice is applicable for passengers against Taiwanese or Mainland Chinese air carriers in the Taiwan jurisdictions, and then to enforce the verdicts in Mainland China.

[513] The content of the "Provisions of the Supreme Court's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Area", which was issued in 1998, can be found online:
＜http://www.gwytb.gov.cn/gjstfg/ssfl/minpan/201101/t20110123_1725324.htm＞(in Chinese).
The supplementary provisions were made on 30 March 2009 and effective on 14 May 2009 to provide more detailed rules to recognize verdicts made by Taiwan courts.
The content can be found at: ＜http://news.xinhuanet.com/legal/2009-05/14/content_11370290.htm＞ (in Chinese).
The courts of Mainland China are entitled not to recognize the verdicts made by Taiwan courts, if:
(i) The effectiveness of applying for recognition of civil judgments is not yet undetermined;
(ii) The civil judgments applied for recognition was made in absence of the accused because of no lawful subpoena or no legal capacity to handle the case and without help from the appropriate agency;
(iii) The cases should be made exclusively by the jurisdiction of the People's Court;
(iv) The parties violated the arbitration agreement;
(v) The cases were reviewed and concluded by the People's Court, or the cases were reviewed by foreign countries or overseas courts or an arbitral award made by an arbitration body has been recognized by the People's Court;
(vi) The civil judgments applied for recognition were in violation of the principles of State law or detrimental to the public interest of the community situation.
In practice, most of the verdicts made by Taiwan courts are recognized by the courts of Mainland China. By referring to (iii) of the supplementary provisions, the exception was found for a case made by the Shanghai Intermediate Court for the verdict made by Taipei District Court for a dispute over real estate located in Mainland China.
See Kao Chin-Bo, "Coordinated Implementation of Operational Experience and Mechanism for the Mutual Recognition of Civil Judgments on Both Sides of Taiwan Strait" (26 April 2009)
online: ＜http://www.legalway.com.tw/兩岸互相認可執行民事判決操作經驗及機制/KKLW.pdf＞ (in Chinese).

4.3.1.2 Mainland China

The rules for choosing a forum applicable to civil or commercial claims related to the Taiwan area are in the *Code of Civil Procedures* at Article 5 of the *Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements*.[514] In 1995, Taiwan's national air carrier, China Airlines had set up a "local company" as its representative office in Beijing.[515] For operational and marketing purposes, other Taiwan air carriers have also incorporated their branch offices in many cities of Mainland China since 1999. Accordingly, the competent People's Courts where the registered offices of Taiwan air carriers are located have jurisdictions over the litigation brought on by Taiwanese or Mainland Chinese against Taiwan air carriers to resolve the contractual disputes in Mainland China under Article 243 of the *Code of Civil Procedures*. In addition, Taiwan law may be the governing law for passengers' delay claims according to Articles 1, 2 and 3 of the *Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements*.

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[514] "Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements" issued on 25 February 2002 and enforced on 1 March 2002.
Article 5 of the mentioned Provisions provides that: The civil and commercial disputes involving Hong Kong, Macao and Taiwan regions shall be subject to the Provisions.
Furthermore, Article 1 of Provisions provides that civil and commercial cases involving foreign elements, including Taiwan, shall be subject to the following jurisdictions of the people's courts:
(1) the people's court of an economic and technological development zone (such a zone shall be established under the approval of the State Council);
(2) the intermediate people's court at the locality of a provincial or autonomous regional capital or a municipality directly under the Central Government;
(3) the intermediate people's court of a special economic zone or a city directly under the State planning;
(4) any other intermediate people's court designated by the Supreme People's Court; and
(5) the People's High Court.
The content can be found online at: ＜http://baike.baidu.com/view/438813.htm＞(in Chinese).

[515] Taiwan Air Carriers Applied for Incorporating Office in Mainland China (7 December 1999) online: China Shipping and Trading Network ＜ http://www.snet.com.cn:9000/18/2005_10_11/1_18_40195_355_4_1128966952247.html ＞ (in Chinese).

Eventually, the judgment of the Mainland China court is enforceable in Taiwan.[516] According to available court cases, most verdicts of Mainland China have been recognized by Taiwan courts unless there are procedural defects.[517] Nevertheless, it is worth noting that in 2007, the Taiwan Supreme Court clarified that a judgment made by a Mainland China court could be examined and reverted to the competent Taiwan court if the Taiwan Supreme Court holds the rationale made by the Mainland China Court was against Taiwanese interests. As a result, the uncertainties of verdicts made by the Mainland China courts against Taiwan air carriers could occur due to contradictions between the legislation and practice in Mainland China and in Taiwan for passengers' *force majeure* delay claims.

4.3.2 Claims Brought by "Foreigners"

The uncertainties of legal practice in Taiwan and Mainland China also affect a foreign passenger's claims against either Taiwanese or Mainland Chinese air carriers for *force majeure* delays related to cross-Strait flights. For instance, if a Canadian bought an Air China Toronto-Beijing round trip air ticket with a stop in Taipei (Toronto-Beijing-Taipei-Beijing-Toronto), and he experienced a flight delay caused by a typhoon in Taipei that had caused him extra expenses during the waiting for a flight back to Beijing, would the Canadian be able to file a lawsuit against Air China, a Mainland China carrier, in Taiwan, and then seek the enforcement of the verdict in Mainland China?

With regard to the jurisdiction of the Taiwan court, a Canadian is able to bring a

[516] See Article 74 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area.

[517] See Supreme Administrative Court (91 Pan No 2062); Taichung High Administrative Court (89 Su No 686) The content can be found online at: ＜http://jirs.judicial.gov.tw/Index.htm＞ (in Chinese). According to a Taiwan lawyer who was legal consultant to the Strait Exchange Foundation, only 6 verdicts among 1,200 verdicts made by Mainland China courts have been rejected by Taiwan courts. See online: ＜http://www.weli.com.tw/invest-2.12.html＞ (in Chinese).

claim against Air China to the Taipei District Court by alleging that Principle No 11 of the Supplementary Agreement indicates: "air carriers engaged in cross-Strait air transportation should be subject to the rule of *lex situs*". Air China has incorporated its Taiwan Branch and is located at Taipei since 4 August 2009.[518] The delay happened in Taiwan and Air China has her branch office in Taiwan. Accordingly, the Taipei District Court has the jurisdiction over this civil lawsuit by referring to Articles 41(2), 41(3) and 45 of the *Act Governing People's Relationship*[519] as well as Articles 2(2) and 15(1) of the Taiwan *Code of Civil Procedures*.[520] Nevertheless, Air China is able to defend that the Taipei District Court has no jurisdiction to hear the case, because:

(1) Taipei was neither the place where the contract of carriage was concluded nor the place where the destination of the flight was in accordance with Article 97(2) of Taiwan *Civil Aviation Act*;[521] and

(2) Air China and the Canadian should be bound by Article 13.5 of the "General Conditions of Carriage" indicating:

"The dispute arising from or with respect to the Conditions shall be

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[518] Air China has been recognized by the Taiwan Ministry of Economic Affairs and invested in a "local company" called "Air China". See Taiwan Ministry of Economic Affairs, online: < http://gcis.nat.gov.tw/pub/cmpy/cmpyInfoAction.do?method=detail&banNo=28982003 > (in Chinese).

[519] Article 41(2) of the Act Governing People's Relationship provides that:
Civil matters between any two or more of the people of the Mainland Area and those between any of the people of the Mainland Area and any foreign national shall be subject to the provisions of the Mainland Area except otherwise provided for in this Act.
Article 41(3) of the Act Governing People's Relationship provides that:
The terms "place of act", "place of contract", "place of occurrence", "place of performance", "situs", "place of litigation" or "place of arbitration" as referred to in this Chapter shall mean each such place either in the Taiwan Area or in the Mainland Area.
Article 45 of the Act Governing People's Relationship provides that:
Where the place of act or the place of occurrence of the fact of a civil matter includes the places in both the Taiwan Area and the Mainland Area, the place of act or the place of occurrence of the fact shall be deemed in the Taiwan Area.

[520] Article 2(2) of the Taiwan Code of Civil Procedures provides that:
A private juridical person or unincorporated association that has the capacity to be a party to an action may be sued in the court for the location of its principal office or principal place of business.
Article 15(1) of the Taiwan Code of Civil Procedures provides that:
In matters relating to torts, an action may be initiated in the court for the location where the tortious act occurred.

[521] Article 97(2) of Taiwan *Civil Aviation Act* provides that:
Litigation over damage provided for in Article 91 shall be under the jurisdiction of the court at the place where the contract of carriage was concluded or at the destination of the flight.

governed by the laws of the People's Republic of China. On the premise that the Conventions are applicable, the litigation with respect to the loss could be proceeded with at the choice of the claimant, in the court at our headquarters or major business location, or at our branch office where the contract has been concluded, or at the court of the destination."[522]

The ticket was brought in Canada and not in Taiwan, and Taiwan was not the final destination. Thus, the Taipei District Court has no the jurisdiction over this civil lawsuit by referring to Article 13.5 of the "General Conditions of Carriage", which is also in compliance with Article 33(1) of the Montreal Convention.[523]

In addition, if the cause of action chosen by this Canadian is under breach of contract to claim damage resulting from *force majeure* delays, Article 20 of the *Act Governing the Choice of Law in Civil matters Involving Foreign Elements* is applicable.[524] As a result, Air China's liability for delays should be governed by the Montreal Convention because both Canada and Mainland China are the contracting States to the Montreal Convention. Furthermore, as mentioned in Section 4.1.1.3, Article 15.11 of the General Conditions of Carriage of Air China provides that the Montreal Convention is applicable for contract matters between this Canadian

[522] See Article 13.5 of the "General Conditions of Carriage" of Air China.
The content can be found online at:
＜http://www.airchina.com.cn/en/investor_relations/cargo/08/15679.shtml＞.

[523] Article 33(1) of the Montreal Convention provides that:
An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

[524] The *Governing the Choice of Law in Civil matters Involving Foreign Elements* provides the principles, indicating:
(1) The applicable law regarding the formation and effect of a juridical act, which results in a relationship of obligation is determined by the intention of the parties.
(2) Where there is no express intention of the parties or their express intention is void under the applicable law determined by them, the formation and effect of the juridical act are governed by the law, which is most closely connected with the juridical act.
(3) Where among the obligations resulting from a juridical act there is a characteristic one, the law of the domicile of the party obligated under the characteristic obligation at the time he /she undertook the juridical act is presumed to be the most closely connected law. However, where a juridical act concerns immovable property, the law of the place where the immovable property is located is presumed to be the most closely connected law.

passenger and Air China. More importantly, as analyzed in Section 4.2.1, Air China should be able to raise the defence there is no entitlement to compensation to this Canadian passenger in delays caused by a typhoon 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 under Article 19 of the Montreal Convention, Article 107 of the Mainland Chinese *General Principles of Civil Code* and Article 126 of the Mainland Chinese *Civil Aviation Act*.

However, there is no case from the Taiwan courts to ensure that Air China should or should not compensate this Canadian passenger since the Taiwan courts may hold different views on recognizing the Montreal Convention as the governing law even though the air ticket indicated (recall to the JAAEG-209 case discussed above). Moreover, it is uncertain whether the Taiwan court will hold that Article 97 of the Taiwan *Civil Aviation Act* is applicable to the contract of carriage related to the cross-Strait flight between Beijing and Taipei. Therefore, it is possible that the Taiwan court could hold the Taiwan law as the governing law, so this Canadian passenger may be entitled to claim "extra necessary expenses" for *force majeure* delays under Article 654 of the Taiwan *Civil Code* and Article 91(2) of the Taiwan *Civil Aviation Act.*[525] Assuming that the Taiwan court made a verdict in favor of this Canadian passenger against Air China, the following challenge will be whether the verdict can be recognized by the Mainland China court in reviewing the principles of "State law" (Mainland China law) or is it detrimental to the public interest of the community situation adopted by Mainland China. In sum, there is no firm response to the question whether a Canadian can file a lawsuit against Air China, a Mainland China carrier, in Taiwan, and then seek the enforcement of the verdict in Mainland China. Indeed,

[525] See Section 4.2.1.1. Article 654 of the Taiwan Civil Code and Article 91(2) of the Taiwan Civil Aviation Act provide legal grounds for passengers to claim monetary compensation.

more generally, there is no firm answer whether any foreign national travelling on a Taiwanese or Chinese air carrier between Taiwan and China, is able to successfully make a claim on either side of the Taiwan Strait.

4.4 Conclusion

The uniqueness of political, socio-economic and cultural factors in Taiwan and Mainland China do indeed influence legislation and legal practice in offering passenger protection in flight delays. Where delays are caused by *force majeure*, Taiwan applies the same rules for international and domestic flights. However, Mainland China's *Civil Aviation Act* clearly distinguishes between the different legal framework governing international air transportation, which should be in accordance with the rules of the Conventions, and those governing the domestic air transportation, which should be strictly governed by the regulations promulgated by the Civil Aviation Administration of China.[526]

Taiwan has a very high level of passenger protection because air carriers are liable to offer monetary compensation and complimentary services to passengers in *force majeure* delays. Furthermore, the JAA EG-209 case demonstrates a view held by Taipei District Court to assure air carriers' obligation to offer monetary remedies for not offering services in delays including those that are caused by *force majeure*. In contrast, in Mainland China, air carriers are able to defend against compensation to passengers in delays beyond their control, and hence are not obligated to provide complimentary services to passengers for delay or cancellation caused by weather, accident, air navigation control, security, passengers' behavior or any other reasons which are not attributable to the air carrier. Undoubtedly, to enhance passenger

[526] Article 128 of the Civil Aviation Act provides the rules for governing air carriers' liability for domestic air transportation; yet, Article 129 of the Civil Aviation Act provides the limited liability for international air transportation.

protection, some court cases reveal inconsistencies in legislation; for instance, the verdicts made by the Taiyuan Intermediate Court and by the People's Court of Hefei Suburb.

In addition to the distinct remedies offered for *force majeure* delays in Taiwan and Mainland China, there are complexities and uncertainties with the application of national laws for passenger claims involving cross-Strait flights. This is an acute problem given the growth of air traffic between the two countries. In 2011, Mainland China registered airlines carried a total of 268 million domestic and international passengers.[527] The CAAC estimate that the same airlines will transport some 430 million international passengers alone in Mainland China airports in 2015.[528] According to Airports Council International, Taipei (Taoyuan) International Airport of Taiwan was ranked as the eleventh international airport based on international passenger traffic ranking in 2014.[529] From a business perspective, the aforementioned figures have caused international air carriers to be more aware of the uniqueness of air transport interactions between Taiwan and Mainland China and to set up adequate delay claim budgets if they are operating in the growing aviation markets of Taiwan and Mainland China. Furthermore, aircrafts carry the registration flag of its State and most land in other territories, which are under the jurisdiction of different States, where different laws and legal practice apply. Passengers may have different points of origin and different destinations on the same flight. Carriage by air thus provides an

[527] See Oxford Economics, *supra* note 445.
[528] China Daily, News Release, "CAAC Estimated to Transport 430 Million Passengers in 2015" (26 December 2014), online:
＜http://dailynews.sina.com/bg/news/int/int/chinesedaily/20141226/05516338526.html＞(in Chinese).
[529] See Airports Council International, International Passenger Traffic for past 12 months: 12-MONTHS ENDING DEC 2014, ACI online: ＜ http://www.aci.aero/Data-Centre/Monthly-Traffic-Data/International-Passenger-Rankings/12-months ＞.

extremely rich example involving matters of choice-of-law if there is no unified governing law or dispute solution.

This chapter has demonstrated that legislation and practice for passenger protection in flight delays are highly complex in nature, not only because of the different legal framework but also because of social and economic transformation in Taiwan and Mainland China. For air transportation that is connected with the regions of Taiwan and Mainland China, the claim for flight delay is not an easy task to handle or settle through the legal process where one has to also take into consideration the political, economic and cultural impacts on passenger protection. The additional dimension of the infringement of dignity is a further challenge to understand distinct values involved in the assessment of remedies for passengers in *force majeure* delays in the US, EU, Taiwan and Mainland China.

After reviewing the legal jigsaw and uncertainties in the current governance of flight delay in the US, EU, Taiwan and Mainland China, current legal practice all lead to more questions: Will making more laws guarantee an effective resolution for flight delay claims in different jurisdictions? And, who should be responsible for damage and/or inconvenience resulting from flight delays caused by *force majeure*? Without having good answers to the mentioned questions, a novel solution is needed to resolve flight delay claims, a solution that is free from the existing uncertainties and -complexities presented by legal approaches. Most importantly, in the case of flight delays caused by *force majeure*, where air carriers have been insisting on a no-liability solution but where passengers and courts, especially in Mainland China and Taiwan are refusing this outcome, a simple yet quick and fair remedy mechanism should be created to provide a practical and cost effective alternative to the current complicated, prolix and conflicting rules that are specified in the international and national legislation and that have proven to be inadequate in practice.

CHAPTER V

PROPOSED REMEDY MECHANISM

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PROPOSED REMEDY MECHANISM

Recognizing the complexities and uncertainties in legislation and practice in previous chapters, this chapter will demonstrate how the proposed remedy mechanism is able to provide alternative solutions over lawmaking. Most importantly, it should answer why the proposed solutions based on risk-sharing philosophy among stakeholders will provide equitable answers to the question: Who should be responsible for damages and/or inconvenience resulting from flight delays caused by *force majeure*?

In practice, to settle disputes or to satisfy passengers' expectation, air carriers budget for passengers' pecuniary remedies irrespective of whether flight delays are caused by air carriers' fault. Yet, there is no guarantee for air carriers to recover their loss after compensating passengers in *force majeure* delays under their liability insurance policy. The inharmonious legal practice and insurance policy, therefore, are evidence that air carriers cannot rely on traditional insurance mechanism to distribute risks resulting from *force majeure* delays. On the passengers' side, most passengers expect to be quickly advised of the status of their journeys instead of receiving pecuniary remedy from air carriers. Unfortunately, in delays caused by *force majeure*, air carriers are unable to satisfy passengers' expectations because they also do not know how long the delays will be. Due to limited manpower, it is not possible to efficiently reroute affected passengers or to reimburse all passengers who decide not to continue their journeys. Thus, seeking a practical solution becomes meaningful.

Since no one should be blamed for *force majeure* delays, the practical solution is a stakeholder contribution-based "fund" created to achieve a simple, fast, and effective remedy mechanism. Furthermore, the fund should harmonize the remedy mechanisms without the influence of political, socio-economic and cultural values. To

mitigate further disputes, two codes of conduct will also be introduced with the objective of mutual respect between passengers and air carriers.

Accordingly, in this chapter, the proposed remedy mechanism is analyzed by responding to three fundamental questions: First of all, why do traditional insurance mechanisms limit the remedy for passenger's damage in relation to flight delays caused by *force majeure*? Secondly, how should the proposed "fund", contributed by stakeholders, be set up to address the risk-sharing philosophy that would be providing a practical remedy mechanism to comfort frustrated passengers? Finally, what must be the passengers' cooperation and air carriers' promise to achieve the mutual respect philosophy in order for the fund to succeed in being an ideal solution for both sides?

5.1 Limitations of Insurance Mechanisms

While insurance is mandatory for air carriers under the Conventions and national law, the scope of compulsory insurance under national laws, however, excludes insurance for delays, including *force majeure* delays. Such legislation leaves flexibilities for air carriers to determine their own insurance policies to eliminate their risk for *force majeure* delays. In contrast, insurance products for *force majeure* delays offer passengers easy means to recover partial financial loss when their travels are unexpectedly interrupted. As emphasized in Chapter IV, during unknown waiting periods, passengers expect air carriers' "respect" to reroute or reimburse them without discrimination. Thus, this "respect" cannot be satisfied by traditional insurance mechanisms, which hardly provide thorough solutions both for air carriers and passengers to deal with disputes from *force majeure* delays. This section will highlight the limitations of traditional insurance to support the need for a novel remedy mechanism introduced in Section 5.2.

5.1.1 Required Insurance under the Conventions and National Laws

Air carriers are responsible for acquiring insurance to cover their liability under the Conventions and national laws. Yet, national laws do not mandate "delay insurance" as part of the air carriers' insurance policies. Based on such inconsistency in international and national legislations, this section highlights the call for insurance under the Conventions and national laws to demonstrate that air carriers are flexible when it comes to acquiring *force majeure* delay insurance.

5.1.1.1 Required Insurance under the Conventions

The Warsaw Convention is considered to have first introduced compulsory insurance at an international level for the liability of an aircraft owner or operator for damages caused to passengers, baggage, cargo and mail.[530] Seventy years after the Warsaw Convention, Article 50 of the 1999 Montreal Convention imposed an obligation on contracting States to require their carriers to maintain adequate insurance to cover their liability under the Convention.[531] However, the Montreal Convention does not contain a definition of what amounts to "adequate insurance"; it also does not indicate any guidance for insurance coverage limit to liability arising under the Convention, such as delays. It is left to the State Party in which air carriers operate to determine any insurance secured as adequate in that jurisdiction.[532] As a consequence, to have insurance eliminating legal risk under the Convention is a compulsory obligation to the contracting States; but, there are no harmonized or detailed rules governing such compulsory insurance, including damage caused by

[530] See Rod D Margo, *Aviation Insurance* (London: Butterworths 2000) at 15.

[531] Article 50 of the Montreal Convention 1999 provides that: "States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention."

[532] See Marc Rémy Halter, *Aviation Insurance in International Air Transportation* (Montreal: University of McGill, 2005) at 28.

delays.

5.1.1.2 Compulsory Insurance under National Laws

Although national laws play an important role in determining compulsory insurance for air carriers to ensure passengers protection, these national laws seldom place obligations on air carriers to acquire liability insurance for eliminating "delay risk". Let us take for instance, by referring to 49 U.S.C. Chapter 443, the US Secretary of Transportation provides rules for having insurance and reinsurance against loss or damage arising out of any risk from the operation of an American aircraft or foreign-flag aircraft.[533] The FAA declares that the Aviation Insurance Program provides coverage that is addressed to the insurance needs of the US domestic air transportation industry, such as war risk insurance, but "it does not adequately meet the commercial insurance market".[534] In other words, flight delay insurance is not categorized as compulsory insurance in the US. In addition, taking the EU as an example, the Resolution ECAC/25-1 demands that air carriers' acquire insurance for "death, wounding or any other bodily injury sustained by a passenger in the event of an accident".[535] Moreover, Regulation 785/2004[536] requires that:

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[533] "Aviation Insurance" (9 February 2015), online: FAA ＜https://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_insurance/＞.

[534] *Ibid.*

[535] Article 2 of the adopted Resolution provides: "The obligation of insurance for death, wounding or any other bodily injury sustained by a passenger in the event of an accident shall be understood to be a minimum of 250 000 SDRs per passenger."
See The European Civil Aviation Conference (ECAC) was held at Paris on 13 December 2000 to adopt the Resolution ECAC/25-1 on minimum level of insurance cover for passenger and third-party liability online: ＜http://folk.uio.no/erikro/WWW/corrgr/ecac.pdf＞.

[536] The official title for this regulation is called: "Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators." "This regulation applies to all air carriers and to all aircraft operators flying within, into, out of, or over the territory of an EU country". Moreover, "the objective of this regulation is to establish minimum insurance requirements for air carriers and aircraft operators in respect of passengers, baggage, cargo and third parties, for both commercial and private flights".
See Insurance for air carriers and aircraft operators, online: Summaries of EU Legislation ＜ http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_insurance/l24300_en.htm＞.

> This regulation requires air carriers and aircraft operators to be insured, in particular in respect of passengers, baggage, cargo and third parties, to cover the risks associated with aviation-specific liability (including acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion).[537]

Undoubtedly, neither Resolution ECAC/25-1 nor Regulation 785/2004 specifies that air carriers should acquire liability insurance covering damage resulting from flight delays.

The compulsory insurance to cover air carriers' commercial risk also can be found in the legislation of Taiwan and Mainland China. For instance, Taiwan *Civil Aviation Act* requests national air carriers and foreign air carriers to acquire liability insurance which is sufficient to cover a minimum compensation of NT$3 million for each passenger's death, NT$1.5 million for severe bodily injury, and a maximum amount of NT$1.5 million for bodily damage other than death and sever bodily injury.[538] Article 166 of the Mainland China *Civil Aviation Act* demands the operator of an aircraft to acquire insurance against liability for third parties on the surface or obtain corresponding guarantee. The scope of compulsory insurance specified in Taiwan and Mainland China aviation law has clearly excluded air carriers' liability for delays, of course, that is including *force majeure* delays.

In sum, without establishing a scope for compulsory insurance to cover flight delays in legislation invariably allows air carriers some flexibility to determine their own insurance policies for mitigation of their financial risks relating to *force majeure* delays. Nonetheless, air carriers have chosen not to acquire delay insurance as such insurance products are too expensive.

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[537] *Ibid*. See "principles of insurance" of the summaries.

[538] See Articles 94 and 95 of the Taiwan *Civil Aviation Act*, and Articles 3 and 5 of the *Regulations of Compensation For Damage Caused to Air Passengers and Cargo*.

5.1.2 Insurance Products for Flight Delays

Insurance is a strategy of risk management.[539] In practice, air carriers do purchase various insurance policies to eliminate or mitigate the risk of financial loss. However, to date, the insurance products offered to air carriers for *force majeure* delays are limited and unreasonably priced vis a vis the risks. In contrast, it is becoming popular and price affordable for passengers to buy flight delay insurance; this is made possible due to the huge risk sharing pool created by the high number of passengers opting to buy such insurance. The aforementioned is a clear indication that traditional available insurance products do provide distinct and separate risk sharing pooling, one pool for the air carriers and the other for the passengers. Hence, passengers who acquire flight delay insurance to cover *force majeure* delays have the ability to claim damages based on "unsatisfactory services" from air carriers. Disputes between air carriers and passengers remain as is. This section, therefore, will review available insurance products and analyze how the currently available insurance cannot provide air carriers with a solution to mitigate their economic burden in *force majeure* delays.

5.1.2.1 Available Insurance for Air Carriers

Insurers who cover most of the non-US air carriers are led by companies such as Global, AIG, Allianz, Lloyd's Syndicates, ACE, Amlin, and Wellington. Together they account for over 50% of the global aviation insurance market.[540] In addition, the London market share is split, roughly equally, between other insurance companies and Lloyd's Syndicates.[541] Representing Lloyd's and other insurance companies, the

[539] See Rod D Margo, *supra* note 530 at 9.
[540] See Paul Hayes, Triant Flouris, Thomas Walker, "Recent Developments in the Aviation Insurance Industry", online: ＜http://www.trforum.org/forum/downloads/2005_1A_StockPrice_paper.pdf＞.
[541] *Ibid.*

Lloyd's Aviation Underwriters Association (LAUA)[542] publishes standard policy forms, proposal forms as well as standard wordings for clauses and endorsements, called the "Aviation Clauses" in the London aviation insurance market.[543] In practice, aviation insurance mainly includes "Aircraft Hull Insurance", "Aircraft Liability", "Crew Personal Accident Insurance", "Airport Owner and Operator Liability Insurance" and "Aircraft Products Liability".[544] However, these existing common Aviation Clauses exclude any insurance coverage for *force majeure* delays.

Through an interview[545] with a well-known reinsurance underwriter, the author was advised of the following: (1) Swiss Re[546] offered an insurance tool for air carriers to eliminate their risk in *force majeure* delays; and (2) majority of air carriers are not interested in this product because of the high insurance premium. After interviewing air carriers, these views were echoed by the interviewees.[547] In other words, there is insurance coverage for *force majeure* delays but it is too expensive; therefore, air carriers do not buy it. Moreover, the author also learned from the reinsurance underwriter that due to the difficulties in deciphering statistical parameters of *force majeure*, the premiums paid by air carriers to acquire such

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[542] Lloyd's Aviation Underwriters Association (LAUA) was formed in 1935 to represent aviation syndicate interests of the Lloyd's aviation market.
See Lloyd's Online: ＜ https://www.lloyds.com/the-market/tools-and-resources/tools-e-services/risk-locator/risk-locator-class-of-business/aviation＞.

[543] The Aviation (AVN) Clauses can be found online: ＜http://www.iua.co.uk/IUA_Test/Documents/Clauses_folder/aviation_clauses_home.aspx＞.

[544] See Insurance Product Introduction, Taiwan Fire & Marine Insurance Co., Ltd. online: ＜ https://www.tfmi.com.tw/product_detailL3.aspx?ProductID=caa7fe1e-07d9-4738-8e19-2e58e599c141 ＞.

[545] The interview was taken in 2013. See *supra* note 60.

[546] Swiss Reinsurance Company Ltd, known as Swiss Re, is one of leading reinsurer based in Zurich, Switzerland.
See Swiss Re, Financial Review 2012, online: ＜ http://media.swissre.com/documents/2012_ar_financial_review_en.pdf ＞.

[547] The findings were given by a few international air carriers and their re-insurance brokers.
On the website of Swiss Re, it declared that "Swiss Re is the leader in the global weather insurance market and has started to promote weather index solutions in China over the past few years."
Swiss Re, "Weather risk management on the rise in China" (September 2014) online: ＜http://www.swissre.com/china/Weather_risk_management_on_the_rise_in_China.html＞.

insurance for *force majeure* delays would not be economical in the future. The findings explain why air carriers budget for passengers' pecuniary remedies instead of relying on traditional insurance mechanisms to manage the risks.

Furthermore, some air carriers rely on the "business interruption insurance"[548] to recover their certain operational losses in the event of serious flight cancellations. Unfortunately, the "business interruption insurance" is to compensate air carriers' operational loss due to business interruption related to "facilities", such as the airplane. This finding is supported by *United Air Lines, Inc. v. Insurance Company of the State of Pennsylvania*[549] case. In this particular case, the Court of Appeal rejected UA's claim for lost earnings caused by the national disruption of flight services and the government's temporary shutdown of the Arlington airport following September 11 attacks because the loss in question did not originate from physical damage to its property or from physical damage to an adjacent property.[550] By referring to the condition of "physical damages to the airport or airplanes", the air carrier will not be compensated from the "business interruption insurance" if the flight interruptions are caused by "weather" or other *force majeure* reasons. The air carriers only can claim

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[548] See Swiss Re, "Business Interruption Insurance", online: < http://www.swissre.com/media/news_releases/swiss_res_latest_publication_focuses_on_business_interruption_insurance.html >.

[549] *United Air Lines, Inc. v. Insurance Company of the State of Pennsylvania,* United States Court of Appeals, Second Circuit. - 439 F.3d 128.
The facts were: "On July 14, 2003, United Air Lines, Inc., ("United") brought suit in the United States District Court for the Southern District of New York seeking a declaratory judgment and recovery in breach of contract under its $25 million "Property Terrorism & Sabotage" insurance policy with the defendant, Insurance Company of the State of Pennsylvania ("ISOP"). United sought indemnity for losses it suffered as a result of the September 11, 2001, terrorist attacks on the World Trade Center in New York City and the Pentagon in Arlington, Virginia. United's ticket office located in the World Trade Center was destroyed. It is undisputed that United can recover from ISOP for any lost earnings that are attributable to this physical damage." However, United's facilities at the Airport in Arlington, Virginia, suffered no significant physical damage as a result of the attack on the nearby Pentagon. The Court of Appeals held that United cannot recover for its lost earnings caused by the national disruption of flight services and the government's temporary shutdown of the Airport.

[550] See *United Air Lines, Inc., Plaintiff-counter-defendant-appellant, v. Insurance Company of the State of Pennsylvania, Defendant-counterclaimant-appellee*. docket No 05-2144 Cv, 439 F.3d 128 (2d Cir. 2006) online: Justia US Law
< http://law.justia.com/cases/federal/appellate-courts/F3/439/128/549891/ >.

damage as a result of flight cancellations or delays if such cancellations or delays were directly caused by "physical damages to the planes."[551] Therefore, the "business interruption insurance" limits air carriers to be compensated for the business loss related to the specific airplane, which was damaged by unexpected event and then affected the concerned flight obligation. If the airplane is grounded and flight cancellations are made for safety reason, it does not fall into the umbrella of "business interruption insurance" since there are no "physical damages to the planes". Hence, insurance companies had declined to absorb losses incurred by the aviation industry as a result of the Icelandic volcanic eruption in 2010 under the "business interruption insurance".[552] Such non-payment was a big shock to the aviation industry at that time. A global insurance broker, Willis Research Network[553] even declared: "the industry currently has no detailed insurance risk models for volcano eruption in Europe and various European overseas territories".[554] As a result, the "business interruption insurance" cannot act as an ideal insurance policy for air carriers to recover their loss in *force majeure* delays.

At present, for *force majeure* delays, air carriers, inevitably, will have to make restitution for passengers' pecuniary remedy through the normal expense channels without having any appropriate insurance coverage backup. As a result, traditional insurance mechanisms have limited air carriers' ability to recover their losses after compensating passengers in *force majeure* delays.

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[551] This finding was made based on the author's experience in handling aviation matters. The author also confirmed the finding from a senior manager who worked for UA.

[552] See Phil Gusman, "Volcano Claims Success Unlikely for Business Interruption Aviation" *Property Casualty 350.COM-A National Underwriter Website* (25 April 2010) online: < http://www.propertycasualty350.com/2010/04/25/volcano-claims-success-unlikely-for-business-interruption-aviation>.

[553] Willis Research Network is based in London, led and sponsored by Willis Group Limited, which is one of only three major risk management and insurance intermediaries that operate on a worldwide basis. See online: <http://www.willisresearchnetwork.com/>.

[554] *Ibid.* It is quoted: "The Willis Research Network, which is funded by Willis Group Holdings, said the industry currently has no detailed insurance risk models for volcanoes in Europe and various European overseas territories."

5.1.2.2 Available Insurance for Passengers

On the passengers' side, flight delay insurance has been well promoted to passengers and travelers through their insurance companies and credit card issuers, such as "Trip Interruption Insurance", "Comprehensive Travel Insurance"[555] or "Flight Delay or Baggage Insurance".[556] In the meantime, more and more passengers and travelers have acknowledged, purchased or benefited from travel interruption or flight delay insurance because of the frequencies of flight delays in air transportation and effective promotions by credit card issuing banks and insurance companies.[557] More interestingly, the clauses under the insurance products for passengers to distribute their risks for flight delays are governed by national laws instead of international insurance rules.[558] It means that national laws endorse such insurance products to protect passengers.

Using Taiwan as an example, AIG Taiwan, an insurance affiliated group of the American International Group Inc. (AIG), allows travelers departing from Taiwan to be compensated NT$1,500 (about US$50) for each six hours up to a maximum amount of NT$10,500 (about US$350) in scheduled flight delay under the 2014

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[555] The key terms of "Comprehensive Travel Insurance" cover medical expenses and travel delays (meals, accommodation, luggage and personal effects).
See "Comprehensive Travel Insurance", Allianz online:
＜http://www.allianz.com.au/travel-insurance/comprehensive-travel-insurance＞(in Chinese).

[556] See Hao Xiu-huei, Liu Hai-an, Yang Wan-liu, *Aviation Insurance Law* (Beijing: Law Press 2011) at 254-255. (in Chinese)

[557] See The standards insurance contract terms offered by AIG and Zurich Insurance Ltd.
Insurance from AIG in Taiwan, online:
＜ http://www.aig.com.tw/chartisint/internet/TW/en/files/personal2.1_pdf01_1.1_tcm2094-478150.pdf ＞ (in Chinese).
Zurich Insurance (Taiwan) Ltd, online:＜
http://www.ezanla.com/travel/travel/zurich/%E5%A2%9D%E5%AC%BE-New%E7%92%B0%E5%97%85%E9%9A%AA%2820130121%E9%80%95%E4%BF%AE%29.pdf＞(in Chinese).

[558] It is a common practice that most insurance policies specify the law of a particular country which the insurers have decided should govern any disputes under the policy and the jurisdiction or courts in which proceedings are to be brought.
See Sharon Daly, Helen Noble and Darren Maher, "How reliable are choice of law and jurisdiction clauses in insurance contracts?" (2011) Association of Corporate Council, online:
＜http://www.lexology.com/library/detail.aspx?g=a0281fd8-e198-4fe0-9444-d933f4f00b45＞.

revised "Whole Year Comprehensive Overseas Travel Insurance Policy".[559] Under the 2014 revised "One Time Comprehensive Overseas Travel Insurance Policy", the delay compensation is NT$1,500 and the maximum remedy is the insured amount.[560] Both one time and whole year "Comprehensive Overseas Travel Insurance Policies" cover overseas travel associated with international flight delays caused by inclement weather, mechanical failure, *force majeure*, being hijacked, strikes or labor movements. The insured is only requested to file the claim with supporting documents issued from air carriers to prove the delay causation and travel certificate, such as ticket, boarding pass or the other equivalents.[561] In the Comprehensive Travel Insurance provided by Zurich Insurance (Taiwan) Ltd, the insured is able to claim necessary expenses, within the insured amount, paid for transportation, accommodation, meals and drinks resulting from flight delay caused by loss of passport or travel documents, quarantine, *force majeure*, and transportation accident.[562] Without proving expenses, the fixed compensation is NT$1,000 (about US$33) per person, or NT$2,000 (about US$57) for a family for the first six hours delay, and an additional NT$500 (US$17) for individual and NT$1,000 (about US$33) for a family for every six hours delay.[563]

In Mainland China, due to serious flight delay complaints, China Eastern Airlines offers RMB 300 (about US$48) for a scheduled flight delay if the delay is more than two hours, and the insured purchases the online e-ticket together with the

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[559] *Ibid*.
[560] See Whole Year Comprehensive Overseas Travel Insurance Policy, AIG online: ＜http://www.aig.com/chartisint/internet/TW/en/files/personal2.1_pdf01_1.2_tcm2094-478151.pdf＞.
[561] See One Time Comprehensive Overseas Travel Insurance Policy, AIG online: ＜http://www.aig.com/chartisint/internet/TW/en/files/personal2.1_pdf01_1.1_tcm2094-478150.pdf＞.
[562] See Zurich Insurance (Taiwan) Ltd., "Comprehensive Travel Insurance Policy", online: ＜https://www.zurich.com.tw/ZurichWeb/home/faq/faq_t.htm＞ (in Chinese).
[563] *Ibid*. See Clause 10 of the Zurich Insurance (Taiwan) Ltd. Comprehensive Travel Insurance Policy (in Chinese).

"Flight Delay Insurance" and they paid a premium of RMB 20 (about US$3).[564] In addition, China Eastern Airlines also offers RMB 600 (about US$97) for flight delay over four hours, RMB 1,000 (about US$156) for eight hours baggage delay and RMB 500 (about US$78) for flight cancellation if the insured purchases online e-ticket together with the "Travel Interruption Insurance" and had paid the premium of RMB 20 (about US$3).[565]

In the developed US and EU aviation market, many comprehensive travel interruption insurance policies are available online[566] or in the aviation markets for passengers or travelers to recover certain pecuniary damages in case of flight delays. Furthermore, with an airline-, or hotel-, or bank-branded credit card, the card holder is entitled to a long list of travel benefits beyond what the air carrier can offer because these cards are promoted by that particular air carrier, hotel or bank whose name appears on the card and they tend to emphasize the perks related directly with them.[567]

According to the above findings, one could conclude that available aviation insurance products offered to passengers for *force majeure* delays are much easier and cheaper than the other "ones", if any, to air carriers. This insurance situation demonstrates one simple fact: a group of many passengers can form a solid risk sharing mechanism managed by the insurer(s). This mechanism allows passengers to get restitution from a simple and fast remedy regime for their damages or suffering caused by flight delays. More importantly, the insurance mechanism offered to

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[564] See Flight Delay Insurance, China Eastern Airlines online:
＜http://www.ceair.com/guide2/bx/t2014610_15508.html＞(in Chinese).

[565] See Introduction for Aviation Accident Insurance, China Eastern Airlines, online at
＜http://www.ceair.com/guide2/bx/t2014610_15509.html#ppt1＞ (in Chinese).

[566] RBC Travel Insurance Plan is indicated: "The RBC Travel Protector Deluxe plan includes coverage for trip cancellation, interruption and delay; loss, damage or delay of your baggage; emergency medical and dental expenses; and much more."
See Travel Insurance Plan, RBC Insurance online:
＜http://www.rbctravelprotection.com/travelers/travel-insurance-plans.html＞.

[567] The finding came from the author's experience to provide legal consultation for international air carriers and banks to jointly issue these credit cards.

passengers for *force majeure* delays conveys two significant messages. First, insurers are able to satisfy the passengers' expectation of receiving a small amount of financial recovery to supplement their expenses for hotel accommodation, ground transportation or other costs when they are subjected to delay inconvenience. Second, insurers organize the insurance pooling for many passengers to share risk caused by *force majeure* delays, and insurers are able to make a profit from managing such a risk sharing mechanism. It proves that there is a demand from passengers. Nevertheless, the insurance for *force majeure* delays offered to passengers is an individual risk sharing mechanism between insurers and passengers, but that is irrelevant to the air carriers. Passengers are still able to claim unrecovered damage from air carriers, and insurers may obtain the right of subrogation against air carriers after paying out remedy to passengers.[568] In other words, the insurance for passengers may add complexities instead of resolving disputes between air carriers and passengers in *force majeure* delays.

5.1.3 Solution Beyond Insurance

As indicated, the insurance pooling that is structured for passengers in *force majeure* delays is separate from the air carriers' pooling. In other words, although passengers and air carriers face the same risks from *force majeure* delays, the traditional insurance mechanisms are not able to merge the two stakeholder groups into a syndicate to jointly share the risks. As a result, the traditional insurance mechanisms neither minimize air carriers' financial losses nor provide solutions to resolve the disputes. More importantly, the findings revealed that in order to alleviate

[568] This result comes from the author's experience handling passengers' claims in Taiwan because passengers are allowed to claim damage resulting from *force majeure* delays under the Taiwan Civil Code. After the insurance company pays the compensation to passengers, the insurance company is eligible for a subrogated claim. The author indeed has experience in handling passengers' claims involving insurance company's involvement. But, the dispute was settled without trial(s).

disputes, the practical solution, apart from the current insurance mechanisms, should take into consideration bringing together all stakeholders to share the same risks for *force majeure* delays. A detailed analysis is provided below to support the above-mentioned hypothesis.

5.1.3.1 Finding Risks in *Force Majeure* Delays

The "risk" under the definition of insurance risk on air carriers in *force majeure* delays is very different from the "risk" under "strict liability" which is broadly applied for consumer protection. As discussed in Sections 3.1.1 and 3.1.2, the strict liability, adopted by the US and the EU to enhance their consumer protection, reserves certain "exceptional causes" to balance off economic development and consumers' expectations. The strict liability regime plus reasonable exceptions allow manufacturers to manage their legal and economic risks through product liability insurance in order to control their financial loss. Thus, the "risk" under strict liability is well managed by the traditional insurance mechanism to enhance manufacturing and to protect the consumers. However, as analyzed in previous chapters, air carriers can defend against liability in order not to compensate passengers in delays under the Conventions or national laws by invoking the defence of "*force majeure*" in the US and Mainland China or the defence of "extraordinary circumstances" under the EU Regulation 251/2004. Nevertheless, in the jurisdiction of Taiwan, air carriers are liable to compensate passengers for their "necessary extra costs" resulting from *force majeure* delays. As a result, air carriers face "uncertainties" regarding compensation to passengers when offering inadequate services in *force majeure* delays in different jurisdictions. Furthermore, air carriers undertake compulsory obligations of offering complimentary services to passengers in *force majeure* delays under the EU Regulation 261/2004 and Taiwan law. Neither the US nor Mainland China place the

same compulsory obligations on air carriers, but air carriers provide complimentary services in practice. Such reality invites a fundamental question: Where is the "risk" to be insured in *force majeure* delays? To this very day, there has been no convincing response to this question; and, that exactly explains why the present insurance mechanism is unable to offer reasonable products for air carriers to relieve their legal or financial burdens when flight delay is caused by *force majeure* or extraordinary circumstance.

It has been emphasized that in *force majeure* delays, most of the passengers demand "respect" from air carriers during frustrating waiting periods (see Section 4.2.2.3). The traditional insurance mechanisms are only able to provide financial recovery; to offer "respect" is beyond the definition of "risk" under traditional insurance mechanisms. Therefore, to resolve disputes between air carriers and passengers arising from *force majeure* delays invites seeking an alternative remedy mechanism other than keeping the traditional insurance mechanisms.

5.1.3.2 Finding A Practical Solution

In terms of finding a practical solution with risk sharing function but other than insurance mechanisms, the answer cannot be found through desk research because the solution should bear the test of time. As mentioned in Chapter I, in 2013, the author interviewed eight individuals for their input and comments on the following ten questions:

- What is your main occupational experience in the aviation industry?
- Do you agree that flight delay has been a significant issue in international air transportation?
- Do you agree that flight delay simultaneously causes passenger disputes and unexpected costs for air carriers?

- Are you aware that the international conventions or national legislations provide sufficient grounds for passengers to claim damages from air carriers for flight delay?
- Do you agree that air carriers should take all responsibility for passenger protection in case of flight delay even though the delay was caused by force majeure?
- Do you agree that both legislation and insurance mechanisms have not provided efficient and satisfactory solutions for flight delays?
- Do you know that insurance companies provide insurance products for passengers to cover flight delays?
- What do you think of an insurance mechanism for passengers or for air carriers to cover damages resulting from delays, especially *force majeure* delays?
- Do you agree that an innovative remedy mechanism for *force majeure* delays should be established?
- Are you willing to consider setting up an international fund where stakeholders will contribute to in order to provide efficient solutions for flight delays?

In sum, the idea of seeking an alternative remedy mechanism to bring all stakeholders together has been highly supported by the eight interviewees because:

(1) The interviewees showed no confidence in relying on further international conventions or national legislations to provide solutions for air carriers and their unsatisfactory services;

(2) The interviewees were aware of and understood the shortcomings of the traditional insurance remedy for *force majeure* flight delays; and

(3) The interviewees expected an innovative remedy mechanism for *force majeure* delays to replace complimentary services in order to allow air carriers to use their limited manpower to focus on flight information update and efficiently reroute

passengers.

In terms of the remedy offered by insurance, all interviewees echoed that the available insurance remedy is not an ideal solution to satisfy passengers' expectation since passengers have to submit their claims with supporting evidences to the insurers and can only depend on the insurers to decide the remedy amount. In addition, the interviewees who were from international air carriers shared the same concern: A traditional insurance pooling would be contributed to by air carriers based on the premium paid by "passenger per head" or by revenue. In practice, each air carrier carries different numbers of passengers and operates on different routes; thus, each air carrier faces different "risks". For instance, China Airlines will face more risk of typhoons than Air Canada has with snow storms based on geographic conditions at their home bases. That is why air carriers pay different premiums depending on the distinct risks in their operations. Assuming passengers are the only beneficiary party and all beneficiaries are compensated equally, how then can the premium formula justify the "fairness" to all air carriers because each air carrier carries different numbers of passengers and pays different insurance premiums? In addition to this concern, there are a few significant "obstacles" under the traditional insurance mechanism, so let us take for example:

(1) A traditional insurance policy is rooted in a "contract" base. Two contracting parties, the insurer and the insured, should be or could be identified when the contract is signed. However, it is common practice that a passenger can be carried by an air carrier who is not the contracting air carrier, and the passenger also can reroute flights to change air carrier(s) after the contracting air carrier issued the tickets. Based on such common practices, if air carriers and passengers are the "two" insureds under the *force majeure* delay insurance, unpredictability of

associating risks with the insured, like contractual carrier, actual air carrier(s) and the passenger, does exist when the tickets are issued. In theory, it would be necessary to determine premiums for each air carrier when the same passenger is carried by different air carriers. This would be very difficult to do in practice; that is to simultaneously combine air carriers and passengers under traditional insurance formats to share *force majeure* risks.

(2) A traditional insurance has a "one-time" payment to the assigned beneficiary to cover the damage resulting from a particular risk. If a passenger suffered delays from different routes carried by more than one air carrier under the same *force majeure* occurrence, can this passenger be compensated under various insured's *force majeure* delay insurance because of the different routes taken?

(3) A traditional insurance is subject to the insurer's final decision to compensate passengers, which will again divert us back to the "right vs liability" regime. As the dismal results show, disputes between air carriers and passengers resulting from *force majeure* delays cannot be resolved by this traditional insurance mechanism because no one should be blamed for damages caused by *force majeure*. As a result, air carriers have to pay very high insurance premium to exchange for the insurer's discretion of risk-sharing in *force majeure* delays.

To remove these concerns, the interviewees concurred that an alternative remedy mechanism other than the traditional insurance mechanisms is imperative and meaningful. More importantly, the alternative remedy mechanism should take into consideration the differences between the air carriers' operational scope and passengers' expectations, even though all the stakeholders have an interest in the same fund which will ultimately bear the risks in *force majeure* delays.

5.1.4 Further Views on Alternative Remedy Mechanism

In addition to finding a practical solution beyond insurance, the interviewees emphasized that the remedy offered by the fund is needed to provide passengers with a simple, fair and fast remedy instead of the constant argument of "right vs liability" regime. Nevertheless, based on their own expectations, the interviewees provided other distinct approaches to the alternative remedy mechanism and their comments are as follows:

- Passengers' approaches:

(1) Although no one should be blamed in *force majeure* delays, air carriers and airport managing entities should keep a "customer oriented" service mentality to assist passengers because they need repeat passengers for their business survival.

(2) Passengers are willing to contribute to the alternative remedy mechanism if passengers are able to benefit from fast, simple and non-discriminatory remedy mechanism without suffering bureaucratic procedure to make their claims. Also, the alternative remedy mechanism should be favorable if it supplements passengers with an amount for hotel accommodation to address the passengers' mental anguish instead of having them wait at the airport terminal during rerouting.

(3) In addition to monetary remedy, air carriers or airport managing entities should update passengers on flight delay information from time to time, and then advise passengers of rerouting or of other solution to complete their journey as soon as possible.

- Air carriers' approaches:

(1) It has been a common practice that air carriers do have a budget for offering passengers meals, beverage and communication, but it is subject to availabilities

and necessities to offer passengers hotel accommodation in *force majeure* delays. Interviewees, representing air carriers, emphasized that air carriers should not compensate passengers for damage caused by *force majeure* delays because air carriers also suffered business loss under such delays circumstances. Nevertheless, air carriers indeed have difficulties to provide passengers with updated flight information, adequate or satisfactory meals, beverage and hotel accommodations due to limited airport facilities and local conditions that are also affected by *force majeure*, for instance, severe snow storm.

(2) Air carriers are willing to contribute to the remedy mechanism if such mechanism releases air carriers' obligations to compensate passengers for damage or for inadequate or unsatisfactory services in *force majeure* delays. That fund will help air carriers do what they do best and that is to concentrate on rerouting passengers or to find solutions for passengers to continue their journey due to limited manpower at airports in handling *force majeure* delays.

- Government officers' approaches:

(1) There is a need to have an alternative remedy mechanism, contributed by stakeholder(s), which will provide amicable and thorough resolutions to dismiss disputes between air carriers and passengers in *force majeure* delays.

(2) In addition to supplementing passengers for their out of pocket cost through the proposed remedy mechanism, air carriers and airport managing entities should also provide passengers with the necessary assistance when their travels are interrupted in third countries.

- Reinsurance underwriter

(1) Insurance companies still have difficulties in deciphering statistical parameters of

force majeure for each air carrier. As a result, the premiums paid by air carriers to acquire insurance for *force majeure* delays will not be a bargain.

(2) Insurance companies are profit-seeking enterprises, not social welfare charities. Thus, it is challenging to come up with an insurance product or policy to satisfy all of the air carriers' obligations under different jurisdictions to offer the same services, assistance or remedies for flight delays, not to mention delays caused by *force majeure* or extraordinary circumstance, where the insurance companies have yet to figure out the actuarial odds or probabilities for such uncertain losses.

In general, these approaches were in favour of an alternative remedy mechanism where the fund implements the risk-sharing function among all stakeholders. However, the codes of conduct among the stakeholders should include guidelines to mitigate further disputes through the fund.

5.2 The Proposed Fund

The proposed fund will implement risk-sharing among all stakeholders for *force majeure* delays to fairly distribute unexpected or unpredictable financial loss among all stakeholders. Furthermore, it is also important to avoid conflicts with existing legislations for compensating passengers; therefore, the fund will be an alternative remedy mechanism to air carriers' compulsory obligation to comfort passengers' inconvenience in *force majeure* delays. To be more specific, the fund will serve as a "substitute" for services like meals and beverage, communications, and/or hotel accommodation. That is to say, the fund does not waive the air carriers' obligation to "care" for passengers, but transfers such "economic care" into "cash remedy" instead of providing "tangible goods and services". It should be noted that the primary difference between the compulsory obligation and the fund is that the fund guarantees

reasonable remedy to affected passengers, and is operated by an assigned independent third party operator and not the air carrier. Furthermore, air carriers and passengers will jointly contribute to the fund through ticket fares to achieve risk-sharing mechanism.

This thesis does not intend to provide a detailed business plan or to assess financial gains and losses for the fund. Thus, the proposed fund will be analyzed by distinguishing its essence with the other existing convention created funds, by outlining the structure of the proposed fund and by highlighting the stakeholders to illustrate the risk-sharing mechanism. Given such analysis, the readers will have a better understanding as to why the proposed fund can serve as an innovative remedy mechanism to resolve conflicts among the primary stakeholders, the air carriers and passengers.

5.2.1 Fund Characteristics

As the proposed "fund" is to provide an alternative remedy mechanism to air carriers' compulsory obligations in offering services to passengers, it will therefore not be used as a legal tool for commercial or non-commercial purposes.

In terms of legal tool for non-commercial purposes, an assortment of international funds have been created by conventions, for instance, the fund for compensation for oil pollution damages[569] and the Central Fund for Influenza Action

[569] The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, often referred to as FUND92 or FUND, is an international maritime treaty. The 1992 convention came into force on 30 May 2005. As of May 2013, the convention had been ratified by 111 States representing 91.2 per cent of the gross tonnage of the world's merchant fleet. Victims of oil pollution damage may be compensated beyond the level of the shipowner's liability. However, the Fund's obligations are limited, and there is no shipowner liable or the shipowner liable is unable to meet their liability, the Fund will be required to pay the whole amount of compensation due. See online International Maritime Organization:< http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-%28FUND%29.aspx>.

(CFIA)[570]. These two international funds are unsuccessful to achieve their goals because of complexities with deep political consideration. Thus, the fund setting for *force majeure* delays should be substantially free from political interference.

In the aviation legal regime, the idea of an international fund can also be found at the *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*, which has not yet come into force.[571] It is because of the lack of success in the fund created by the mentioned Convention that the author was challenged by an aviation expert to justify why she still believes that the "fund" will minimize disputes between air carriers and passengers. The answer lies in the distinctions between *force majeure* delays and damages to third parties caused by unlawful interference. The most obvious dividing line is that *force majeure* is uncontrollable and unpredictable, but "unlawful interference" can be managed by a well-developed aviation security network involving air carriers, airports, and State governments.[572] Moreover, damages caused by *force majeure* delays are significantly more onerous than "unlawful interference involving aircraft"; for instance, air carriers are able to eliminate risk resulting from "unlawful interference involving aircraft" through insurance mechanisms, such as "aviation war risk insurance"[573] or "aviation

[570] It is cited: "The Central Fund for Influenza Action (CFIA) is a multi-donor trust fund established in November 2005 to finance the urgent unfunded and under-funded priority actions of the United Nations System Consolidated Action Plan for Avian and Human Influenza (UNCAPAHI) strategic framework. The latter was developed around a set of broad-based objectives that allow the building of a multi-sectoral partnership between the member States, the United Nations (UN) and the larger humanitarian community and development partners, to jointly combat the threat of the highly pathogenic avian influenza (HPAI) pandemic and enhance global, regional and country level preparedness and coordination."
See Dr. Bile Khalif Mohamud and Dunn Claude, The Central Fund for Influenza Action: Lesson Learned Exercise (April 2012) online:
＜http://www.capsca.org/Documentation/CFIA-LessonsLearnedReportMay2012.pdf＞.

[571] The main concept of the international fund should refer to Articles 17-19 of the *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*.
See ICAO, *Convention on Compensation for Damage to Third Parties* DCCD Doc No 42 (1 May 2009), online: ＜http://www.awg.aero/assets/docs/GRC%20-%20Final.pdf＞.

[572] The international rules for aviation security include "Technical Instruction", "Emergency Response Guidance", Annexes 9, 17 and 18 of the Chicago Convention.

[573] By referring to the research report submitted to the US Congress in 2014, the aviation war risk

third-party insurance"[574]. However, as analyzed, the available *force majeure* delays insurance is too expensive for air carriers to write off their financial loss at the present day. In addition, the funds under the umbrella of the international conventions are difficult to be implemented globally due to various political and economic considerations from the different State's perspectives; for example, Taiwan cannot be a party to any international conventions. As given such comparisons, it is clear that the international fund created under the convention regime in respect of damage to third parties that result from acts of unlawful interference is not attractive enough for a State to participate. In contrast, to eliminate the financial burden on the aviation industry, the proposed fund could satisfy an urgent need for *force majeure* delays from a global risk sharing perspective.

It is also worth emphasizing that *force majeure* delays, such as the Eyjafjallajökull Icelandic volcano eruption in 2010, usually cause serious financial

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insurance has developed to eliminate air carriers' financial burden in handling "unlawful interference", like the 9/11 terrorist attacks. It is quoted:

> "Following the terrorist attacks of September 11, 2001, coverage for such attacks, and for "war risks," became difficult, if not impossible, for airlines to purchase from private insurers. In response, Congress passed expansions of the Federal Aviation Administration (FAA) Aviation War Risk Insurance Program. The amended statute (49 U.S.C. §44301 et seq) requires that the FAA offer war risk insurance to U.S. airlines with the premiums based on the cost of such coverage prior to the 9/11 terrorist attacks. The federal coverage under the program is relatively expansive, with coverage provided after the first dollar of losses and with a broad definition of what constitutes a war risk loss. The expansion of the program was limited in time, but has been extended several times over the years, often as part of appropriations legislation. The last extension was in the Consolidated Appropriations Act, 2014 (P.L. 113-76), which extended the expanded program to September 30, 2014. Up until 2014, most U.S. airlines purchased the FAA coverage and generally supported the existing program against proposed changes. In 2014, the number of air carriers purchasing insurance and the premium volumes dropped. This movement away from government insurance has occurred against a backdrop of increased private insurance capacity and lower prices…"

See Bart Elias, Richard Y. Tang, Baird Webel, "Aviation war Insurance: Background and Options for Congress" (5 September 2014) online: Congressional Research Services ＜ https://www.fas.org/sgp/crs/misc/R43715.pdf＞.

[574] The third-part insurance was included in the war risk insurances. It is quoted:

> "War risks coverages ("war, hijacking and other perils" including terrorism) are: Hull – insured in a separate war risk insurance market. Passenger and third party – added to the principal liability policies by an extension clause known as AVN52. This cover (with limits as high as US$2bn for each and every occurrence for each insured) was traditionally provided at nominal cost, given the absence of major loss…"

See "A Guide to Aviation Insurance" (December 2012) online: OECD ＜http://www.oecd.org/daf/fin/insurance/4.DavidGasson-background.pdf＞.

burdens for air carriers, passengers, airports and even seriously affect the concerned countries' economy. According to the Oxford Economics[575], the global GDP losses of the prolonged inability to move people or goods during the Eyjafjallajökull Icelandic volcano eruption were estimated at approximately 4.7 billion US dollars.[576] About seven million people were grounded across Europe and that resulted in extreme pressure on buses, trains, taxis, and cars. Many hotels were at full capacity, leaving crowds of people without accommodation.[577] That is to say, one natural disaster can cause severe economic impact to the aviation industry and nations; more significantly, several million passengers also suffered from travel interruption. Yet, there is no fundamental solution to eliminate severe financial loss suffered by the aviation industry and passengers. It is the air carriers who undertake obligations to look after passengers under the passenger protection legislation. However, the passenger protection or consumer oriented mentality is insufficient to justify why air carriers, a profit-making enterprise, alone, should assume the risk resulting from *force majeure* delays which no one should be blamed for. The proposed fund, therefore, should focus on minimizing air carriers' financial loss and passengers' inconvenience caused by *force majeure* delays.

5.2.2 Outline of the Fund

As indicated, the fund is not to be seen as a waiver of air carriers' obligation to "care" for its passengers; it merely converts the air carriers' duty of care into

[575] Oxford Economics is evaluated as "a key adviser to corporate, financial and government decision-makers and thought leaders."
See About Oxford Economics, online: Oxford Economics ＜ http://www.oxfordeconomics.com/about-us＞.
[576] Elin Thora Ellertsdottie (senior sophister), "Eyjafjallajökull and the 2010 closure of European airspace: crisis management, economic impact, and taking future risks" (2014) 28 The Student Economic Review at 132.
See online: ＜https://www.tcd.ie/Economics/assets/pdf/SER/2014/elin_thora.pdf＞.
[577] *Ibid.*

organized “cash remedy”. In so doing, it will enable air carriers to use their limited manpower productively to reroute passengers that choose to continue their journey, or to refund passengers who elect not to continue with their journey. Passengers would just need to keep in contact with the air carriers for information on their next flight. With guaranteed remedy from the fund, passengers are free (with dignity) to make their own choice of finding meals and/or accommodation instead of “waiting” for free services at the airports or getting enraged with unsatisfactory services. Based on passengers’ needs during their waiting period, airports are able to provide passengers with facilities to check on updated flight information. Furthermore, airports could offer services and/or entertainment to alleviate passengers’ mental anguish rather than leaving them unattended at the airport terminals during *force majeure* delays. The fund, therefore, provides passengers with immediate financial assistance and allows them the freedom of spending at the airports. In fact, air carriers have started to increase the practice of issuing meal and beverage vouchers for use at the airport. Some air carriers even issued vouchers for flight miles or ticket fare discount if meals or beverages are not available. The fund will improve goodwill for air carriers as a result of the prompt offering of complimentary services. In addition, it should be noted that using the fund as an alternative remedy mechanism for air carriers’ obligations by offering services is not inconsistent with current industry practice; and, perhaps, it could save individual air carrier’s operational cost.

To achieve the objectives of this fund, which will be created solely for *force majeure* delays, the following must be understood:

(1) The fund’s purpose is to minimize financial loss to stakeholders in cases of *force majeure* delays. It should not be viewed as passenger damages.

(2) The fund is an alternative remedy mechanism to provide passengers with guaranteed financial supplement to minimize their expenses and to comfort

passengers for inconvenience suffered.

(3) This fund does not replace air carriers' obligations to protect consumer rights, such as the right to safety, right to be informed, right to education, and right to redress. Air carriers, therefore, should inform passengers of updated flight information, reroute passengers and reimburse passengers if they decide not to continue their journeys.

(4) The fund aims to provide simple, fast and predictable redress to settle passengers' pecuniary and non-pecuniary claims regardless of the distinctions from socio-economic, political and cultural values.

(5) The fund will be financed by contributions paid by stakeholders who expect to benefit from the speed offered by transnational air transportation, and these will include air carriers, passengers, and airport management entities that desire robust and dynamic development of international air transportation.

(6) The fund will be managed and administrated by an experienced fund manager, such as an insurance underwriter, and supervised by a non-government entity or non-national organization, in order to avoid political interference; an example of a supervisor would be IATA.

(7) The terms and conditions established by the fund as an alternative remedy mechanism for *force majeure* delays will be incorporated into the contract of carriage of air carriers who decide to participate in the fund. Passengers are free to select their contracting air carriers. They are then bound by the contract if the contracting air carrier is a subscriber to the fund.

(8) After a passenger has been remedied by the fund under the credit account of the contracting air carrier, the passenger will have no further claim against any air carrier involved in the same contract to claim damage arising from delays caused by *force majeure*.

With regard to offering passengers' hotel accommodation, as discussed, in the EG 209 case, the Taiwan Taipei District Court held a view that JAA should pay passengers the equivalent cash amount for not providing hotel accommodation during *force majeure* delays.[578] Interestingly, among discussions on amending the EU Regulation 261/2004, it has been suggested to reimburse passengers' expenses based on receipts provided by the passengers up to a certain "reasonable" amount that is in line with offering assistance, such as hotel accommodation.[579] That is to say, although a practical solution of offering necessary hotel accommodation has not been determined, the "alternative assistance" of reimbursing passengers' expenses is expected and practiced by the aviation industry. However, the reimbursement mechanism may cause other disputes between air carriers and passengers, for example by auditing the receipts provided by the passengers. As examined, air carriers have their own policies of offering free hotel accommodations in *force majeure* delays, and that has triggered complexities and uncertainties in terms of passenger protection.

The fund's objective is to minimize such complexities and uncertainties in applying international and national legislations; and accordingly, the fund would harmonize the rules for offering passengers financial supplement where hotel accommodation is necessary to assist passengers in *force majeure* delays. After the

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[578] See Section 4.2.2.1.

[579] See European Commission, "Non-paper Proposed Informal Guidelines on the application of Some Articles of (EC) Regulation 261/2004" online: < http://ec.europa.eu/transport/themes/passengers/air/doc/2011_ash-cloud-crisis-guidelines-for-interpretation.pdf>. Comments on Article 9. The conclusion is made by referring to the quoated content as below:

> This would also mean that g) accommodation does not necessarily imply in all events the continuation of the stay of the passenger in the same hotel where he was previously lodged, h) nor the automatic right for the passengers to decide himself where and at what condition he is to be accommodated. In the case of passengers making their own alternative travel arrangements (by whatever mode) and subsequently seeking reimbursement from the carrier, NEBs should take account of efforts made by the carrier to finding alternative transportation, particularly where a carrier made no effort at all. In all circumstances relating to alternative travel and other assistance, NEBs may accept that air carriers reimburse passengers' expenses against receipts up to a certain "reasonable" level in line with the above mentioned criteria. In any event passengers who feel that they are entitled to have more of their expenses reimbursed retain the right to pursue the air carrier through a national Court procedure.

fund has taken over the air carriers' regulatory obligations of offering hotel accommodation, passengers will have no legal ground against air carriers for not offering such assistance and/or unsatisfactory services. As a consequence, passengers' claims, which arise from air carriers' regulatory obligations, could be effectively managed by the fund.

5.2.3 Stakeholders of the Fund

Following up with the outline of the proposed fund, the stakeholders of the fund should at least include: passengers, air carriers, and airports to initiate the risk sharing pooling for *force majeure* delays. Of course, passengers are the beneficiaries and the fund should have contributions from air carriers and airport managing entities. However, to operate the proposed fund, governments, fund operator, and supervisor also play important roles. A brief role-paying function is demonstrated below to support the risk-sharing philosophy.

5.2.3.1 Air Carriers

Air carriers and passengers, undoubtedly, are two sides of a coin, or as the Chinese saying goes, they are the lips and teeth.[580] Air carriers cannot survive without passengers and passengers rely on air carriers' services to benefit from fast air transportation. Thus, air carriers lead the role to contribute to the fund based on commercial considerations and legal obligations to "protect" passengers in *force majeure* delays.[581]

[580] It comes from one of the Chinese idiom stories, which happened in the year of BC551 to describe that two small countries, like lips and teeth, shall jointly defend for the attack from a strong neighbor country. In the other words, if one of two interdependent things falls, the other is in danger. It is the same as: when the lips are lost, the teeth will be exposed to the cold.
See "Chinese idiom stories", online: <http://chengyu.game2.tw/archives/798#.VBT_1b4VGew>. (in Chinese)

[581] In practice, when air tickets are issued, passengers simultaneously pay the ticket fare and various

However, as explained, this fund is not viewed as a traditional insurance mechanism. As a result, the fund pooling is distinct from one air carrier to another, each having a separate carrier account with the fund. Passengers would be entitled to claim a monetary remedy from the fund from the credit account of each carrier with whom the passenger has contracted. The rationale for air carriers to have their own credit account is in response to the concern: How does the proposed fund meet fairness requirements towards air carriers? It is significant to note that each air carrier will be carrying different numbers of passengers, and each air carrier may choose to take different routes depending on the associated weather risks. Furthermore, air carriers conduct many code-sharing arrangements with other selected air carriers, but passengers are not in a direct contracting position with code-share air carriers.[582] Once a passenger has obtained a remedy from the fund against the contracting air carrier, this passenger cannot claim another remedy from the fund against the actual carrier(s) under the code-sharing arrangements. For instance, Passenger A purchased a round-trip ticket from Air France and flew with Air France from Montreal to Paris. Passenger B purchased ticket from Air Canada but flew with Air France from Montreal to New Delhi through Paris under a code-sharing arrangement. If the delay on the Montreal-Paris flight was caused by a snow storm in Montreal, Air France will issue the certificates for both Passengers A and B to claim a remedy from the fund.

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surcharges, such as fuel surcharge and taxes, to the travel agents or air carriers. Passengers' payment was distributed to suppliers to achieve their journey through the IATA Billing and Settlement Plan (BSP) system. Therefore, technically, it is practical for air carriers to act as the "transferor" to transfer a certain amount collected from the airfare to the fund under the air carrier's credit account.
Eventually, the contracting air carrier's individual credit account also helps to easily settle distinct air carrier's regulatory and contractual obligations to each of her delayed passenger.

[582] The US DOT defines the "code-sharing arrangements" as: "Code sharing is a marketing arrangement in which an airline places its designator code on a flight operated by another airline, and sells tickets for that flight. Airlines throughout the world continue to form code-share arrangements to strengthen or expand their market presence and competitive ability. "
See US DOT online:
< http://www.transportation.gov/policy/aviation-policy/licensing/code-sharing#sthash.7zzn2lGt.dpuf >.

However, Passenger A's remedy should be deducted from Air France's credit account with the fund, and Passenger B's remedy should be paid by Air Canada's account. If both Passengers A and B are paid by Air France's account, Air Canada's contribution to the fund on behalf of Passenger B makes no sense. Indeed, if the remedy granted to Passenger B is charged to Air France's account, it may initiate another legal whirlpool for Air France to claim reimbursement from Air Canada.

5.2.3.2 Airport Managing Entities

Airports, air carriers and passengers have shaped an interwoven relationship in the aviation industry. Air carriers cannot take off or land without runways, nor can a passenger board and deplane without terminals. Airports rely on the revenue stream created by air carriers and their passengers for their very existence.[583] In case of delays, without efficient support from airport managing entities, air carriers cannot efficiently provide updated flight information, or offer sufficient meals, beverages, medication, and communication facilities to passengers. Furthermore, according to IATA's estimation, more than ten million passengers were affected by the 2010 volcano eruptions of Eyjafjallajökull in Iceland which resulted in the largest air traffic shut-down in many European countries since World War II.[584] In the period of waiting for the resumption of air transportation, millions of passengers had to wait at airports for rerouting.[585] This event eventually urged international airports to establish contingency plans to address safety and security concerns in case of serious flight delays. That explains the airports' indispensable roles and rationale to contribute

[583] See Paul Stephen Dempsey & Laurence E. Gesell, *Air Commerce and the Law*, *supra* note 146 at 451.
[584] See IATA Economic Briefing – The Impact of Ejafjallajökull's Volcanic Ash Plume (2010 May) online:< http://www.iata.org/whatwedo/Documents/economics/Volcanic-Ash-Plume-May2010.pdf>.
[585] See ICAO, "Mitigating Ash Impacts －What We've Learned and Improved Post 2010" online: (2013) ICAO Journal Vol 58, No 1 at 10.
<http://www.icao.int/publications/journalsreports/2013/5801_en.pdf>.

to the fund. Airports are able to benefit as a stakeholder of this fund for safety and security reasons.

From a legal aspect, for instance, under the US 49 U.S.C. §42301, an airport operator is obligated to submit an emergency contingency plan to the FAA which should include providing a sterile area following excessive "tarmac delays" for passengers who have not yet cleared the United States Customs and Border Protection.[586] In the EU, based on severe impacts caused by the 2010 volcano eruptions of Eyjafjallajökull, the EU proposed adding paragraph 5 to Article 5 of the EU 261/2004 as outlined below:

> At airports whose annual traffic has been not less than three million passengers for at least three consecutive years, the airport managing body shall ensure that the operations of the airport and of airport users, in particular the air carriers and the suppliers of ground handling services, are coordinated through a proper contingency plan in view of possible situations of multiple cancellations and/or delays of flights leading to a considerable number of passengers stranded at the airport, including in cases of airline insolvency or revocation of the operating license. The contingency plan shall be set up to ensure adequate information and assistance to the stranded passengers. The managing body of the airport shall communicate the contingency plan and any amendments to it to the National Enforcement Body designated pursuant to Article 16. At airports below the above-mentioned threshold, the airport management body shall make all reasonable efforts to coordinate airport users and to assist and inform stranded passengers in such situations.[587]

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[586] 49 U.S.C. §42301(c) Airport Plans provides that:
An emergency contingency plan submitted by an airport operator under subsection (a) shall contain a description of how the operator, to the maximum extent practicable, will—
(1) provide for the deplanement of passengers following excessive tarmac delays;
(2) provide for the sharing of facilities and make gates available at the airport in an emergency; and
(3) provide a sterile area following excessive tarmac delays for passengers who have not yet cleared United States Customs and Border Protection.

[587] See "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air" COM/2013/0130 final - 2013/0072 (COD) , online: EUR-Lex ＜http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0130＞.

Although the proposed "airport contingency plan" under Regulation 261/2004 has not been in force, undoubtedly, the airport managing entities indeed hold a significant position in coordinating with stranded passengers, air carriers and suppliers of ground handling services in case of multiple cancellations and/or delays of flights. Thus, the airport managing entities should be a stakeholder for passenger protection in cancellation and flight delays under the US and the EU legislations.

Given the critical role of airport managing entities in case of cancellations and delays, they should also act as a stakeholder and hence could be eligible as the transferor. As such, they should contribute a certain amount to the fund where they will be given a credit account under the particular airport managing entity's name. If the airport managing entity can act as the transferor under the fund, passengers can then be the beneficiaries to receive benefits offered by the airport managing entity through the fund. Therefore, if a passenger is travelling on a non-participating air carrier but at a participating airport contributing to the fund, this passenger can be the beneficiary under the credit account of the participating airport. The rationale for airport managing entities to contribute to the fund is because passengers pay airport tax to use the airport facilities. From a business developing perspective, the participating airport may attract more transfer passengers and perhaps earn more business from serving passengers paid by the fund.

5.2.3.3 Passengers/Beneficiaries

Under the structure of the fund, passengers will be the beneficiaries who will be entitled to claim compensation from the credits deposited by the contracting air carriers and/or airport managing entities. As emphasized, this fund aims to provide a practical solution to supplement passengers' extra out of pocket expense or to comfort passengers' inconvenience resulting from *force majeure* delays. Substantially, the

general principles of compensation are inapplicable for the remedy mechanism created by the fund. In the end result, passengers may enjoy double remedy under the fund, one from the air carrier and the other from the airport managing entity if passengers choose to have a transit stopover at the airport participating in the fund for delays caused by *force majeure*. When a passenger travels with a non-participating air carrier through a non-participating airport, this passenger will have no remedy from the fund. Passengers eventually will be encouraged to pay attention to contracts of carriage before they decide to book their tickets from the contracting air carrier, and also to select the participating transit airport stopover. Perhaps, this exposes "insufficiency" to provide "all" delayed passengers with the same protection. However, it is significant to emphasize that non-participating air carriers' regulatory and contractual obligations will remain unchanged under the positive law. The contribution to the fund by participating air carriers and airport managing entities will form a risk-sharing pooling group to provide an alternative remedy mechanism instead of offering meals, beverage, communication and necessary hotel accommodations. Without serving a function of "compensation" to passengers' financial loss caused by *force majeure* delays, there is no "insufficiency" to the passengers flying on non-participating air carrier(s) through a non-participating airport. However, if the fund indeed provides good results to address passengers' complaints about air carriers' services, over time, passengers will choose participating air carriers' flights to assure their efficient remedy in *force majeure* delays.

5.2.3.4 Governments

Contracting States of the Chicago Convention regulate immigration affairs as in the admission into or departure from its territory of passengers, crew or cargo aircraft

to ensure national safety and security.[588] Accordingly, using the severe delays caused by the 2010 volcano eruptions of Eyjafjallajökull as an example, the concerned governments had to adjust their visa policies to facilitate the cross-border movement of passengers. Consequently, between 2010 and 2012, over forty countries made significant changes to their visa policies changing from a visa required to "visa on arrival", "eVisa" or "no visa".[589] The visa issue is associated with national safety and security concerns, making governments substantial stakeholders in situations of severe flight delays.

Furthermore, the majority of airports that are opened to the public and operate commercial air transportation are owned and/or operated by governmental entities.[590] Air traffic control (ATC)[591] or air navigation services[592] at such airports are mainly controlled and/or managed by the respective States according to their State-owned characters.[593] Based on graphical information presented in the study of the European Commission, and with reference to the data of the European Regional Airlines

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[588] See Article 11 of the Chicago Convention:

> Subject to the provisions of this Convention, the laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

[589] See ICAO, "Mitigating Ash Impacts －What We've Learned and Improved Post 2010" online: (2013) ICAO Journal Vol 58, No 1 at Page 17.
＜http://www.icao.int/publications/journalsreports/2013/5801_en.pdf＞.

[590] See Paul Stephen Dempsey & Laurence E. Gesell, *Air Commerce and the Law*, *supra* note 146 at 457.

[591] Air traffic control (ATC) system is to prevent a collision between aircraft operating in the system and to provide a safe, orderly and expeditious flow of traffic, and to provide support for National Security and Homeland Defense.
See Chapter 2- General Control, 2-1-1 ATC Services, FAA online:
＜http://www.faa.gov/air_traffic/publications/atpubs/ATC/atc0201.html＞.

[592] Taking Eurocontrol as an example, the role of Eurocontrol is to provide all Member States to achieve safe, efficient and environmentally-friendly air traffic operations across the European region.
See Eurocontrol online: ＜http://www.eurocontrol.int/articles/our-role＞.

[593] According to a survey report made by ICAO in 2007, 73% of the sampled international airports were, fully or partially, State-owned. In addition, private participation in the provision of air navigation services remains rare to date.
See ICAO, *Report for Ownership, Organization and Regulatory Practices of Airports and Air Navigation Services Providers 2007* (July 2008), online ICAO:
＜http://www.icao.int/sustainability/Documents/Report_OwnershipStudy_en.pdf＞.

Association and of Association of European Airlines, in 2010 the ATC companies were responsible for 15-25% of total delays decisions.[594] About half of the cancellations in the 2010 volcanic ash crisis were decided by navigation controllers.[595] In other words, the government "sector" is answerable for a significant amount of flight delays, which are incidentally beyond the air carriers' control. Although governments will not contribute to this fund, they could be a stakeholder in the flight delay fund by not levying taxes from revenues or profits made by this fund.

5.2.3.5 Fund Operator

Undoubtedly, the aviation insurance underwriters have significant experience with insurance in the air transportation market with their air carriers and passengers insurance products. The aviation insurance underwriters appear to be the choice group to manage the fund to ensure the smooth operation of the fund within the aviation industry's unique characteristics.[596] Given such rationale, the proposed fund should be managed by the aviation insurance underwriters to ensure that there is a sufficient sustainable capital base to settle potential passengers' claims. Therefore, the insurance underwriter should be eligible as the manager of the fund.

5.2.3.6 Supervisor

The role of the fund supervisor is to ensure the transparency in the management of the fund as well as to discourage abuse. Furthermore, since the proposed fund should be a trust fund, it is imperative to avoid any form of governmental interference

[594] It is worth noting that: "According to a European Commission working paper published in April 2011 on the operation of Regulation 251/2004, about half of the cancellations in 2010 were due to the volcanic ash crisis which took place in April of the same year. This illustrates the high impact of circumstantial or cyclical disruptions on overall airline timeliness."
See "Effectiveness of Consumer Protection Regulations" ATConf/5-IP/1, online: ICAO ＜http://www.icao.int/Meetings/atconf5/Pages/WorkingPapers.aspx#IP-1＞.

[595] *Ibid.*

[596] See Rod D. Margo, *supra* note 530 at 12.

in managing the decisions made by the trustee/manager. The supervisor should be acting independently and should be an entity with no political agenda.

From an industry perspective, for instance, IATA could be a candidate to act as the supervisor because of its 260 airline members[597] who will be the major transferor under the fund. Furthermore, as IATA fully understands and appreciates aviation characteristics and industry practices, its appointment will help the manager to implement the plan for the fund. Alternatively, participating air carriers and airport managing entities could prefer to organize a finance committee to act as the supervisor.

Given the outline of the roles for each of the stakeholders, the remedy offered by the fund should reduce the air carriers' financial burden of recovering necessary expenses and the obligations of offering complimentary services. As a result, air carriers should be able to efficiently use their limited manpower at airports to reroute passengers or to refund a valuable portion of the air tickets for passengers instead of trying to arrange food or accommodation services or having to be distressed over legal claims for providing inadequate services. At the same time, airport managing entities will be encouraged to upgrade various supplies and accommodation facilities to satisfy passengers' needs during their waiting period at the airports. For the passengers, the fund will provide a fair and efficient remedy mechanism to supplement their extra expenses without the additional cost of insurance premiums. As a result, all stakeholders will be committed to a risk-sharing network to minimize inconvenience to passengers rather than arguing who should be responsible. The proposed fund, therefore, performs the risk sharing functions among stakeholders and can efficiently settle passengers' claims on the spot.

[597] IATA Home page (May 2015), online: ＜http://www.iata.org/Pages/default.aspx＞.

5.2.4 Principles of Administrating the Fund

How will the fund be managed to ensure its continuous success? The principles of administrating the fund are briefly introduced by identifying the objectives of the fund and the payment of subscriptions. The details of the administration of the fund, such as "operations and transactions of the fund", "organization and management", "supervision and auditing" and "termination of participation or liquidation of the fund", are technical matters and will be left for a further study since this thesis focuses on justifying an alternative remedy mechanism to replace air carriers' regulatory services.

5.2.4.1 Objectives

The main objectives of the fund, which is solely for *force majeure* delays, are:

(1) To promote cooperation among all the stakeholders by forming a fund based on a risk sharing mechanism, which allows passengers to supplement their out-of-pocket costs while waiting during delays caused by *force majeure.*

(2) To simplify procedures for passengers to efficiently make claims without prejudice.

(3) To solve conflicts arising from legal uncertainties among air carriers, passengers and airport managing entities which cannot be harmonized by lawmaking and which may hamper the growth of international air transportation.

5.2.4.2 Payment of Subscription

As emphasized, the fund replaces air carriers' and the airports' obligations under the contingency plan to offer complimentary services to passengers during *force majeure* delays, which no one should be blamed for. The fund, therefore, should act as supplement to passengers' extra costs and/or to comfort passengers' inconvenience

instead of recovering passengers' costs or compensating passengers' mental anguish. Accordingly, the subscription of each air carrier and airport managing entity shall be injected into the fund, and a detailed financing plan for this fund should rely on actuarial and other experts to conduct further assessment. The subscription structure is briefly illustrated below to assure sufficient financial support for the operation of the fund.

(1) Air carrier ("X") contributes a certain amount that is based on a predetermined formula for carrying each passenger ("Y"), which is added to X's credit account in the "fund".

(2) The airport managing entity ("Z") who is collecting a service charge from X and airport tax from Y should also contribute a certain amount based on a predetermined formula involving the number of passengers using the airport, which is added to Z's credit account in the fund.

(3) The funds contributed by air carriers and airport managing entities would be managed and operated by an experienced manager ("M") and overseen by an assigned supervisor ("S") representing stakeholders.

(4) In case of a delay caused by *force majeure*, Y will wait for X's rerouting and if the delay has met certain conditions, the fund will offer the remedy. Y should fill in the standard form which should be endorsed by X indicating the delay time, cause of delay, and agreed remedy. (Such forms are currently used in practice by air carriers who issue a delay certificate to passengers to claim insurance compensation.[598]) With the endorsed form, Y then can claim the fixed amount from the assigned agent of M located at airport Z, or Y can later claim

[598] For instance, Cathay Pacific Airways provides the "flight certificate request form" online: ＜http://downloads.cathaypacific.com/cx/CRD/cx_insurance_form_zh1.pdf＞.
Passengers of KLM are able to claim the certificates at:
＜ http://www.klm.com/travel/jp_en/customer_support/customer_support/certificates/index.htm＞.

the remedy from M within a certain deadline.[599]

(5) At the point where passenger Y receives the endorsed form, it will be deemed that air carrier X has handed over its obligations to offer complimentary services to passenger Y through the fund.

(6) Since airport Z will also participate in the fund, passenger Y can also claim a monetary remedy from the fund by providing the certificate issued by Z to confirm Y's beneficiary status.

(7) M should establish detailed financial rules and procedures in order to ensure effective and efficient financial administration and operation of the fund for each air carrier. Moreover, M will publish an annual report containing an audited statement of its accounts and issue monthly interim financial statements.

(8) Should it be required, a simple majority of air carrier and airport managing entity stakeholders will vote to determine the need for an internal auditor or the need to have the interim financial statements reported upon by an external audit firm.

Given the structure of the fund, the following information should be taken into account to ensure that the sufficient funds are available for the operation of the fund. Globally, air carriers carried three billion passengers on board thirty million scheduled flights in the year of 2012, and these numbers are expected to double by 2030.[600] This statistic provides a rough but predicable figure to form the fund based on three billion passengers and there will even be more passengers flying in the coming years.

[599] The reference of conditions can be found in the "Westjet RBC World Mastercard Emergency Purchase and Flight Delay Insurance Certificate of Insurance", which can be found online: ＜http://www.rbcroyalbank.com/cards/documentation/pdf/WestJet-RBC-World-Emerg-Purch_Flight-Delay.pdf＞.

[600] See Raymond Benjamin, *Address by the Secretary General of ICAO to the ICAO/McGill-Pre-Assembly Symposium*, 21th September 2013 online: ICAO ＜http://www.icao.int/Meetings/ICAO-McGill2013/Documents/1-SG.pdf＞.

Assuming every air carrier participates in the fund and pays US$1.00 for each carried passenger, the fund would collect about US$3 billion in total in the first year. As long as passenger travel increases as predicted, the fund would keep growing in subsequent years. Taking the 2010 volcano eruption of Eyjafjallajökull as an example, the Oxford Economics estimated that the cumulative negative impact on the airline industry and destinations came to US$2.2 billion for the main crisis period.[601] These figures provide reference to estimate the fund with US$3 billion in the first year that will sufficiently handle the serious delays caused by *force majeure* should there be another eruption of say, Eyjafjallajökull.

Moreover, in practice, air carriers offer each passenger a meal and beverage coupon at the value of US$10 to US$20. If a complimentary accommodation is needed, the total supplementary amount including meals, beverage and transportation could add up to US$150 per passenger per night, an amount that is based on the author's experience in handling flight delay claims. From the passengers' perspective, passengers can hardly find any insurance product for compensating flight delay by paying out US$1.00 as the insurance premium[602] in return for delay remedy to supplement passengers' out of pocket costs at US$150 per night. In other words, the fund is able to offer most passengers an attractive remedy mechanism compared to current insurance products; for instance, passengers are able to have RMB 500 (about US$78) for flight cancellation after paying RMB20 (about US$3) for "Flight Delay Insurance" offered by China Eastern Airlines.[603]

[601] See Elin Thora Ellertsdottie, *supra* note 576 at 132 and 133.

[602] The finding is concluded by referring to the standards insurance contract terms offered by AIG and Zurich Insurance Ltd. Jardien Matheson Group Taiwan/Jardine Lloyd Thompson Ltd. The premium is more than US$1, and the compensation amount is subject to distinct terms and conditions of insurance policy.

[603] See Section 5.1.2.2.

To conclude, the fund offers an alternative remedy mechanism to supplement passengers' extra expenses and/or to comfort passengers' inconvenience which is the air carriers' regulatory obligations of offering services, like meals, beverage, communication, and/or hotel accommodation. As a consequence, the fund translates the air carriers' "economic care" component into "cash remedy" instead of providing "tangible goods". This system will mitigate disputes over unsatisfactory services resulting from the uniqueness in the political, socio-economic and cultural factors.

5.3 Essential Mutual Respect between Air Carriers and Passengers

A well-organized fund could satisfy passengers' expectations of having a simple, fair and efficient remedy mechanism to replace air carriers' services without suffering arcane legalese or long procedures in claiming for remedies. However, as emphasized, in *force majeure* delays, the majority of passengers also expect air carriers' to "respect" them, which the insurance compensation cannot offer to passengers. More importantly, as explained in Section 4.2.2.3, infringement of passengers' dignity has triggered a cause of action against air carriers since air carriers are able to defend against compensation to passengers in *force majeure* delays. That is why the novel remedy mechanism is not limited to satisfying passengers' expectations of financial supplement through the fund, but also includes proposed codes of conduct both for air carriers and passengers. The proposed codes of conduct aim to add conditions to implement the fund with the mutual respect between air carriers and passengers. Such conditions will be specified in the standard form issued by air carriers to passengers to assure the passengers' beneficiary status, and at the same time to reaffirm rules to achieve mutual respect recognized by air carriers and passengers. The author's two proposed codes of conduct are summarized below.

5.3.1 Code of Conduct for Air Carriers

In terms of mutual respect, the code of conduct for air carriers should be reviewed from the passengers' perspective in exchange for passengers' promise to honor their (passenger) code of conduct. In this regard, based on the author's experience in handling passengers' complaints against air carriers, passengers always demand that air carriers advise the passengers with updated flight information and of available choices so that they can make a suitable choice and continue on their journey. Therefore, air carriers should:

(1) Update passengers with available flight information from time to time, or advise passengers where they could check for updated flight information;

(2) Provide manpower to handle passengers' request to reroute their final destination under comparable transport conditions as soon as possible, but of course this is subject to the availability of seats;

(3) Provide manpower to handle passengers' request to reimburse them part or parts of their journey that were not made, and for the part or parts already made if the flight no longer serves any useful purpose, taking into consideration the original flight plan, and also a return flight to the first point of departure as noted on the ticket;

(4) Provide clear and transparent information for various charges if passengers do not like the air carriers' rerouting plan, and decide to find alternate air routes; and

(5) Offer services or assistance to all delayed passengers without judging their nationalities, seat classes, economic status, and race.

The fund will only replace air carriers' obligations of offering passengers services in *force majeure* delays, and air carriers should still provide flight information, rerouting, reimbursing and other assistance for passengers. To establish a defense to

offering services to passengers, air carriers should clearly disclose the conditions for seeking a remedy from the fund and their other policies regarding passenger assistance in *force majeure* delays.

5.3.2 Code of Conduct for Passengers

The passengers' code of conduct should be incorporated into air carriers' conditions of carriage to propose a complete dispute resolution related to air carriers' obligations regarding services in *force majeure* delays.

As mentioned in the Introduction, the consumers' representatives demanded "reciprocal treatment" while the author negotiated with representatives of the consumer protection agencies to accept the provision in the Taiwan *Civil Aviation Act* to punish unruly passengers' refusal to disembark. To stop passengers' unruly behavior, air carriers are willing to offer complimentary services to passengers during delays. These services were treated as a kind of "respect" to passengers. However, this reciprocity treatment would be determined by actual circumstances and the passengers' needs during the waiting period.[604] In order to establish this fund, the author believes that it is the passengers' turn to compromise by reciprocating their respect to air carriers so that conflicts between air carriers and passengers may be avoided. Any disputes should be settled completely without further arguments. Thus, the passengers' code of conduct must be a condition to the remedy offered by the fund. After passengers have received the endorsed claim forms, their beneficiary status from the fund is confirmed; meanwhile, they should also give up making any further

[604] In Taiwan, if passengers refuse to embark or disembark after the aviation police made official order to urge passengers to embark or disembark from airplane, passengers would be considered as offences of Article 135, paragraph 2 of the Taiwan Criminal Code, which provides:

> A person who employs threats or violence with purpose to compel a public official to perform an act relating to his public duties, with purpose to obstruct the lawful performance of such public duties, or with purpose to cause such public officials to resign shall be subject to the same punishment.

claims, including pecuniary and non-pecuniary remedies, related to free services against the air carriers. Thus, passengers' claims for mental anguish resulting from *force majeure* delays will not be an issue.

5.3.2.1 Essential Code of Conduct for Passengers

At the ICAO 5th International Air Transport Conference, the ICAO Secretariat viewed that there will probably always be "irrational factors for passengers' dissatisfaction". ICAO also proposed to enhance consumer education to achieve increasing passenger satisfaction.[605] Furthermore, it is very interesting that there is no specific "code of conduct" governing air passengers' behaviors but the passenger code of conduct is widely recognized when taking a bus[606] or train.[607] The legal framework for restricting passengers' travel by air, the author states with some hesitation, may be referred to the "Aviation Security Manual" (Doc 8973 – Restricted). This was issued by ICAO to provide guidance for the Contracting States in applying Annex 17 to the Chicago Convention in order to establish the effectiveness of measures designed to prevent acts of unlawful interference.[608] In addition, the brief, the *Resolution Relating to Updating Circular 288 - Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*[609] was issued by ICAO on 2 April 2014

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[605] *Ibid.*

[606] For instance, Chittenden County Transportation Authority (CCTA) published its passenger code of conduct online: ＜http://cctaride.org/how-to-ride/code-of-conduct/＞.

[607] See Passenger Code of Conduct, Arriva Trains Wales online: ＜http://www.arrivatrainswales.co.uk/PassengerCodeofConduct/＞.

[608] See Aviation Security Manual (Doc 8973 – Restricted) ICAO online: ＜http://www.icao.int/Security/SFP/Pages/SecurityManual.aspx＞.

[609] "Resolution Relating to Updating Circular 288 - Guidenace Material on the Legal Aspects of Unruly/Disruptive Passengers" ICAO (DOTC Doc No 32), ICAO online: ＜http://www.icao.int/Meetings/AirLaw/Documents/DCTC_32_en.pdf＞.

The definition of unruly behavior includes the threat of or actual physical assault, or refusal to follow safety-related instructions by referring to the Montreal Protocol 2014 which makes important changes to the original Tokyo Convention. See Unruly Passengers, IATA online: ＜ http://www.iata.org/policy/Pages/tokyo-convention.aspx＞.

The meaning of disruptive passenger means: "A passenger who fails to respect the rules of conduct at an airport or on board an aircraft or to follow the instructions of the airport staff or crew members and

during the International Conference on Air, which aims to provide guidance on what constitutes unruly or disruptive behavior on board a civil aircraft.[610] By issuing the guidance, ICAO recognized that "existing international law as well as the national laws and regulations in many States may not be fully adequate to deal effectively with less serious types of offences and other acts committed by unruly or disruptive passengers on board a civil aircraft".[611] Following ICAO's guidance for handling unruly passengers, IATA developed its own guidance for air carriers to develop their business approach of handling unruly passengers without contradicting the State regulation.[612] In addition, IATA clarified that there is no "one-size-fits-all" approach to preventing and managing unruly passengers, but provided a non-exhaustive list of examples of "unruly/disruptive" behaviors instead.[613] In other words, there is no global binding code of conduct for air passengers, and passengers' unruly behavior is subject to different national laws.

It is also important to note that the guidance under the ICAO and IATA legal regime for unruly passengers is solely restricted to passengers "on board" the aircraft;

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thereby disturbs the good order and discipline at an airport or on board the aircraft."

610 See *Ibid*.

611 See *Ibid*.

612 See IATA Unruly Passenger Prevention and Management 1st Edition (December 2012), IATA online: < http://www.iata.org/policy/Documents/2013-V1-PUBLIC-Guidance-on-Unruly-Passenger-Prevention-and-Management.pdf >.

613 IATA has established the following non-exhaustive list of examples of "unruly/disruptive" behaviors on board:

- Illegal consumption of narcotics;
- Refusal to comply with safety instructions; (examples include not following Cabin Crew requests, e.g., instructions to fasten a seat belt, not to smoke, turn off a portable electronic device or disrupting the safety announcements)
- Verbal confrontation with crew members or other passengers;
- Physical confrontation with crew members or other passengers;
- Uncooperative passenger (examples include interfering with the crew's duties, refusing to follow instructions to board or leave the aircraft);
- Making threats (includes all types of threats, whether directed against a person, e.g., threat to injure someone, or intended to cause confusion and chaos, such as statements referring to a bomb threat, or simply any threatening behavior that could affect the safety of the crew, passengers and aircraft);
- Sexual abuse / harassment; and
- Other type of riotous behavior. (examples include: screaming, annoying behavior, kicking and banging heads on seat backs/tray tables)

that is to say, it is somewhat uncertain whether the air carriers are allowed to stop passengers' unruly conduct before the departure or after arrival. Some air carriers therefore will indicate why certain "passengers are not accepted" on their flight. For instance, American Airlines focuses on passengers' health conditions[614], whereas EVA Air extends to various unruly behaviors[615], such as:

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[614] "Passengers Not Accepted" under American Airlines' website shows:
The following types of passengers will NOT be accepted for travel:

- Passengers who must travel on a stretcher.
- Pregnant passengers expecting delivery within seven days of departure. For travel trans-Atlantic, trans-Pacific, and to or from Central or South America, is not permitted if expecting delivery within 30 days of departure.
- Newborn babies (within seven days of delivery) unless parent or guardian has a medical certificate indicating travel is authorized.
- Customers with questionable contagious diseases. Contact SAC for determination. Queue record to DFW105/11 or contact American Airlines reservations. Contagious diseases are indicated below.
    - Chicken Pox
    - Diphtheria
    - Hepatitis A
    - Lice
    - Measles - German and Red
    - Meningococcal Meningitis
    - Mumps
    - Polio
    - Open, draining or bleeding sores
    - Tuberculosis (TB)
- Comatose passengers are not accepted on American Airlines. The passenger must be able to follow emergency procedures.
- Passengers unable to sit upright with seatbelt fastened. The only exception is a passenger in a body cast. Contact American Airlines Reservations for details.

See American Airlines online: ＜ http://www.aa.com/i18n/agency/Travel_Experience/Accept_pax_overview.jsp#Passengers%20Not%20Accepted＞.

[615] The "General Conditions of Carriage" provides a provision for EVA Air to refuse the carriage:
ARTICLE 7 — REFUSAL AND LIMITATION OF CARRIAGE
7.1 RIGHT TO REFUSE CARRIAGE
In the reasonable exercise of our discretion, we may refuse to carry you or your Baggage if we have notified you in writing that we would not at any time after the date of such notice carry you on our flights. In this circumstance you will be entitled to a refund. We may also refuse to carry you or your Baggage if one more of the following have occurred or we reasonably believe may occur:
7.1.1 such action is necessary in order to comply with any applicable government laws, regulations, or orders;
7.1.2 the carriage of you or your Baggage may endanger or affect the safety, health, or materially affect the comfort of other passengers or crew;
7.1.3 your mental or physical state, including your impairment from alcohol or drugs, presents a hazard or risk to yourself, to passengers, to crew, or to property;
7.1.4 you have committed misconduct on a previous flight, and we have reason to believe that such conduct may be repeated;
7.1.5 you have refused to submit to a security check;
7.1.6 you have not paid the applicable fare, taxes, fees or charges;
7.1.7 you do not appear to have valid travel documents, may seek to enter a country through which you may be in transit, or for which you do not have valid travel documents, destroy your travel

"the carriage of you or your Baggage may endanger or affect the safety, health, or materially affect the comfort of other passengers or crew"; and

"you have committed misconduct on a previous flight, and we have reason to believe that such conduct may be repeated".[616]

The reason for EVA Air to make such rules could be traced back to a Taiwanese passenger's abuse of his passenger right. In this instance, the passenger allegedly sought to personally inflict his "improve the cabin crew's training" by pressing for the cabin chief to deliver ten times his meal service on that single flight.[617] Furthermore, on his previous flight with EVA Air, he made three requests to be served fresh ground coffee, made for business class passengers even though he sat in the economy class. After the coffee was served to him, he refused to have the coffee each time declaring it wasn't good.[618] Under these circumstances, although this particular passenger's behavior did not affect flight safety or security, it bordered on abuse of the passenger's rights and caused the crew member mental stress. As a result, EVA Air decided to prohibit this particular passenger to fly with them. EVA Air's treatment of

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documents during flight or refuse to surrender your travel documents to the flight crew, against receipt, when so requested;

7.1.8 you present a Ticket that has been acquired unlawfully, has been purchased from an entity other than us or our Authorized Agent, or has been reported as being lost or stolen, is a counterfeit, or you cannot prove that you are the person named in the ticket;

7.1.9 you have failed to comply with the requirements set forth in Article 3.3 above concerning sequence and use, or you present a ticket which has been issued or altered in any way, other than by us or our Authorized Agent, or the ticket is mutilated;

7.1.10 you fail to observe our instructions in respect to safety or security.

[616] By referring to local news, one passenger continuously caused trouble to cabin crew of EVA Air, so EVA Air decided not to accept this passenger. The well-known case was to request cabin chief to provide meal before taking off, and he went to the kitchen to take a drink when air crew were busy for passengers' seating. Before taking off, cabin crew discovered that this passenger did not close the drawer of the beverage trolley, which may cause serious safety issue.

EVA Air made a public announcement not to carry this passenger; yet, for safety consideration, the Taiwan CAA respected EVA Air's approach even though consumer protection supporters made comments on EVA Air's refusal of carrying this passenger. To avoid arguments, EVA Air indicates the rules not to carry the passenger with unruly behaviors in their record, which is so called "passengers in black list". See Apple Daily News, "EVA's First Case of Refusing to Carry A Unruly Passenger" (10 September 2011) online:

＜http://www.appledaily.com.tw/appledaily/article/headline/20110910/33659334/＞ (in Chinese).

[617] See Apple Daily News, *Ibid*.

[618] *Ibid*.

this passenger resulted in an argument in public circles that without causing a safety or security concern, EVA Air should not refuse to carry this passenger without notifying him in advance. EVA Air, therefore, made a press release not to carry this passenger, and subsequently introduced in its conditions of carriage the right of refusal to carry passengers with a past misconduct record. This case had opened up a "public secret" that air carriers do have their own book of blacklisted passengers who are not welcome on board their flights.[619]

By referring to the above-mentioned rules and practice to handle unruly, disruptive or unwelcome passengers, it is crucial to consider whether air carriers are able to stop the proposed fund from providing a remedy to unruly passengers because of their misconduct during the waiting period. In other words: Is there a need to establish a code of conduct for air passengers which will allow them to decide or decline to offer the remedy from the fund to passengers who refuse to embark or disembark from the airplane during the delay? Is there a need to punish passengers who misbehave where such misconduct affects operations during the flight delay waiting period? Or, to passengers who have filed claims against air carriers for additional civil compensation after benefiting from the remedy? Undoubtedly, the answers should be positive in order to completely settle flight delay caused by *force majeure* through the proposed remedy mechanism. To solve delay disputes and to implement the "mutual respect" mentality, it becomes necessary and important to have the code of conduct governing air passengers' behavior associated with the benefit given by the fund.

[619] It was a hot topic for Mainland Chinese to debate on the rationale for air carriers to have a black list of passengers who refused to disembark from airplane or caused trouble to air carriers' operation. See "Who made the decision to name the black list?", Fujian Daily News (27 February 2012) online: ＜http://news.xinhuanet.com/air/2012-02/27/c_122757155.htm＞ (in Chinese).

5.3.2.2 Proposed Code of Conduct for Passengers

Given the rationale of having a code of conduct for the air passengers, the next question will be: What should be incorporated into this code of conduct in order to meet the objectives of the fund? In response to this question, the author believes that the code of conduct should at least include the following:

(1) Refusal of carriage — Air carriers are able to deny services to a particular passenger or his/her baggage if he/she refuses disembarkation from an airplane or embarkation on board an airplane under the excuse of flight delays caused by *force majeure*.

(2) List of "unwelcome passengers" — Following the passenger's decision to be rerouted and acceptance of the certificate of flight delay caused by *force majeure*, the air carrier is then considered to have discharged all its liability and obligations for the delay. However, if a passenger takes action against any of the air carriers involved in the flight delay, this passenger would take the risk of being listed as an "unwelcome passenger" for future flights and any stakeholder air carrier shall reserve the right to refuse carriage of the passenger for a period of time of their choice.[620]

(3) Refusal to pay remedy — The air carrier is entitled to withdraw its approval to issue a remedy to the passenger by the manager if this passenger takes action against any of the concerned air carriers due to the same *force majeure* delays and if the passenger has not yet claimed for the remedy. Any paid remedy plus additional costs for handling legal matters should be retrieved from the passenger.

[620] The rationale to set up "certain period of time" is also based on the author's handling experience and some air carriers' policy to handling unruly passengers to protect human rights and to reduce operational costs of handling unruly passengers.

In brief, after receiving payment in respect of the remedy, affected passengers should avoid unruly behavior in order to guarantee a harmonious aviation development, especially in a delay caused by factors which no one should be blamed.

5.4 Conclusion

To close this chapter, we have to evaluate whether the proposed remedy mechanism would satisfy this question: Who should be responsible for damages and/or inconvenience resulting from flight delays caused by weather or other unforeseeable factors? The author believes the fund plus the codes of conduct provide a favorable answer because:

Firstly, insurance has always been the preferred way to control risks in the aviation business; but, as it is, the traditional insurance mechanism hardly provides thorough solutions both for air carriers and passengers to address disputes arising from *force majeure* delays these days. For instance, the insurance mechanism is unable to mitigate complexities and uncertainties resulting from the Conventions and national laws in *force majeure* delays. In addition, available insurance products provide distinct and separate risk sharing pooling for air carriers and passengers; thus, insurance mechanisms are not served to fairly distribute risks. On the passengers' side, travel interruption insurance is relatively popular and allows passengers to share risks with the insurance underwriters. However, in reality, that same insurance offered to individual passengers has so far been unable to completely resolve conflicts between the air carriers and most passengers in long delays which air carriers cannot be blamed for and an example is the 2010 Eyjafjallajökull case. As a consequence, the limitations of traditional insurance mechanisms support the need for having a novel remedy mechanism.

Secondly, this chapter briefly outlines certain key principles of the proposed fund and the structure and management of the fund, and the risk sharing functions among the stakeholders. More importantly, based on a mentality of mutual respect, both air carriers and passengers should comply with their codes of conduct as a condition to enjoy the benefits of the fund. As a result, the proposed fund will initiate a practical solution, which is beyond liability-bearing arguments and without discrimination, and allows stakeholders to jointly share risks resulting from flight delays caused by weather or other unforeseeable factors.

Even though the fund may not guarantee to resolve all disputes between air carriers and passengers resulting from *force majeure* delays, most of the disputes related to air carriers' "complimentary services" could be dismissed. In summary, the expected benefit for each stakeholder would be:

- Passengers - Every respectful passenger is equally treated, and is efficiently remedied by the fund for flight delays caused by *force majeure*.
- Air carriers - Air carriers are able to rely on limited manpower for rerouting or reimbursement to passengers, and to relieve their obligations for compensating passengers and offering complimentary services. Air carriers, therefore, are able to control operating costs in the handling of flight delays caused by *force majeure* or extraordinary circumstance. Should air carriers decide to offer additional complimentary services based on their customer service spirit, they should be free to do so instead of having to weave through the complex web of obligations imposed upon the air carriers by law.
- Airport managing entities - Airport managing entities can enhance their competiveness in passenger services by developing realistic contingency plans to provide necessary needs to passengers during their stay at the airports.

As a result, the fund plus the codes of conduct provide a practical solution for passengers, air carriers and airport managing entities to share unexpected and unpredictable risks resulting from *force majeure* delays.

CHAPTER VI
CONCLUSIONS

6.1 Can the Conventions Offer a Unified Solution to Settle Passengers' Claims against Air Carriers in *Force Majeure* Delays?

6.2 Can National Legislation Successfully Settle Passengers' Claims Resulting from Flight Delays Caused by *Force Majeure* or Extraordinary Circumstances?

6.3 Can We Rely on New Lawmaking or Traditional Insurance Mechanism to Satisfy Passengers' Expectation in *Force Majeure* Delays?

6.4 Can the Proposed Remedy Mechanism Satisfy Passengers' Expectation instead of Making Claims against Air Carriers in *Force Majeure* Delays?

CHAPTER VI

CONCLUSIONS

The key issues analyzed in the previous chapters will be summarized in this final chapter to support the proposed remedy mechanism for *force majeure* delays.

In addition to analyzing the inadequacies of the Conventions to provide unified remedy for *force majeure* delays, this thesis also examines the complexities and uncertainties in legislation and practice in the US, the EU, Taiwan and Mainland China in responding to passengers' claims in flight delays caused by *force majeure* or extraordinary circumstances. Such complexities and uncertainties are more apparent in cases where passengers claim remedies for air carriers' failure to deliver "complimentary services" during the delays. By pointing out complexities and uncertainties in legislation and practice, it reveals the "right vs liability" regime that brings air carriers and passengers into a whirlpool when passengers are seeking pecuniary and non-pecuniary remedies caused by *force majeure* delays and the air carriers are defending a no liability mechanism.

Passengers' expectations are that air carriers should provide adequate services "with respect" to the delayed passengers and to keep on updating accurate information on a timely basis. Air carriers, however, deny any liability to compensate passengers for mental anguish resulting from time loss or for offering inadequate services in *force majeure* delays, which is beyond their control. This unresolved conflict between air carriers and passengers also substantially affects the healthy development of the aviation industry. Particularly, it is the air carriers alone who are currently carrying the obligation to offer complimentary services to passengers in most jurisdictions. As a result, when air carriers refuse to incur unexpected financial costs to offer complimentary services in *force majeure* delays, such as the Eyjafjallajökull Icelandic volcano eruption in 2010, there is no satisfactory answer as to who should be

responsible for damages and/or inconvenience resulting from flight delays caused by *force majeure*. Passengers' expectations in *force majeure* delays are in the area where the law is at a loss to satisfactorily resolve the conflicts between the air carriers and passengers. More significantly, lawmaking can hardly resolve passengers' claims where these involve political, socio-economic and cultural values. This thesis, therefore, aims to propose an alternative and practical remedy to answer this long unresolved dispute arising from air carriers' obligations to offer "regulatory services with respect".

The following questions will review the findings and analysis developed in this thesis to conclude this study.

6.1 Can the Conventions Offer a Unified Solution to Settle Passengers' Claims against Air Carriers in *Force Majeure* Delays?

This thesis was initiated to answer the above question. The conclusive answer is "No!"

The international legal framework formed by the Warsaw and Montreal Conventions has been considered as achieving important successes in unifying certain rules for air carriers' obligations relating to international air transportation. Evidently, a unified solution to passengers' claims for *force majeure* delays cannot be ideally reached because only 113 ICAO Member States (59%) have ratified the Montreal Convention. More importantly, Chapter II illustrates that the remarkable exclusivity principle, which was created by the Warsaw and Montreal Conventions, is being eroded by the different regions where national laws are chosen over the two Conventions. The practice reveals that the terms and application for the Conventions are subject to judicial determination. For instance, the "SQ006 Accident", which took place in Taiwan in 2000, illustrates the distinct outcomes in applying the

Conventions.[621] This incident demonstrates how the application of the Conventions could be affected by political concerns in the US, Singapore and Canada, which are contracting States to the Conventions. In this situation, the political concerns had revealed ways to avoid the application of the Conventions. And accordingly, this also challenges the harmonization objective of the Conventions in governing air carriers' liability in flight delays, which is one of the unified liabilities under the Conventions.

Furthermore, due to the lack of a detailed definition of "damage" for delay claims under Article 19 of the Warsaw Convention, passengers borrow the case-law made for mental anguish that is associated with "bodily injury" specified in Article 17 of the Warsaw Convention to claim damage in flight delays.[622] This phenomenon still remains even though the Montreal Convention provides detailed rules regarding air carrier's limited liability and unlimited liability for flight delays. Article 29 of the Montreal Convention, headed "Basis of claims", clearly indicates that: "punitive, exemplary or any other non-compensatory damages shall not be recoverable". That is to say, Article 29 of the Montreal Convention provides a gap for national laws applicable to recover passengers' damages where the Convention is not applicable. Particularly, Article 20 of the Warsaw Convention and Article 19 of the Montreal Convention both allow air carriers to avoid liability where they can show that they had taken every necessary precaution to avoid the delays.[623] In practice, the remedy scheme for international flight delays caused by *force majeure* is in most cases subject to national laws instead of the Conventions. For instance, Articles 19 and 29 of the Montreal Convention jointly provide an opening for the claimant's lawyer to circumvent the Conventions' limited compensation if national law allows damages for "mental injury" (Chinese:精神損害) resulting from delays which are beyond air

[621] See Section 2.3.
[622] See Section 2.4.
[623] See Section 2.5.

carriers' control. This is the case in the EU (time loss and inconvenience), Taiwan (delict/infringement of dignity) and Mainland China. As a result, relying on the international legal framework, like the Conventions, to solve passengers' claims resulting from *force majeure* delays has proven to be unsatisfactory.

6.2 Can National Legislation Successfully Settle Passengers' Claims Resulting from Flight Delays Caused by *Force Majeure* or Extraordinary Circumstances?

Chapters III and IV examined the response to the above question in the US, the EU, Taiwan and Mainland China. These two chapters explored the controversies, complexities and uncertainties arising from remedies that are offered for flight delay claims, especially when *force majeure* or extraordinary circumstances are involved. These current controversies and complexities indicate an unfavorable answer to the above question.

In both the US and the EU, neither the Conventions nor the domestic statutes clarify the scope of "damage" for which air carriers are liable for *force majeure* delays. In case of "international carriage" as defined by the Conventions, air carriers argue for no compensation for unforeseeable delays by proving that it and its servants and agents have taken all measures which could reasonably be required to avoid the damage, or that it was impossible for it or them to take such measures. For flights where the Conventions are not applicable, air carriers in the US and the EU have also refused to undertake liability for unforeseeable flight delays by referring to national legislation and their conditions of carriage. To be more specific, Section 3.2 in Chapter III explains the remedy mechanism under the US DOT Tarmac Delay Rules and specifically emphasizing passenger's protection in "tarmac delays". Meanwhile, the CFR 253.4(b) and (c) provide that air carriers are obligated to display the full text

of their terms and conditions specified in their contract of carriage. Accordingly, air carriers do display and inform passengers of contractual terms, but such terms also allow air carriers to have the flexibility of achieving their marketing strategies in a competitive market. Thus, parallel regimes, including regulatory and contractual obligations, are in place to govern the consequences of delays. These regimes provide for passenger protection as well as for aviation development. As a result, air carriers declare limited obligations for offering services in *force majeure* delays by means of contract arrangements.

Section 3.3 of Chapter III discusses the EU legislation and CJEU's views, which demonstrate that air carriers must carry compulsory obligations to compensate passengers in delays unless such delays were caused by extraordinary circumstances. However, to enhance "a high level of protection for passengers", the EU Regulation 261/2004 demands that air carriers offer "free assistance", such as meals, refreshments, and hotel accommodation in cancellations and long delays, and even for delays caused by extraordinary circumstances. In spite of that, Section 3.3.2.3 explains how the European air carriers could limit their obligations for offering complimentary services through their conditions of carriage since the EU Regulation 261/2004 does not specify the rules for offering such free assistance. The author found one significant controversy that reveals air carriers' obligations to render services in the tarmac delay under the US statute; on the other hand, there is no exception for all delays under the EU Regulation 261/2004. In practice, however, passengers' expectations of air carriers to offer free assistance did experience a severe challenge in the complimentary services in a serious flight delay that was caused by the Eyjafjallajökull Icelandic volcano eruption in 2010. This new level of expectation landed a heavy blow to the EU Regulation 261/2004 and set up a challenge for the Regulation's "high level of protection for passengers" policy. Furthermore, the

extraterritoriality issue resulting from the US and the EU legislation was also briefly brought up to reveal the uncertainty of placing liability on foreign air carriers outside the US and the EU territories.[624] As a consequence, present legislation has yet to provide satisfactory remedy mechanisms to meet passengers' expectations in *force majeure* delays. In other words, the "right vs liability" legal frameworks rooted in the legislation of the US and the EU, have so far not been able to settle passengers' claims resulting from flight delay caused by f*orce majeure* or extraordinary circumstances.

Taiwan and Mainland China, representing the growing aviation markets in East Asia, illustrate different approaches to passenger claims resulting from *force majeure* delays. Chapter IV emphasizes that Taiwan and Mainland China passengers' claims are affected by the political sensitivity surrounding the "One-China" policy. In addition, the special socio-economic and cultural influences affect the application of the Conventions and national legislation in passenger protection and passenger claims in *force majeure* delays. To meet with passengers' expectations, reported court judgments indicate inconsistencies between legislation and practice in response to remedies rendered to passengers' claims for *force majeure* delays. For example, Sections 4.2.1 and 4.2.2 explain how Taiwan has been offering a very high level of passenger protection because the air carriers are burdened with obligations to offer monetary compensation and complimentary services to passengers in *force majeure* delays. In contrast, Mainland China imposes no liability on air carriers to compensate passengers in *force majeure* delays, and any services rendered will be charged to the passengers even if the delay is caused by *force majeure*.

Furthermore, Section 4.2.2.1 uses the JAA EG-209 case to demonstrate a view held by the Taipei District Court to shoulder air carriers' obligation to offer monetary remedies for not offering services even in delays caused by *force majeure*. Section

[624] See Section 3.4.

4.2.2.2 shows that the Taiyuan Intermediate Court and the People's Court of Hefei Suburb allowed passengers to be compensated by refunding ticket fares based on unsatisfactory services in delays caused by *force majeure*. In other words, air carriers can be exposed to liability for *force majeure* delays even though Article 126 of the China *Civil Aviation Act* provides that "the carrier is not liable if it proved that it and its servants or agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures." Again, in Section 4.2.2.3, taking the JAA EG-209 case as an example, the Taiwan judge clearly pointed out the infringement of dignity as a cause of action. Based on the author's handling of passengers' complaints, most of the passengers' claims for mental anguish or unsatisfactory services are based on infringement of dignity (Chinese:人格權侵害). Accordingly, Section 4.2.2.3 briefly explains why the infringement of dignity is associated with passengers' expectations, which have been embedded as a legal norm as a result of the socio-economic and cultural context. Through studying the dignity issue, it adds to the complexities to form a unified compensation mechanism so deeply influenced by socio-economic and cultural interaction in passengers' claims in *force majeure* delays.

In addition, Section 4.3 highlights the complexities and uncertainties in the application of the two national laws for passengers' claims involving cross-Strait flights. By examining such uncertainties in applying either Taiwan law or Mainland Chinese law to cross-Strait flights, this thesis attempts to explain the uniqueness that one cannot rely on the positive law to answer all legal issues involving political sensitivities. This also affects global passengers seeking delay remedies when they travel to East Asia with connecting flights in Mainland China and/or Taiwan. Thus, it is no longer a question of just passengers traveling between Taiwan and Mainland China. Such uniqueness between legislation and practice in the growing aviation

markets provides a different angle to emphasize the value of an alternative solution in handling passengers' claims for *force majeure* delays. Because of the uniqueness in the political, socio-economic and cultural factors, national legislations in Taiwan and Mainland China have manifested difficulties in harmonizing remedy mechanisms for *force majeure* delay claims through lawmaking.

Based on the findings in Chapters III and IV on the existing legislations and passengers expectations, the recommended innovative remedy framework outlined in Chapter V will provide absolute governance outside the traditional lawmaking framework to replace the air carriers' obligations of offering complimentary services and assistance.

6.3 Can We Rely on New Lawmaking or Traditional Insurance Mechanisms to Satisfy Passengers' Expectations in *Force Majeure* Delays?

Again, the findings support a negative answer to the question.

In terms of new global lawmaking, in 2013, 191 ICAO Member States discussed the unified principles for passenger protection at the ICAO 6th International Air Transport Conference and at the ICAO 38th Assembly.[625] Among all the discussions concerning passenger protection, the World Tourism Organization clearly asked for the development of a new convention to strengthen State assistance obligations in *force majeure* affecting travel interruption.[626] It is most interesting to learn that the

[625] The ICAO 6th International Air Transport Conference and the ICAO 38th Assembly has listed passenger protection as one of the crucial issues to be solved, and the flight delay is the core topic among all passenger protection issues. The US and IATA suggested to prevent from overlapping regulatory requirements since a growing number of States have adopted consumer protection regulations. Thus, ICAO should play a role to develop "core principles" or "policy guidance", in conformity with the Warsaw-Hague regime and the Montreal Convention 1999 in an effort to harmonize the approach to consumer protection in an aviation context.
See ICAO Working Papers (ATConf/6-WP/45) and (ATConf/6-WP/60); IATA, Passenger Rights Working Paper, on-line
＜http://www.iata.org/policy/icao-assembly/Pages/icao-passenger-rights.aspx＞.

[626] See The ICAO 6th International Air Transport Conference, Working Papers (ATConf/6-WP/5) Section 2.3

Republic of Singapore expressed that ICAO should, in developing policy guidance on consumer protection, accord the States the "flexibility" to develop consumer protection policies based on their own "unique socio-political and economic context".[627]

As examined in Chapters II, III and IV, the complexities and uncertainties of applying the Conventions and national legislation have highlighted difficulties in resolving conflicts between the air carriers and passengers in *force majeure* delays through new lawmaking. Moreover, neither the international legal framework nor national legal regimes are able to settle disputes involving political, socio-economic and cultural influence in passengers' claims resulting from *force majeure* delays. Taking the 2010 Eyjafjallajökull Icelandic volcano eruption as an example, air carriers refused to undertake unpredictable financial burden to offer passengers monetary remedies and/or unlimited complimentary assistances in meals, beverage, communication costs and hotel accommodation. In addition, passengers' claims for compensating mental anguish and/or for obtaining a remedy for unsatisfactory services are hardly harmonized by traditional lawmaking and distinct legal practice. Under Chapter IV, the Chinese traditions and cultural values rooted in Confucianism discreetly influence the judges in Taiwan and in Mainland China to render "moral fairness" to passengers, who are considered "the weak", in order to undertake the conscientious duty of "helping the weak and aiding the needy" (Chinese:濟弱扶傾). Interestingly, a similar result is also found in the *Sturgeon* and *Nelson* case, where the CJEU held that "the loss of time inherent in a long flight delay constituting an inconvenience within the meaning of Regulation 261/2004 cannot be categorized as

[627] Singapore indicated that the passenger protections are safeguarded by the national consumer protection law in Singapore, and the socio-political and economic context differs from State to State. Singapore, therefore, viewed that ICAO should, in developing policy guidance on consumer protection, accord States the flexibility to develop consumer protection policies based on their own unique socio-political and economic context. See ICAO Working Papers (ATConf/6-WP/69).

‘damage occasioned by delay’ within the meaning of Article 19 of the Montreal Convention, and therefore falls outside the scope of Article 29 of that convention.” In other words, mental anguish, which cannot be recognized as “damage” in the Conventions, is recognized as a cause of action both in Taiwan and the EU jurisdictions. Thus, if the mental anguish cannot be recognized as damage since the 1929 Warsaw Convention came into force, it is hardly any surprise to expect new lawmaking to harmonize arguments and disputes for compensating passengers or for satisfying passengers’ expectations in *force majeure* delays. Such a scenario confirms that any global lawmaking rooted in “right vs. liability” regime cannot guarantee satisfaction for passengers’ expectations of pecuniary and non-pecuniary (respect) remedies in f*orce majeure* delays.

As far as the insurance mechanism is concerned, the “risk” under the definition of insurance risk on air carriers in *force majeure* delays is very different from the “risk” under “strict liability” which is broadly applied for consumer protection. The risk under strict liability is well managed by the traditional insurance mechanism to enhance manufacturing and to protect the consumers. However, air carriers can defend against liability in order not to compensate passengers in delays under the Conventions or national laws, invoking the defence of “*force majeure*”. That demonstrates an “uncertain risk” for air carriers to acquire *force majeure* delays insurance. Consequently, “uncertain risk” and “too expensive” limit air carriers’ ability to rely on insurance mechanisms to cover losses when they do compensate passengers in *force majeure* delays. In addition, passengers’ pain, mental anguish, inconvenience or disappointment of not being offered services is excluded from the scope of recovery under traditional insurance; particularly, the insurance mechanism cannot offer “mutual respect” between air carriers and passengers during the exasperating waiting period in *force majeure* delays. In examining available insurance

products in Section 5.1.3.1, air carriers cannot depend on present day insurance mechanisms to mitigate their losses resulting from *force majeure* delays. On the passengers' side, the present flight delay insurance products, such as travel interruption insurance or comprehensive travel insurance, may provide certain risk sharing function to the passengers. Meanwhile, passengers are still entitled to claim remedies from air carriers under the respective national legislation. Therefore, the current available insurance products just act as an "analgesic" medication to the passengers, and cannot be considered to have fundamentally solved the conflicts between air carriers and passengers in *force majeure* delays.

Consequently, neither new lawmaking nor present insurance mechanisms can be considered to offer fundamental resolution for dismissing the conflicts between air carriers and passengers in *force majeure* delays. Seeking an alternative remedy mechanism other than more lawmaking and the traditional insurance mechanism has become imperative and meaningful.

6.4 Can the Proposed Remedy Mechanism Satisfy Passengers' Expectations instead of Making Claims against Air Carriers in *Force Majeure* Delays?

The objective of this thesis is to provide an affirmative response to the above question. The proposed remedy mechanism is able to propose a fair response and settlement to passengers' claims resulting from unsatisfactory services in flight delays caused by *force majeure.*

Most studies and academic analyses focus on air carriers' liability for "delay" under the Conventions or a hybrid of governing law between the Conventions and national laws. Yet, deeply rooted in the "right vs. liability" regime, neither air carriers nor passengers are satisfied with the current remedy mechanism to resolve conflicts resulting from *force majeure* delays, for which no one party should be responsible.

After reviewing the legal jigsaw and uncertainties in the current governance of flight delays in the US, EU, Taiwan and Mainland China, one could infer that there are no satisfactory answers in response to the question as to who should be responsible for damages and/or inconvenience resulting from flight delays caused by *force majeure*. Based on the author's long-term practice in handling severe passengers' complaints, a novel solution is long overdue and is needed to resolve this *force majeure* delay issue. To avoid legal complexities, this novel solution should be free from the existing uncertainties and conflicts presented by the current legal framework. A simple yet quick and fair remedy mechanism to substitute air carriers' regulatory obligations in offering complimentary services could be created to provide a practical and cost effective alternative to minimize the current complicated, prolix and conflicting claim rules.

To respond to the above-mentioned considerations, a "fund" is proposed to be the remedy mechanism and to implement a risk-sharing function among stakeholders, particularly, for the risks resulting from an event no one should be blamed for. Although the fund serves as a "substitute" for regulatory services, like offering meals, beverage, communication, and/or hotel accommodation, the fund does not waive the air carriers' obligation to "care" for passengers but translates the "economic care" component into "cash remedy" instead of providing "tangible goods". In so doing, air carriers are able to productively use their limited manpower to reroute passengers, if they choose to continue their journey, or to reimburse passengers, if they do not want to continue with their journey. On the passengers' side, passengers would be required to keep in contact with the air carriers to assure their next flights. Meanwhile, with a guaranteed remedy from the fund, passengers are free (with dignity) to make their own choice of finding meals or accommodation instead of "waiting" for free services at the airports, or getting enraged with the unsatisfactory services. Based on

passengers' needs during their waiting period, airports would be able to provide passengers with facilities for updated flights information. Furthermore, airports could offer various services to release passengers' mental anguish rather than leaving them at the airport terminals during *force majeure* delays. The fund, therefore, provides passengers with an immediate financial supplement to satisfy their immediate needs at the airports. In practice, more and more air carriers have issued meal and beverage coupons to passengers for them to use wherever they like instead of providing tangible meal and beverage at the airports itself. This suggests that the proposed approach is already working in practice.

Most significantly, the proposed fund is rooted in the philosophy of "risk sharing" among the stakeholders for delays caused by *force majeure* without regard to political, socio-economic and cultural values. The stakeholders under the proposed fund should at least include passengers, air carriers and airport managing entities which have been discussed in Section 5.2. Of course, passengers are the beneficiaries and the fund should have contributions from ticket fares collected by air carriers and from airport tax collected by airport managing entities. In consequence, passengers, air carriers and airport managing entities substantially share risk resulting from inconveniences and financial burden caused by *force majeure* delays.

Moreover, the fund is not only limited to satisfy passengers' expectations of financial supplementation, but also includes two proposed codes of conducts for both air carriers and passengers. The proposed codes of conducts aim to add conditions to implement the fund with the mutual respect between air carriers and passengers. Such conditions will be specified in the standard form issued by air carriers to passengers to assure the passengers' beneficiary status, and meanwhile to reaffirm the rules to achieve mutual respect recognized by both air carriers and passengers. Air carriers and airport managing entities should keep a "customer oriented" service mentality to

serve passengers because they rely on repeat business from passengers. On the passengers' side, they will enjoy "speed" provided by air transportation in crossing the continents, and should also expect flight irregularities caused by *force majeure* or extraordinary circumstances. Hence, in case of flight delays beyond air carriers' control, air carriers and passengers should honor the essence of "mutual respect" in finding a compromise between passenger protection and aviation development. Accordingly, air carriers should promptly advise passengers with updated flight information and to advise passengers of available choices so that they can make suitable choices and continue on their journey. And, under the passengers' code of conduct, passengers should not make any further claims related to complimentary services against the air carriers after confirming their beneficiary status from the fund. That is to say, it is the passengers' turn to compromise by reciprocating their respect to air carriers so that conflicts between air carriers and passengers may be quickly resolved. The proposed remedy mechanism, under a fund, therefore, will offer passengers with simple, fair and efficient financial supplement instead of making claims against air carriers for unsatisfactory services in *force majeure* delays.

To conclude, surely mankind has no control over *force majeure*, which invariably will cause flight delays. Yet, passengers in the East and in the West share the same desires to be respected and cared for when they are suffering time loss and inconvenience during delays. Notwithstanding, in Aristotle's classic quote: "Law is reason unaffected by desire", legislation and law practice in the new era have to respond to human "desire" or "expectation". The traditional legal framework has for many years on *force majeure* flight delays revealed continued limitations and serious weaknesses. The author's professional experience in Taiwan provides the lessons in responding to passengers' expectations in *force majeure* delays where reliance on the Conventions and the selected national legislation had been used to settle the

differences. In particular, the critical issues and the alternative remedy as suggested in this thesis are only possible because of the author's practice-based background. The experience supports a timely and much needed out-of-the-box alternative to balance air carrier and airport managing entity compulsory obligations with passenger expectations. The proposed contribution-based "fund" is the most practical, fair, simple and non-discriminatory remedy mechanism for *force majeure* delays.

This would be a better time than any to introduce a novel risk-sharing win-win remedy mechanism aimed at substituting air carriers' regulatory services offered to passengers in *force majeure* delays.

APPENDIX A

※Referred articles of the 1929 Warsaw Convention

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR, SIGNED AT WARSAW ON 12 OCTOBER 1929

CHAPTER I SCOPE - DEFINITIONS

Article 1

1. This 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.
2. For the purposes of this Convention the expression “international carriage” means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.
3. A carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

Article 2

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.

CHAPTER III
LIABILITY OF THE CARRIER

Article 17

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

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.
2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
3. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Article 19

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

Article 20

1. The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.
2. In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the 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.

Article 23

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

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

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

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Article 28

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

2. Questions of procedure shall be governed by the law of the Court seised of the case.

Article 29

1. The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
2. The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.

APPENDIX B

※Referred articles of the 1999 Montreal Convention

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR DONE AT MONTREAL ON 28 MAY 1999

Chapter I - General Provisions

Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

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 transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State 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 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.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 - Carriage Performed by State and Carriage of Postal Items

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. In the carriage of postal items, the carrier sha11 be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter III

Article 17 - Death and Injury of Passengers - Damage to Baggage

1. 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.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term «baggage» “ ?” means both checked baggage and unchecked baggage.

Article 18 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19 - Delay

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.

Article 20 - Exoneration

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.

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.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the

carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

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 23 - Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method

of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogram with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either

Article 24 - Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention.

The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall. notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25 - Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26 - Invalidity of Contractual Provisions

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

Article 27 - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the

Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

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.

Article 29 - Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liabilities are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30 - Servants, Agents - Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the 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 servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

APPENDIX C

QUESTIONNAIRES FOR INTERVIEWS

A. Thesis Topic (revised) ─ Remedies for Passengers for Flight Delays Caused by *Force Majeure*

B. Interview Goals

These interview aims to verify that:

1. Flight delay is an important global issue in terms of passenger protection.
2. Flight delay is a factor, which essentially affect aviation development globally.
3. Flight delay is testimony indicating the obvious conflicts between passenger protection and aviation development.
4. The current legislation and disputes solution show there is limited functionality in solving flight delay issues.
5. The current insurance mechanism cannot cover the gaps in flight delay caused by force majeure.
6. Both passengers and air carriers expect a simple compensation mechanism for flight delay claim, for instance, establishing an international fund without border.
7. Airport management authorities should contribute to this international fund in order to justify the fairness of compensation scheme and to improve aviation services.
8. Remedy for flight delay damages should not be solved as pure legal issues without taking into consideration the social value as well as different economic reality.

C. Questionnaires (original questionnaires)

- What is your main occupational experience in the aviation industry?
- Do you agree that flight delay has been a significant issue in international air transportation?
- Do you agree that flight delay simultaneously causes passenger disputes and unexpected costs for air carriers?
- Are you aware that the international conventions or national legislations provide sufficient grounds for passengers to claim damages from air carrier for flight delay?
- Do you agree that air carrier should take all the responsibility for passenger

protection in case of flight delay even though the delay is caused by *force majeure*?

- Do you know that the insurance companies provide insurance product for passengers to seek for remedy in case of flight delay?
- Do you think that the insurance mechanism for passengers and for air carriers do not have sufficient means to cover remedy in flight delay?
- Do you agree that both legislations and insurance mechanism have not provided cost-effective and satisfactory solution for flight delay?
- Do you agree that an innovative remedy for flight delay should be established?
- To provide efficient solution for flight delay, are you willing to consider setting up an international fund with contributions from passengers, air carriers, and airport management?

D. Potential Participants

1. Legal staff or airport managers of the international air carriers
2. Insurance agents or brokers related to international civil aviation
3. Officers of passenger protection affairs
4. Officers of consumer protection agencies

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