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The Survival of the Warsaw System and the New Montreal Convention Governing Certain Rules for International Carriage by Air: Are the Conflicts Solved?

Jeanny Romero González

Faculty of Law
McGill University, Montreal

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Abstract

The year 2003 marks the entering into force of the new Montreal Convention governing certain rules for international carriage by air. This, however, does not mean that the international community, including States, air carriers and their agents, passengers, shippers and consignors, insurance companies and the legal community in general (specially aviation lawyers and judges) shall only rely on this instrument. The Warsaw Convention and its complementary instruments, known as the Warsaw System, is still applicable and in certain circumstances, may be the only existing relation binding States and air carriers, especially in terms of liability and compensatory damages arising from an accident or delay. Good knowledge of the conflicts that may arise within the existing international legal framework is an asset for a successful civil aviation case consultancy or trial.

Résumé

L'année 2003 marque l'entrée vigueur de la nouvelle Convention de Montréal qui régule certaines règles du transport aérien international. Malheureusement, on ne peut pas dire que la communauté internationale, soit les Etats, les transporteurs aériens et leurs agents, les passagers, les entreprises de transport, les affréteurs, les compagnies d'assurance et la communauté juridique en général (en particulier les avocats et les juges) doit seulement compter sur cet instrument juridique. La Convention de Varsovie et ses instruments complémentaires, connue comme le Système de Varsovie, est toujours en vigueur et, dans certaines circonstances, ils peuvent constituer le seul lien juridique contraignant entre les Etats et les transporteurs aériens, notamment en terme de responsabilité et d'indemnisation des dommages survenus à la suite d'un accident ou d'un retard. Une bonne connaissance des conflits qui peuvent survenir dans un environnement international est un atout lors d'une consultation juridique ou dans la gestion d'un contentieux en aviation civile.

Introduction

The aviation industry provides a fascinating area for a fruitful link between law and economics. On the legal field, private international air law focuses its field of study in a very important aspect of the industry, which is international carriage by air. The legal framework governing international carriage by air covers only certain rules for this type of transport, which brings international treaties and national laws to come into conflict, not to mention those conflicts which arise between conventions as well.

The Warsaw Convention of 1929 and its following amending instruments, has been modernized by the recently coming into force Montreal Convention of 1999. As for the conflicts arising between national and international legal bodies, it is important to anticipate concepts such as 'accident', 'bodily injury', operations of 'embarking and disembarking', differences between concepts from one translation to another and the supremacy of language (if applicable). Conflicts of conventions appear when the original scheme governing air transport, evolved, and unfortunately States' policies could not evolve at the same rhythm as the industry's needs required.

This thesis explores the still applicable regulatory system known as the Warsaw System, and the new Montreal Convention, in order to determine whether the previous conflicts arising under the old regime subsist, or they are rather solved. Taking this issue into perspective, this work has the following objectives: 1) to show how conflict of laws may arise in international carriage by air by raising out those issues which are governed by the international regime and those which are governed by national laws; 2) to clarify the purpose of the unification of law in international carriage by air, briefly referring to the evolution and crisis of the Warsaw System and the new Montreal Convention, and 3) to acknowledge the future trends to solve conflicts from a regional approach, which determines the general trend at the global scene.

The First Chapter of this thesis deals with conflict of laws in international carriage by air. Emphasis is provided on those issues which are specifically covered by the international

regime and those which are not. Other general aspects of private international law are dealt with in relation to international carriage by air, such as choice of law, forum shopping, *forum non conveniens* and public order/policy. A brief analysis of conflict of conventions is also provided. The Second Chapter explains the purpose of the unification of law in international carriage by air, describing the Warsaw System, its evolution and crisis in terms of liability limits for the air carrier. Proper mention is given to the new Montreal Convention of 1999 as well as the important role of two major international organisms, ICAO and IATA in their effort for the unification of law in this field. The Third Chapter deals with the future trends to solve conflicts. It describes the merits and demerits of both the Warsaw System and the new Montreal Convention. It emphasizes on the hard task faced by national courts in the aim to achieve uniformity of interpretation relying on two basic elements: the concept of accident and the concept of bodily injury. At last, a final reasoning in favour of the ratification of the new scheme is provided from a regional approach towards multilateral unification of law in international carriage by air.

The air carrier's limitation of liability for bodily injury or death of the passenger, damage to baggage or cargo, and delay, has found an outstanding source of concern and study. Courts in different countries have developed very interesting jurisprudence which has lead to the evolution and modernization of the legal framework. The most recent achievement in this sense is the Montreal Convention of 1999, which has initiated a new era where 'unlimited liability' of the air carrier and a 'fifth jurisdiction' are among the core concepts. No new legal knowledge is provided in this thesis; instead, a remarkable reference to legal experts in this field is aimed to encourage readers for deeper research in this fascinating field of law. The analysis of the existing literature provides for a general solution in the face of various conflicting elements governing international carriage by air: the prompt ratification of the new scheme and the slow but final denunciation of the old regime in an era where risk management and economic factors undoubtedly influence the evolution of law at the international and national level.

Chapter I

Conflict of Laws under the *Unified* International Regime Governing International Carriage by Air

The international regime governing international carriage by air cannot be considered a complete unification of private air law, since it only regulates certain rules related to this type of transport.[1] The lack of unification is also due to the various instruments governing the subject, either in the form of amendments or supplementary provisions. Although the Warsaw Convention is of relevant acceptance among the international community, these instruments do not attempt to eliminate all problems, but rather diminish them, especially in the field of conflict of laws.

As it is not the objective of this work to travel through the evolution of theories of conflicts; the aim of this chapter is to provide the reader with a general overview of what conflict of laws is and then to turn specifically to conflicts of laws in international carriage by air.

a. Conflict of Laws: A General Perspective

Conflict of Laws or Private International Law is the area of law that comes into place when a legal relationship -of private character- involves one or more foreign elements. A foreign element will be one that emerges under another legal system which is outside the scope of applicability of a specific State.

It is precisely the aim of the conflict of laws theory and evolution, to seek for uniformity and unification of principles in order to avoid, as much as possible, any unpredictable and undesirable effects in the court's resolutions which would translate into injustice between the parties involved.

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[1] In the same sense as to whether the drafting of the Warsaw Convention does not solve all conflicts of laws, see, Andreas Kadletz, *Conflicts of Laws in Private International Air Law. The Contracts of Carriage by Air, Aviation Insurance, Aircraft and Purchase, Finance, the Creation of Security Rights in Aircraft and a Common General Part* (LL.M. Thesis, McGill University Institute of Air and Space Law 1996) at 70 [*Kadletz*].

The analysis of conflict of laws is sometimes avoided to the extent possible, since it involves sometimes difficult and in-depth analysis of the facts and circumstances brought before the Court. It also implies good knowledge of domestic laws and good understanding of procedural matters as well. Despite this, any modern lawyer should bear in mind three principal aspects which are directly related to the study of conflict of laws: 1. Whether the Court is able to hear the case or not (questions of jurisdiction); 2. If it does, then, which law should be applicable to the matter? 3. Some questions of recognition and enforcement of foreign judgments.

International litigation cannot go blind to these core issues of private international law, and the following example provides an illustration of how conflict of laws may arise: Among the 191 member states of the United Nations Organisation,[2] each of them have their own domestic legal system, conformed in accordance to their own Constitution or main body of recognition and creation of that particular State. These legal systems may regulate different social relations that arise within their community, converting into what western legal systems know as constitutional law, family law, contract law, criminal law, administrative law, labour law, property law, tax law, corporate law, among others. Aside from this variety of norms, some or many of these States may be parties of different international agreements, which by virtue of their own domestic systems, become law, within their borders. Judges are obliged to recognise and apply these instruments, as they constitute the legal sphere to which that State is part of, in a universal basis. The interrelationships and interconnections between two or more, or many of these States, bring these laws into concert, and in specific situations, into conflict, depending on the nature and number of foreign elements that may be found in a given legal relationship. In the private law area, the main question lies on which law should govern a given situation when two or more laws are conflicting? And under which basis is this decided? Does the doctrine provide any viable solution to these problems? Are there any rules which, if followed in a systematic way may provide a satisfactory solution? The answer to these

[2] United Nations Organization, Member States, online: United Nations Organization http://www.un.org/Overview/unmember.html (last visited June 13, 2004).

questions is not easy. As I stated before, different theories have evolved throughout the years, and some solutions may contradict the already evolved solutions of other countries. Judges have their own criteria. They tend to follow different methods, even within the same country (the case of Federated States). The scenario at the international level is uncertain and unpredictable, but fortunately, some exhaustive work has been made at the international level in order to create some sort of uniformity.[3]

b. Conflict of Laws in International Carriage by Air

Air Law is a good example of how the different areas of law converge with each other in a specific socio-economic activity.[4] Diederiks-Verschoor provides the following definition: "Air law is a body of rules governing the use of airspace and its benefits for aviation, the general public and the nations of the world".[5] Perhaps, the appropriate terminology in these pages should be 'air transportation law', since the contract of carriage by air will be the main focus of this work.

International civil aviation gives rise to different issues that could be subject to conflict within the existing regulatory framework. International carriage by air, as only one of the several areas related to international civil aviation, brings issues that may find application under different regulations and different legal systems. In the field of contracts (beside the contract of carriage by air), for example, we find contracts of aviation insurance, contract of aircraft purchase, aircraft financing, the creation of security rights in aircraft, contracts of employment of the crew of an aircraft, contracts of agency and aircraft charter. In the

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[3] For example, the Hague Conference on Private International Law, recognising the differences among legal systems around the world, has developed outstanding work in its effort for the unification of private law at the international level, specially in issues related to jurisdiction, applicable law and recognition and enforcement of foreign judgments covering areas of commercial law, international civil procedure, child protection, marriage and personal status. See, Hague Conference on Private International Law, online: Hague Conference on Private International Law http://www.hcch.net (last visited: June 13, 2004).

[4] See, Michael Milde, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. 220, 221 (1965), describing "air law" as a conglomeration of different branches of the system of law – a comprehensive scientific specialization which combines the research in several fields of law... citing Knapp V., *Predmet a system ceskoslovenskeho socialistickeho prava obcanskeho* (Prague 1959) p.79. Outrata V., *Predmet mezinarodniho prava*, (1961) Casopis pro mezinarodni pravo, No. 1, p.16. Milde M., *The Problems of Liabilities in International Carriage by Air. A Study in Private International Law*, (Prague 1963), p. 11-13.

[5] I.H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (The Hague: Kluwer Law International, 2001) at 1 [*Diederiks*].

tort field (aside from those actions for damages that fall into the Warsaw System)[6], we find other related areas of study, such as aircraft accidents, aerial collisions and questions of salvage, as well as damage caused to third parties on the ground.

The above examples provide a quick view of the whole scheme that surrounds international civil aviation, in addition to the existing standards for aviation security, airport infrastructure and technical support needed for the optimal operation of the aviation industry. Due to this extensive area of study, I will focus only on conflicts of laws that may arise in relation to the contract of carriage by air.

Kadletz refers to conflict of laws as: "...the problem of identifying gaps in uniform law, the norms identifying the law which shall apply to matters not addressed by the Conventions, as well as the method of reconciling or adjusting...uniform law and other law...".[7] Conflicts of laws in international air transport arise when a Court (Court A) has to deal with the legal rules of another State in matters of private rights. Instead of Court A applying its own laws (LA) it will have to refer to Court B rules (LB) and apply them, or decide the question in accordance to foreign law.

The private rights of the parties in connection to the contract of carriage by air must have foreign connectors in order to bring conflict of laws to light. The foreign connections in air law are multiple: the nationality, domicile or place of habitual residence of the various passengers travelling in a given flight; the different places of departure and destination according to their individual tickets (or air waybills in the case of cargo); the place of registration of the aircraft; the air carrier's principal place of business; the existence or not of successive carriers, and whether or not the transport was performed by the contracting carrier or some other(s) acting on its behalf.

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[6] For a detailed description of the Warsaw System, *see*, below Chapter II (a).
[7] *Kadletz*, *supra* note 1 at 2.

Assuming that a given Court has jurisdiction over the matter (first question in conflict of laws cases), the next step is to determine what law should apply.[8] In order to know what is the legal system that will govern a specific matter in connection to international air transport (i.e. a claim for damages which brings up issues of liability of the carrier), one must proceed to an analysis of the specific facts and circumstances around it. First, it must be determined whether or not the contract of carriage is *international* in terms of the international regulatory framework. The places of departure and of destination are key elements for determining the applicability of the Conventions: this will reveal the States parties to the international regime and then the Court will have to analyse the facts and determine which instrument will be held applicable.[9]

In another scenario, it may happen that the States involved (by virtue of the foreign connecting factors derived from the private legal relationship) are Parties to the international regime but the specific matter is not covered under its umbrella; in this case, the Court will have to apply the national law. If the matter in question has foreign elements, then issues of forum shopping will appear (deciding jurisdiction, recognition of foreign law, *forum non conveniens*, recognition and enforcement of foreign judgements). To these, we must not forget the tendencies of some Courts of the world to decide in terms of what is more beneficial (in compensatory terms) to the claimant by virtue of the available legal remedies and probable compensatory amounts in a given jurisdiction.

A good example of choice of law issues is provided by Windle Turley: "A typical illustration of the choice of law problems faced by courts in aviation cases may be found in the Air Florida crash near Washington, D.C., in January 1982... A Boeing 737 crashed shortly after takeoff from Washington National Airport, hitting the Fourteenth Street Bridge across the Potomac and plunging into the river. The passengers who brought suit were from seven states: Virginia, Maryland, the District of Columbia, Florida, Massachusetts, Pennsylvania, and Texas. The three defendants were Boeing, the

[8] See, Dicey & Morris, *The Conflict of Laws* (London: Sweet & Maxwell, 1993) at 4. Abla Mayss, *Principles of Conflict of Laws* (London: Cavendish, 1999) at 1.

[9] Note that some States are Party to one instrument but not the other. Other instruments are not yet in force, and others, like the Guadalajara Convention, require that both States be Parties in order for it to apply.

manufacturer of the plane; Air Florida, the airline; and American Airlines, in charge of de-icing the plane before it took off. Each had its corporate headquarters in a different state. Additional contacts involved the place of departure, the crash site, and the destination. Altogether there were eight jurisdictions with a provincial interest in having their own law applied to the litigation..."[10] Turley's example, however, may be applied to any other aircraft accident occurring in the past years. Choice of law issues may arise, either at the national level or the international level, where most complex relations coexist.

In the field of aviation insurance, choice of law issues are commonly addressed by litigators before the courts. Margo explains this situation in the following terms: "...An aviation insurance contract frequently involves one or more foreign elements. Thus an airline or major products manufacturer's policy is likely to be subscribed by insurers in different countries, and a risk insured in one country will frequently be reinsured in another country or in several other countries. In addition, a policy written in London may cover an insured or property situated abroad, or payment of premiums may be made abroad. Where this occurs it is necessary to establish which courts have jurisdiction to resolve disputes under the policy, and to determine which legal system governs the interpretation of the policy and the extent of the rights and obligations conferred and imposed by it".[11] Knowledge of private international law is then, of extreme importance for all parties in international civil aviation (air carriers, insurance companies, passengers, governments and international litigators).

Another important aspect of modern choice of law analysis is the question of *dépeçage*: "*Dépeçage*, a French abbatorial term for the process of chopping up or dismembering, suggests that separate parts of a conflict problem may be severed from the whole and refereed to different systems of law. If the issues are referred to different systems of law, this is called '*dépeçage*' by the French and 'picking and choosing' by the Americans".[12]

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[10] Windley Turley, *Aviation Litigation* (Colorado: McGraw-Hill, 1986) at 403 [*Turley*], citing *In re* Air Crash Disaster at Washington, DC, on Jan 13, 1982, 559 F Supp 333 (DDC 1983).
[11] Rod D. Margo, *Aviation Insurance* (UK: Butterworths, 2000) at 461 [Margo].
[12] John O'Brien, *Conflict of Laws* (London: Cavendish, 1999) at 109, footnotes omitted.

This practice may increase confusion in choice of law issues that arise in the legal practice: In this context, Turley explains that: "...modern choice of law analysis usually focuses on the interest which each competing jurisdiction has in the various issues involved in the case. As a result, the laws of different states are often applied to different issues".[13] In an aviation case this is most probable to happen, since some issues would be legally bound by different laws, leaving a wide range of choice to the lawyer and his client. Turley adds that: "...aviation practitioners must have thorough understanding of all the choice of law rules so that, in making their forum selection, they can achieve the combination of laws which best advances their client's interests".[14]

The importance of determining the applicable law in a given matter has therefore been established. For this work, I could take the content of the international regime for granted; however, I will not do it, and instead I will provide an overview of what the international legal framework regulates and what it does not, before proceeding to specific conflict of rules established on it. It should not be forgotten that, even with the existence of a new Convention regulating international carriage by air, already in force, it is not yet applicable to the majority of countries, so, the study of the 'old' regime, is still of crucial importance for the lawyer.

i. Issues Governed by the International Regime

The Warsaw System[15] and the new Montreal Convention[16] govern certain rules for international carriage by air. The scope of application of these instruments defines what international carriage in terms of the Convention is, and provides a preliminary delimitation of substantive regulation.

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[13] *Turley*, *supra* note 10 at 404.
[14] *Ibid.* at 405.
[15] See, *supra* note 6.
[16] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, ICAO Doc. 9740. [*Montreal Convention*] Article 4.

1. Scope of Application and the Principle of Exclusivity

International carriage by air, as defined by the Warsaw System and the *new* Montreal Convention, covers carriage of persons, carriage of luggage (baggage), and carriage of goods (cargo) which is performed by an aircraft[17] for reward, or constitute gratuitous carriage by aircraft performed by an air transport undertaking.[18]

Article 1(2) of the Warsaw Convention establishes that the contract of carriage is international if *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 territories 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.*[19] The same definition is provided in the Hague Protocol, with the following amendment: "...international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party."[20] In brief, the Hague Protocol is substituting all the possible territories of a State by the concept of 'territory' alone.

The international character of the contract of carriage is given in the following terms:

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[17] The International Civil Aviation Organization [*ICAO*] defines 'aircraft' as "...any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface". See, *ICAO International Standards and Recommended Practices, Annexes 6, 7, 13 to the Convention on International Civil Aviation, Definitions,* ICAO 2001 9/01, E/P1/5800, ICAO 2003 7/03, E/P1/3000, ICAO 2001 8/01, E/P1/6000.

[18] See, *Montreal Convention*, *supra* note 16, Article 1(1) and *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, *Schedule to the United Kingdom Carriage by Air Act*, 1932 (U.K.) 22 & 23 Geo. V, c.36 [*Warsaw Convention*] Article 1 (1).

[19] See, *Warsaw Convention*, *supra* note 18, Article 1(2).

[20] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 Done at The Hague* , 28 October 1955, ICAO Doc. 7632, [*Hague Protocol*] Article I (2).

First, the existence of a contract or agreement between the Parties (in general terms, these are the carrier and the passenger/consignor-consignee). In terms of liability of the carrier for injuries to passenger, Goldhirsch explains that the Warsaw Convention refers to the actual carrier (the carrier which was operating the aircraft at the time of the accident or the carrier that was in control of the passenger if it did not take place "on board"). The term seems to include employees, agents and independent contractors.[21] In cases of delay, the initial and the final carrier, as well as the carrier who actually caused the delay are responsible to the consignor and consignee, independent of the actions that may exist to claim compensation between them.[22] In the case of liability for goods and baggage, the contracting carrier is the main responsible. Goldhirsch explains that the contracting carrier is *the one whose name appears on the ticket*, constituting *prima facie* evidence of who the contracting carrier is.[23] Giemulla (et al.) suggest the following definition: " ... a carrier must be someone who promises the carriage of persons or objects by aircraft pursuant to a contract in his own name".[24] These authors provide also for a definition of consignor and consignee: "Consignor is any (natural or juristic) person who appoints an air carrier by contract in his own name to perform carriage of cargo by aircraft".[25] "Consignee is the (natural or juristic) person to whom the carrier is obliged under the contract of carriage to deliver the cargo".[26] A 'passenger' should be considered a 'person' who is transported by virtue of a contract of carriage.[27]

Second, the place of departure and the place of destination are situated within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State. The first hypothesis may be illustrated as follows: a passenger flying from Mexico City to Montreal (Mexico and Canada are High Contracting Parties). The second hypothesis is

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[21] Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (The Hague: Kluwer Law International, 2000) at 71 [*Goldhirsch*].
[22] *Ibid.* at 104.
[23] *Ibid.* at 91. According to this author, the term *carrier* includes *anyone or any entity that performs any function which the carrier itself could or would have performed.*
[24] Giemulla/Schmid (eds.), *Warsaw Convention* (The Hague: Kluwer Law International, 2000) at Article 1 paragraph 37 [*Giemulla*].
[25] *Ibid.* citing Ruhwedel at Article 1 paragraph 44.
[26] *Ibid.* citing Oberlandesgericht Hamburg, 1980 VersR 1075, and Ruhwedel at Article 1 paragraph 45.
[27] See, *ibid.* at Article 1 paragraph 46 and 47.

easier to understand in terms of 'round trips', i.e. Mexico City-Montreal-Mexico City. In general terms, the *place of departure* is where the contract of carriage begins; *place of destination*, according to Goldhirsch, *is* "the end of the operation of transport and where successive carriers are involved, the destination is the end of the entire operation as agreed upon and not the place where a leg of the flight ends".[28] In Goldhrisch words, an *agreed stopping place* is "...a place where, according to the contract, the aircraft will stop in the course of performing the contractual carriage..."[29]

For a proper understanding and interpretation of the international regime, it is important not to leave any detail on the side. In this particular analysis, it must be clearly understood who is a 'high contracting party' and what is considered as 'territory' under the Conventions. A *High Contracting Party* in terms of the Warsaw Convention as amended at The Hague, 1955, establishes that this term shall mean *State* in relation to Article 37, paragraph 2 and Article 40, paragraph 1. *In all other cases it shall mean a State whose ratification of or adherence has become effective and whose denunciation has not.*[30] Goldhrisch provides reference to newly formed countries which have been considered by the courts as High Contracting Parties, i.e. Lebanon, Senegal, Vietnam, Laos, Tunisia, Morocco, India and Pakistan. As for 'territory', Article XVII of The Hague Protocol states that: "...the word *territory* means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible."[31] However, by virtue of Article XXV, States can exclude, extend or denounce its application to one or more of its territories.[32] For example, the United Kingdom extended the applicability of the Warsaw Convention and the Hague Protocol to Bahamas before this country became independent. The same example applies for Bangladesh (by virtue of the extension made by the Islamic Republic of Pakistan), Benin and Cameroon (as for France). In the case of China, the Warsaw Convention applies to the entire Chinese

[28] *Goldhirsch*, *supra* note 21 at 208.
[29] *Ibid.* at 17.
[30] See, *Hague Protocol*, *supra* note 20, Article XVII (1).
[31] *Ibid.* Article XVII (2).
[32] See, *ibid.* Article XXV (2)(3)(4).

territory including Taiwan.[33] The Warsaw Convention and the Hague Protocol apply to the Hong Kong and the Macao Special Administrative Regions with effect from 1 July 1997 and 20 December 1999, respectively.[34] On the Montreal Convention, New Zealand extended its application to Tokelau and Denmark specifically states that the Convention will not be applied to the Faroe Islands.[35] The European Community declaration concerning the competence with regard to matters governed by the Montreal Convention is not applicable: "...to the territories of the Member States in which the Treaty establishing the European Community does not apply and is without prejudice to such acts or positions as may be adopted under the Convention by the Member States concerned on behalf of and in the interests of those territories".[36]

Article 57 of the Montreal Convention establishes the only two reservations that may be made by the States under this Convention: 1. that this Convention shall not apply to international carriage by air *performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or* 2. That this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, *the whole capacity which has been reserved by or on behalf of such authorities.*
States making the first reservation are: the United States, Japan, Austria, Germany and Spain.[37] States making the second reservation are Canada, Austria, Germany and Spain.[38]

Articles 17 and 24 of the Warsaw Convention as well as Article 29 of the Montreal Convention set the principle of exclusivity within these instruments. In other words, the Conventions are the sole basis for a claim, in terms of liability for death and injury

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[33] See, Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention signed at The Hague on 28 September 1955 [*Contracting Parties*], *ICAO* Treaty Collection, online:http://www.icao.org/icao/en/leb/wc-hp.htm (last visited: July 24, 2004), n 10.
[34] *Ibid.*
[35] List of Parties to the Montreal Convention of 1999, *ICAO* online: http://www.icao/en/leb/mtl99.htm (last visited: July 9, 2004) [*List of Parties*].
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

against the air carrier.[39] As an international treaty, it also pre-empts national laws which provide anything to the contrary.[40] In Weigand's words, "...the Convention precludes any resort to alternative law, where the injury arose out of the international flight or out of any of the operations of embarking or disembarking, regardless of whether the event constitutes an accident".[41] However, Article 17 and 24 are interconnected, and courts must be aware that the interpretation of 'accident' will determine whether or not the claimant has any remedy at all.[42] Weigand points out that "[t]he only means of escaping the Convention's preemptive scope is to establish that the claim arises out of an event that did not take place during the transportation or the process of embarking or disembarking".[43]

The practical importance of understanding the pre-emptive effects of the Warsaw Convention is of outstanding results in any aviation case in relation to death or injury of a passenger and the limits of liability that could possibly apply.

In terms of competence, the Montreal Convention takes a new approach by allowing regional economic integration organizations to become parties.[44] The instrument of approval by the European Community contains the following declaration:
"Declaration concerning the competence of the European Community with regard to matters governed by...the Montreal Convention...:
...4. In respect of matters covered by the Convention, the Member States of the European Community have transferred competence to the Community for liability for damage sustained in case of death or injury of passenger. The Member States have also transferred competence for liability for damage caused by delay and in the case of

[39] Supported criteria of the United States Supreme Court in *El Al Israel Airline* v. *Tseng* 525 U.S. 155 (1999). Cited by Barnes W. McCormick & M.P.Papadakis, *Aircraft Accident Reconstruction and Litigation* (Tucson, AZ: Lawyers & Judges Publishing Company, Inc., 2003) at 378 fn 1 [*McCormick & Papadakis*].
[40] For case law on the two views on whether the Warsaw Convention precludes or not any state law remedies, See, T.A.Weigand, *"Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention*, 16 Am.U.Int'l.L.Rev. 891, 926 (2001) [*Weigand*] with accompanying footnotes.
[41] *Ibid.* at 931. For examples of preempted actions under existing case law, See, *ibid.* at 932 with accompanying footnotes.
[42] *Ibid.* at 934.
[43] *Ibid.* at 932.
[44] *Montreal Convention*, *supra* note 16, Article 53(2).

destruction, loss, damage or delay in the carriage of baggage. This includes requirements on passenger information and a minimum insurance requirement. Hence, in this field, it is for the Community to adopt the relevant rules and regulations (which the Member States enforce) and within its competence to enter into external undertakings with third States or competent organizations...

5. The exercise of competence which the Member States have transferred to the Community pursuant to the EC Treaty is, by its nature, liable to continuous development. In the framework of the Treaty, the competent institutions may take decisions which determine the extent of the competence of the European Community. The European Community therefore reserves the right to amend the present declaration accordingly, without this constituting a prerequisite for the exercise of its competence with regard to matters governed by the Montreal Convention."[45]

2. Documentation and Duties of the Parties

In respect to passengers, Article 3(1) of the Montreal Convention establishes the duty (of the carrier)[46] to deliver an individual or collective document of carriage. This document shall indicate the places of departure and destination. In the case of stopping places, when the place of departure and destination are within the same country, the document should show at least one of those stopping places.

Article 3(2) allows the document of carriage to be substituted *by any other means which preserves the information.* In this case, *the carrier shall offer to deliver the passenger a written statement of the information preserved.*[47] This provision first appeared under Article II of the Guatemala City Protocol, which is not in force.

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[45] *List of Parties, supra* note 35. This declaration makes reference to the following sources: 1) Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, Official Journal of the European Union, L 285, 17.10.1997, p.1; 2) Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, Official Journal of the European Union, L 140, 30.05.2002, p.2.

[46] See, *Giemulla supra* note 24 at Article 3 paragraph 2, pointing out that the related provision does not indicate *who* should deliver the documentation.

[47] Electronic ticketing in international air transport is another subject related to international civil aviation which deserves a detailed study, due to its increasing use among the industry and the consumers.

Written notice shall be given to the passenger of the applicability of the Convention in the limits of liability of the carrier in cases of death or injury. The notice requirement was added to the original Warsaw Convention at the Hague Protocol. However, Article 3(5) establishes that non-compliance with these dispositions shall not affect the existence or the validity of the contract of carriage, which will still be subject to the Convention. In *Chan* v. *KAL (1989) S.Ct.*, the Supreme Court of the United States held that the size of the font in the notice does not fail to provide the liability limits under the Convention.[48]

In addition to the provisions established in the Montreal Convention, the Warsaw Convention required the ticket to contain: the place and date of issue, as well as the name and address of the carrier(s). It also excluded the carrier from the limits of liability under the Convention if it accepted a passenger without a passenger ticket.

The ticket itself constitutes the clearest evidence of the contract of carriage. In this respect, Article III of the Hague Protocol establishes:

"2. The passenger ticket *shall constitute prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22".[49]

In the private sector, the International Air Transport Association (IATA) has taken the initiative towards uniformity among its members. Giemulla (et al) refer to IATA Resolution 275 and IATA General Conditions of Contract, which contain the requirements for IATA carriers in terms of form and content of tickets.[50]

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[48] 490 U.S. 122, 109 S.Ct. 1676

[49] *Hague Protocol*, *supra* note 20, Article III.

[50] *Giemulla*, *supra* note 24 at Article 3 paragraph 5.

In respect to baggage, Article 3(3) of the Montreal Convention establishes the duty of the carrier to provide the passenger with a baggage identification tag for each piece of checked baggage. The same written notice as for death or injury to the passenger shall be given in respect to the destruction, loss or damage to baggage. This written notice also applies for delay. Under Article IV (b) of the Hague Protocol, the same criteria of 'prima facie evidence' apply to the baggage check.[51] The original Warsaw Convention contained a much detailed requirement for the luggage ticket.[52] Unlike the previous conventions, Montreal does not establish any consequences in the absence of notice.

In respect to cargo, an air waybill shall be delivered and it may be substituted by any other means which preserves a record of the carriage. If this is done, then the carrier, if the consignor so requests, shall deliver a cargo receipt that permits identification and access to such information.[53] Article 16 complements this provision in respect to customs, police or other public authorities' formalities. A special provision requiring the consignor to deliver a document indicating the nature of the cargo (*if necessary* in order *to meet customs, police or other similar public authorities formalities*) relieves the carrier of any duty, obligation or liability resulting from the above requirement.[54]

The following exception applies to the above provisions: Article 51 of the Montreal Convention establishes an exception for documentation formalities in relation to passengers, baggage and cargo, which is performed in *extraordinary circumstances outside the normal scope of a carrier's business.* Similar provision is found in Article 34 of the Warsaw Convention.

3. Existence, Validity and Performance of the Contract of Carriage

As for the existence of the contract of carriage, Article 3(5) of the Montreal Convention states that:

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[51] Note that Article IV of The Hague Protocol replaces the provisions established in the original Warsaw Convention.
[52] See, *Warsaw Convention*, *supra* note 18, Article 4.
[53] *Montreal Convention*, *supra* note 16, Article 4.
[54] *Ibid.* Article 6.

"...Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability".[55] The same provision, but applicable to cargo, is contemplated in Article 9 of the same instrument. Article 26 of the Montreal Convention establishes that the nullity of any provision relieving the carrier or lowering its liability does not imply the nullity of the whole contract of carriage. The same provision is found in Article 23 of the Warsaw Convention.

In terms of performance, the international regime also applies to:

1. International carriage performed by successive carriers (Warsaw System and Montreal Convention);
2. International carriage performed by a person other than the contracting carrier (Guadalajara and Montreal Convention);
3. International carriage performed by the State or by legally constituted public bodies, and
4. As an only exception to carriage of postal items (in which in general terms the Convention does not apply) Article 2(2) of the Montreal Convention applies to liability between the carrier and the postal administrations. Warsaw Convention established non-applicability to carriage performed under the terms of any international postal convention. The Hague Protocol replaced this provision by the non-applicability to carriage of mail and postal packages.

4. Liability of the Carrier

The international regime makes the carrier liable for:

1. Death, wounding or other bodily injury of the passenger,
2. Destruction or loss of , or damage to checked baggage or cargo, and
3. Delay

[55] *Ibid.* Article 3(5).

For the first type of liability, Article 17(1) of the Montreal Convention[56] establishes that:
1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger; if
2. 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.

It is important to mention that the death, wounding or other bodily injury of the passenger must be a consequence of an accident, adding to this, not any accident, but one that takes place in flight or in the operations of embarking or disembarking. It is relevant to know what an accident in terms of the Convention is and what is the criterion used to determine what the operations of embarking and disembarking are.

As for destruction or loss of, or damage to checked baggage, Article 17(2) of the Montreal Convention establishes liability of the carrier in this aspect, upon the following conditions: 1. 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; 2. That the carrier shall not be liable if the damage resulted from *the inherent defect, quality or vice of the baggage.*

For unchecked baggage, the carrier is liable if the damage resulted from its fault or that of its servants or agents.[57]

In the case of cargo, the same conditions stated above as for baggage, will apply. As for the second condition, Article 18 of the Montreal Convention adds three more possibilities: *defective packing of that cargo performed by a person other that the carrier or its servants or agents; an act of war or an armed conflict;* and, *an act of public authority carried out in connection with the entry, exit or transit of the cargo.*

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[56] Warsaw and The Hague keep the same criteria.
[57] Richard Stone provides the following definition for agency: "Agency is a legal relationship under which one person (the agent) acts on behalf of another (the principal)." It is also important to recognise that a person may be both, an employee and an agent, or, an employer and a principal. See generally, Richard Stone, *Law of Agency* (London: Cavendish Publishing, 1997) at 4 and 10.

Article 19 of the Montreal Convention establishes liability of the carrier for damage caused by delay in the carriage of passengers, baggage or cargo. However, it exempts the carrier *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.*[58] In this provision, the *all necessary measures* defense of the carrier, is substituted now in the Montreal Convention by a more realistic defense that lies on *all measures that could reasonably be required to avoid the damage.*

The limits of liability under the Montreal Convention are established in Articles 21, 22 and 23. However, Article 25 of the same Convention establishes that *a carrier may stipulate that the contract of carriage shall be subject to higher limits of liability...or to no limits of liability whatsoever.* This provision opens the door to des-unification of the law, where the international instrument could be affected by future intercarrier agreements, either in a multilateral forum or in a unilateral way. Article 36(3) of the Montreal Convention establishes joint and several liability within carriers in respect to successive carriage. Article 30(3) of the Warsaw Convention provides the same criteria, unamended by The Hague Protocol.

The criterion for compensation under the international regime is found in Article 29 of the Montreal Convention which establishes that punitive, exemplary or any other non-compensatory damages are not recoverable under the Convention. Servants or agents of the carrier are entitled to avail themselves of the limits established under the Montreal Convention, if they prove that they acted in the scope of their employment. Under this circumstance, the aggregate of the amounts recoverable shall not exceed the limits established, unless, in the case of cargo, 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.*[59]

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[58] See, *Warsaw Convention*, *supra* note 18, Article 20, which also contemplates negligent pilotage/navigation as an exception for liability (deleted in The Hague Protocol).
[59] See, *Montreal Convention*, *supra* note 16, Article 29.

In the case of carriage by air performed by a person other than the contracting carrier, the aggregate of the amounts recoverable from the actual carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting or the actual carrier under the Convention.[60]

Exoneration of the carrier is contemplated in the regime, since all the liability provisions in the Montreal Convention are subject to Article 20, which relieves the carrier, in whole or in part, of its liability, where it can prove the existence of contributory negligence or other wrongful act or omission of the person claiming compensation.[61] For compensation in case of death or injury of passengers, for damages exceeding 100,000 SDRs per passenger, the carrier is not liable if it can prove that the damage was due to the negligence or other wrongful act or omission of a third party.[62]

Finally, and according to Article 40 of the Montreal Convention, the contracting carrier is responsible for the whole carriage contemplated in the contract and, the actual carrier is only responsible for the part of the carriage it actually performed. In an action for damages, the plaintiff may choose to sue the actual carrier or the contracting carrier, or both, together or separately.

5. Insurance

Article 50 of the Montreal Convention establishes the obligation of the States Parties to require their carriers *to maintain adequate insurance covering their liability.* In England, under the Insurance Companies Act 1982, as explained by Rod D. Margo, aviation insurance is composed of accident insurance, aircraft insurance, goods in transit insurance and aircraft liability insurance. "Aircraft insurance embraces the risks usually covered under an aircraft hull policy...while aircraft liability insurance includes the risks usually

[60] *Ibid.* Article 44.
[61] *Ibid.* Article 20.
[62] *Ibid.* Article 21(2)(b).

covered under passenger and third party liability policies".[63] As for passenger liability insurance, Margo explains that: "...this form of cover protects an aircraft operator against its legal liability to passengers. In the case of airlines, the insurers undertake to pay on behalf of the insured airline all sums which the insured shall become legally liable to pay as damages arising from bodily injury or property damage caused by an occurrence and arising out of or in connection with the insured's operations. The policy will also usually cover the legal liability of the insured for the negligence of its employees and may be worded so as to cover the personal liability of such employees while acting in the course of their employment and within the scope of their authority".[64]

Under the above mentioned provision, the carrier also may be required to furnish evidence of this 'adequate insurance'. This has been a positive step in the new Convention; however, there remain some uncertainty in the provision's language. Margo comments the following: "The term 'their carriers' is unclear, but presumably refers to carriers which are incorporated, and have their principal place of business, in that state, and/or are licensed by that state".[65] He adds: "[t]he term 'adequate insurance' is likewise vague and uncertain, particularly in an environment of unlimited liability. Since liability exposure is dependent on several variables, including the legal system in which liability is determined, the basis of liability, and the types and level of damages awarded to accident victims or their heirs, what is adequate insurance in one state or region, may not necessarily be so in another".[66] The author then refers to the European Community Council Regulation 2027 of 1997 which also requires for a 'reasonable level' of liability insurance. As *no guidance* is provided of what a 'reasonable level' should mean, the author refers to the CAA – Civil Aviation Authority – Official Record applicable to UK air carriers.[67] In the United States, the Code of Federal Regulations establishes compulsory insurance for passenger and third party liability for United States and foreign

[63] See, Rod D. Margo, *supra* note 11 at 11.
[64] *Ibid.* at 243.
[65] *Ibid.* at 19 in note 47.
[66] *Ibid.* at 19 in note 48.
[67] See, *ibid.* at 23 in note 86.

direct air carriers operating under authority of the Department of Transportation (DOT) and engaging in domestic or international transportation.[68]

In terms of cargo insurance, Margo explains that there are two types available in the London market: the cargo legal liability insurance, which protects an air carrier against legal liability for loss or damage to goods while in the care, custody or control of the carrier, and, the all risks insurance, which is usually effected by a consignor or consignee of goods, and protects him against loss of or damage to goods during their shipment by air.[69] Margo also suggests that perhaps the most difficult type of aviation insurance is that of products liability.[70] All this elements are important to take into account, since some aviation cases, especially those dealing with aircraft crash accidents, will deal with the manufacturer's liability, as well.

Most importantly, it must be said that some exemptions may apply to aviation insurance. For example, in English law, war and hijacking risks are not covered (as a general rule) in terms of the Aviation policy as amended in 1971 (AVN 48B). This exclusion clause covers terrorist attacks as well; however, some of these risks may be subject to a 'write back' by which the insured may obtain a higher coverage.[71] A similar criterion is found in the *Common North American Airline War Exclusion Clause* (CWEC).[72] There is indeed, an important role for interpretation and definition of concepts in terms of insurance policies and their exclusion clauses. Courts have interpreted terms such as war, invasion, act of foreign enemies, hostilities, warlike operations, civil war, rebellion, insurrection, military or usurped power, strikes, riots, terrorism, sabotage, confiscation, nationalization and hijacking, among others, which are determining elements in an aviation case.[73]

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[68] *Ibid.* at 25.
[69] *Ibid.* at 259.
[70] *Ibid.* at 267.
[71] See, *ibid.* at 326.
[72] *Ibid.* at 355. Please note that no deep study and proper attention is given to this subject in this thesis work; for a serious and deep study, refer to the cited reference.
[73] See generally, *ibid.* at 334-354.

6. Reference to the *lex fori*

There are some rules of conflict in the international regime, which refer to the *lex fori* principle (the law of the court) in order to determine the applicable law for the solution of issues such as:

1. Costs and litigation expenses;
2. Conversion of monetary units;
3. Advance payments;
4. Questions of procedure;
5. The method for calculating the period for limitation of actions;
6. The interpretation and effect of contributory negligence;
7. Whether damages may be awarded periodically, and
8. What constitutes fault equivalent to wilful misconduct.

1. Costs and litigation expenses

Article 22 (6) of the Montreal Convention establishes that the limits of liability *shall not prevent the court from awarding, in accordance with its own law,* and in addition to the limits applicable under the Convention, the whole or part of the court costs and the other expenses of the litigation incurred by the plaintiff, including interest. An exception to the above provision applies: "...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."[74]

2. Conversion of Monetary Units

According to the Montreal Convention, limits of liability are expressed in Special Drawing Rights (SDR), which is the monetary unit established by the International

[74] *Montreal Convention*, *supra* note 16 Article 22(6). Correlative provision is found in Article XI of The Hague Protocol which deletes and replaces Article 22 of the Warsaw Convention (read, Article 22(4) of the Warsaw Convention as amended by The Hague Protocol).

Monetary Fund (IMF).[75] 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 SDR value at the date of the judgement. For those States, which are members of the IMF,[76] the way to determine this value is explained in the Convention; however, for those States, which are not IMF members, the value shall be calculated *in a manner determined by that State.*[77]

3. Advance payments

Article 28 of the Montreal Convention provides that:

"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 recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier."[78] This is an innovative feature in the new Convention, placed as a concession to the European Union with a clear concern for the protection of aircraft accident victims and their families, which in some occasions have encountered difficult and long trials under the 'old' applicable regime.

4. Questions of procedure

Article 33(4) of the Montreal Convention states that questions of procedure *shall be governed by the law of the court seised of the case.*[79] For carriage performed by a person other than the contracting carrier, where a suit is brought against either the actual carrier

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[75] For the daily value of SDR and for more information about this unit, see, International Monetary Fund, [*IMF*] online: International Monetary Fund http://www.imf.org (last visited: April 3, 2004).

[76] As for April 3, 2004, the IMF is composed of 184 countries. *IMF, Ibid.*

[77] *Montreal Convention, supra* note 16, Article 23(1). This provision was first inserted in the *Additional Protocol No.1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, signed at Montreal, on 25 September 1975*, 25 September 1975, ICAO Doc. 9145 [*Additional Protocol No.1*] and in the *Additional Protocol No.2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amedned by the Protocol Done at The Hague on 28 September 1955 Signed at Montreal on 25 September 1975,* 25 September 1975, ICAO Doc. 9146 [*Additional Protocol No.2*].

[78] *Ibid.* Article 28.

[79] The equivalent provision is found in Article 28(2) of the Warsaw Convention.

or the contracting carrier, Article 45 states that the carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.[80]

5. The method for calculating the period for limitation of actions

Article 35(2) of the Montreal Convention refers to the *lex fori* in order to determine the period of two years by which an action for damages may be brought under the Convention. Equivalent provision is found in Article 29(2) of the Warsaw Convention.

6. The interpretation and effect of contributory negligence

Article 21 of the Warsaw Convention establishes that: "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".[81] Under Warsaw, conflicts arise if the Court has to decide under which law it should examine the effects of contributory negligence. The Montreal Convention does not make reference to the *lex fori*.[82]

7. Whether damages may be awarded periodically

Reference to the *lex fori* is made in Article 22(1) of the Warsaw Convention as to whether damages may be awarded in the form of periodical payments. If this is true, then *the equivalent capital value of the said payments shall not exceed 125,000 francs*, which is the applicable limit of liability per passenger under the Convention. The Hague Protocol deletes and replace Article 22 of the Warsaw Convention by virtue of Article XI. The changes are basically in respect of the limit of liability, raised to 250,000 francs.

8. What constitutes fault equivalent to wilful misconduct

Article 25(1) of the Warsaw Convention makes reference to the law of the Court seised of the case, which will determine what constitutes fault equivalent to wilful misconduct, in which the carrier will not be entitled to avail himself of the limits of liability under the

[80] *Montreal Convention, supra* note 16, Article 45.
[81] *Warsaw Convention, supra* note 18, Article 21.
[82] See, *Montreal Convention, supra* note 16, Article 20.

Convention. Article XIII of the Hague Protocol does not make the above explicit reference to the *lex fori*. This Article deletes and replaces Article 25 of the Warsaw Convention and states that: "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he is acting within the scope of his employment".[83] Similar provision is found in Article 22(5) of the Montreal Convention.

7. Jurisdiction

Article 28(1) of the Warsaw Convention establishes that:

"1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, whether 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.[84]

Article 33 of the Montreal Convention adds a 'fifth jurisdiction' in paragraph 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 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

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[83] *Hague Protocol*, *supra* note 20, Article XIII.

[84] The Guadalajara Convention 1961 added the same provision as for the *actual carrier*. See, *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September* 1961, 18 September 1961, ICAO Doc. 8181 [*Guadalajara Convention*] entered into force on 1 May 1964. A same criterion is found in Article 33(1) of the Montreal Convention.

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."[85]

MacIntyre describes four steps in order to determine jurisdiction under the Warsaw Convention:

1. Whether or not the Convention applies. This is determined by what the Convention defines as 'international carriage'.
2. Whether or not there is treaty jurisdiction under Article 28 of the Convention. This will be determined in virtue of the four fora established under this provision (five, if we take into account the Montreal Convention) in which the plaintiff must proof that the court is the appropriate forum to hear the case.
3. The Court must have subject matter jurisdiction, and
4. The Court must be able to exercise personal jurisdiction over the defendant.[86] In this sense, MacIntyre says that courts may apply a minimum contact analysis in order to bring a carrier into their jurisdiction, for example, by applying theories of agency in order to determine jurisdiction based on the place of business through which the contract of carriage was made.[87]

8. Prescription

The Montreal Convention states that in the case of damage to checked baggage, *the person entitled to delivery must complain to the carrier at the latest, within seven days from the date of receipt.* As for cargo, it must be done within fourteen days from the date of receipt.[88] Article 26 of the Warsaw Convention establishes lower periods of notice: three days from the date of receipt of luggage and seven days for goods.

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[85] *Montreal Convention*, *supra* note 16, Article 33 (2).
[86] See generally, James D. MacIntyre, "Where are you going? Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis?" (1994-1995) 60 J.Air L. & Com. 657, at 669 ff. [*MacIntyre*].
[87] *Ibid.*
[88] See, *Montreal Convention*, *supra* note 16, Article 31(1).

In the case of delay, for both baggage or cargo, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.[89] Under the Warsaw Convention the time is set as fourteen days. If the claimant does not respect the times, then no action shall lie against the carrier, save in the case of fraud on its part.[90]

Article 35 of the Montreal Convention establishes that an action for damages shall be brought within a period of two years[91] counted as follows:

1. From the date of arrival at the destinations, or
2. From the date on which the aircraft ought to have arrived, or
3. From the date on which the carriage stopped.

As for the recourse available between successive carriers, there is controversy whether they should comply with the limits set out by the international framework, or whether the time limits to bring actions should be governed by the applicable local law.[92]

9. Arbitration Alternative

The parties to the contract of carriage of cargo have the possibility to agree on the settlement of disputes by arbitration, under the terms and provisions of the Montreal Convention.[93]

Dr. Christian Borris suggests that some procedural disadvantages when dealing with foreign national courts may be avoided through arbitration.[94] He expresses some reasons

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[89] *Ibid.* Article 31(2).
[90] *Ibid.* Article 31(4). See also, *Warsaw Convention*, *supra* note 17, Article 26(4).
[91] This time limit only applies to personal injuries. See, *Giemulla*, *supra* note 24 at Article 26 paragraph 2. Also, note that Article 52 of the Montreal Convention provides a definition of days within the meaning of the Convention, in which it shall mean *calendar days* and not *working days*.
[92] See generally, *Goldhirsch*, *supra* note 21 at 213, referring to the American position as an unfortunate one, contrary to the Canadian, French and Italian decisions which tend towards the application of local law in this respect.
[93] See, *Montreal Convention*, *supra* note 16, Article 34.
[94] Christian Borris, "The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process" in *Conflicting Legal Cultures in Commercial Arbitration*, S.Frommel and B.Rider (eds), (London: Kluwer Law International, 1999) at 2 [*Borris*].

why arbitration is sometimes preferred by the parties, for example, the fact that it allows the parties to select arbitrators with specific expertise and leads to confidential, faster and less costly proceedings.[95] As to pre-trial discovery, arbitration may represent a better way to balance both common and civil law principles of law.[96] In general terms, Borris suggests that parties in international commerce prefer arbitration because they believe that an international forum is more neutral than a national court.[97]

In respect to Latin America, it is common that parties choose international commercial arbitration rather than a court procedure due to the lack of confidence in a foreign legal system and its procedures.[98] However, and not looking at what are the advantages and disadvantages of arbitration in itself, such a recourse is only permitted under the Montreal Convention for cargo claims, and it must be subject to all provisions set out in the Convention, including those related to jurisdiction. Arbitrators then, should be familiar with the whole legal framework governing international carriage of cargo by air.

The arbitration alternative is favored by the following argument, although subject to certain criticism: "Without question, the international private law has substantially changed in content. Few are now interested in the doctrine of the conflicts of law. The jurists have known how to respond effectively to the challenges of the economy's globalisation through the emergence of a true international arbitration culture which demands, in its everyday practice, a more interactive approach to ensure real communication among those who participate in arbitration to meet the expectations of the parties who select this method as the best means to resolve their international commercial conflicts".[99] I believe that the *conflict of laws* theory and practice is far from non-existing. Reluctance to admit that imminent differences exist from one legal order to another, becomes a danger and an excuse for the jurists not to learn about other's legal cultures.

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[95] *Ibid.*
[96] See, *ibid.* at 12.
[97] *Ibid*, at 18.
[98] In the same sense, see, Horacio A. Grigera Naon, "Latin American Arbitration Culture and the ICC Arbitration System" in *Conflicting Legal Cultures in Commercial Arbitration*, in Frommel &Rider, *supra* note 94, at 131.
[99] Bernardo M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration" in Frommel &Rider, *supra* note 94, at 83.

Even if arbitration was the trend, matters of recognition and enforcement of arbitral awards are still a matter of conflict in the legal practice.

ii. Issues Governed by National Laws in Relation to International Carriage by Air

The issues covered by the international legal framework have been established. Now we turn those issues that are not covered by it. This is important because it is where conflicts of laws will arise.

As a general rule, the parties are free to determine the law that will apply to their contractual relationship. If there is a lack of choice, then usually contractual responsibility will be governed by the law of the contract of the domicile of the carrier's principal place of business. For extra contractual responsibility, or torts, the law applicable will be that where the damage or tortious act took place. In both cases, the process of qualification will determine whether an action falls into contractual or extra contractual responsibility.[100] However, due to the special character of the contract of carriage by air, which may be characterized as an *adhesion consumer contract*, it may be the case that a court may consider a clause determining the law applicable invalid for public policy reasons,[101] although Warsaw and Montreal prohibit choice of law by the parties.

As Lagerberg shows, the following are some of the issues (in relation to the contract of carriage) not covered by the Warsaw Convention, in which rules of conflict apply:[102]

1. The existence of consent, in which the law of the parties' place of habitual residence would apply;
2. The legal capacity, in which the national law of the party acting would apply;

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[100] See generally, Eric M.Lagerberg, *Conflicts of Laws in Private International Air Law* (LL.M. Thesis, McGill University Institute of Air and Space Law 1991) [unpublished] at 39 [*Lagerberg*], citing Batiffol & Lagarde and Cheshire.

[101] *Ibid.*at 45. Some reference is made to "public policy/order" in the following pages, however, this means not to be an exhaustive explanation on this matter. For an exemplary work on this subject, see Gerald Goldstein, *De l'exception d'ordre public aux regles d'application nécessaire. Etude du ratachement substantiel impératif en droit international privé canadien* (Montreal: Thémis, 1996), where he analyses both civil and common law conceptions of public order.

[102] See, *Lagerberg*, *supra* note 100 at 44.

3. The formal validity, in which the law of the contract would apply. The same applies to the material validity (except for consent), consequences of faulty performance not covered by the Convention, non-performance, non-compliance with the carrier's regulations, nullity, cancellation, negotiability, interpretation, discharge and substantial validity of the contract.[103]
4. The manner of performance, in which the law of the place of performance should apply.

1. The Plaintiffs

Article 24 of the Warsaw Convention establishes:
"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."[104]

Article VIII of the Montreal Protocol No. 4, which replaces Article 24 of the Warsaw Convention, establishes:
"1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits 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..."[105]

The question of who is entitled to claim must also be looked at in the light of the applicable national law. Under Article 17, the first entitled to file a claim is the passenger. Any third party may also file a claim against the carrier, according to the applicable

[103] Some reference to fault and nullity of the contract are covered in the *new* Montreal Convention.
[104] *Warsaw Convention*, *supra* note 18, Article 24.
[105] *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, signed at Montreal on 25 September 1975*, 25 September 1975, ICAO Doc. 9148 [*Montreal Protocol No.4*] at Article VIII.

national law.[106] Article 29 of the Montreal Convention consolidates the Warsaw Convention provision.[107]

In terms of Article 26(2) which refers to complains (a previous step towards a claim against the carrier) for damage to baggage, goods or cargo, the following persons could file a claim against the carrier:[108]

1. in case of damage to baggage, the passenger or any other third party;
2. in cases of damage to goods or cargo, the air waybill would show who is the person entitled to claim (the one entitled to delivery).[109]

3. Rights of Carriers among Themselves in Cases of Successive Carriage

Goldhirsch explains that Chapter III of the Warsaw Convention only regulates the rights between the carrier and the consignor, the consignee and the passengers; as a consequence, third-party actions must be governed by local law. The author refers to three important court decisions (Canadian, French and Italian) as opposed to the US position in this respect, which tends towards the application of the Convention's limits for claims under Article 29 of Warsaw.[110] It is then understood that the rights of successive carriers among themselves shall be governed by the appropriate national laws in a specific case. One case that can illustrate this hypothesis is the determination of the period when the cargo is in charge of the carrier (carrier A or carrier A's servants/agents) in a reloading process to another carrier (carrier B or carrier B's servants/agents).[111] If a national court decided that the period of liability is not within the terms of the Convention(s), actions within carrier A and carrier B (or its servants/agents)are expected

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[106] See, *Giemulla*, *supra* note 24 at Article 17 paragraph 47.
[107] *Ibid.* at Article 24 paragraph 16.
[108] In successive carriage, complains must be addressed to each of the carriers from whom the consignor or consignee pretends to claim damages from. See, *ibid.* at Article 26 paragraph 11.
[109] *Ibid.* at Article 26 paragraph 5, noting also that the authorised representatives of the consignee, transhipment firms and insurers, can also be availed to claim.
[110] *Goldhirsch*, *supra* note 21 at 213 referring to *Connaught* v. *Air Canada*, 94 Don.L.Rep. 3rd 586 (Ontario High Ct. 1978), 1980 Air Law 37, 15 Avi. 17705; *Cie. D'Aviation Pakistan International Airlines* c. *Cie. Air Inter*, 1981 RFDA 142 (C.A. Aix-en-Provence, 31 Oct. 1980); *Vibra* v. *Alitalia*, 1986 Air Law 281 (Trib. Milan, 29 May 1976). As for the USA, *Split End Ltd.* v. *Dimerco Express (Phils), Inc.* 19 Avi. 18364 (D.C.N.Y. 1986).
[111] See, *Giemulla, supra* note 24 at Article 18 paragraph 43.

to be governed by the national laws, considered that there is no specific reference under the international framework. There is no such reference as for indemnification or contribution among them.[112] Problems may also arise if carrier A decided to sue carrier B in another jurisdiction, different from the one that found carrier A to be liable.[113]

Giemulla expresses that the time limit for claims between successive carriers shall be determined by national law.[114] The same authors refer that even tough Article 30(3) establishes joint and several liability in successive carriage, it does not state whether there exist recourse within them for damage to baggage or goods.[115] Most likely, national laws will provide laws in relation to this, where carriers can claim compensation among themselves.

4. Liability of the Passengers Vis-à-vis the Carrier

The time limits for claims under Article 29 of Warsaw do not apply to actions of the carrier against the passengers; under these circumstances, these actions will be regulated by the applicable national laws,[116] leaving important issues, such as those related to unruly passengers, outside the scope of a unified private international law.

IATA and ICAO have encouraged the study of the problem of disrupt and unruly passengers and have also developed a working group in order to develop some common approach solutions.[117] IATA, for example, has developed a recommended practice for IATA member airlines.[118] IATA suggests that there are two elements which contribute to unruly conduct of passengers during a flight: (a) the banning of smoking on board; and (b) the intake of alcohol before and on board the flight.[119]

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[112] *Ibid.*at Article 29 paragraph 9.
[113] *Ibid.* at Article 30 paragraph 47.
[114] *Ibid.* at Article 29 paragraph 10.
[115] See, *ibid.* at Article 29 paragraph 10 and Article 30 paragraph 47 citing other authors.
[116] See also, *ibid.* at Article 29 paragraph 38.
[117] See, Ruwantissa I.R. Abeyratne, *Aviation Trends in the New Millenium* (England: Ashgate, 2001) at 294 n. 6 [*Abeyratne*].
[118] *Ibid.*at 294 n. 6, referring to "-'Unruly Some" to Bring One Rule for All', *Airlines International*, 4 Issue (6), November/December 1998, 38-9.
[119] See, *ibid.* at 274.

But how this liability should be determined will lie on the domestic legal systems. In IATA's view, the most efficient way to combat unruly passengers conduct is through the implementation of effective national laws by States.[120] In the same sense, the International Transport Workers' Federation recommended, among other relevant issues, the following: "...[to put] into place laws which ensure that the national jurisdiction of the country of disembarkation applies to all passengers on all flights entering that country, providing appropriate police powers (and resources) at airports, and appropriate judicial and police responses to all degrees of offence which violate the Tokyo Convention...".[121] This is to be considered a relevant recommendation which shall be taken into account, especially by developing countries which are still somehow reluctant to some issues that could violate some of the sovereign rights that they have over their territories. The adoption of national laws in this sense would represent a positive advantage for the prevention of unruly conduct of passengers in international flights. Harmonisation of rights and duties among States and the air carriers would be a clear improvement, along with preventive measures before boarding and on board the aircraft which will give notice to the passengers of the meaning of "unruly conduct" and the legal consequences of such behaviour.

c. Choice of Law, Forum-shopping, *Forum non conveniens* and Public Order/Policy

It has been established in this chapter, what conflict of laws is, and why it may arise in legal situations related to international carriage by air. The unavoidable prescriptive rules that apply to international carriage under the international legal framework have also been set out. The aim has been to show the existing variations from one Convention to another. In the legal practice, the diversity of applicable regulations has developed an interesting role for choice of law and forum-shopping aspects within the court rooms. Issues of

[120] IATA suggests ICAO should 'urge member states to enact stringent legislation within their territories to permit prompt and effective intervention in apprehending and prosecuting offenders who arrive immediately after commission of an offence on board an aircraft'. See, *ibid.* at 275.
[121] *Ibid.*, noting that the US and UK have already taken measures in this sense; ECAC has also appointed an expert to address this issue. See also, *ibid.* at 276.

public order/policy have been raised as well. Attraction of jurisdiction and exceptions of *forum non conveniens* have also seen light in aviation cases.

Choice of law has important effects on liability issues and in the award of damages in any aviation case. For instance, McCormick and Papadakis suggest that the mobile nature of aviation as well as the multiple manufacturers of an aircraft bring both, forum-shopping and conflict of laws issues to be taken into consideration.[122] When it comes to choice of law in an air crash case, the aboved mentioned authors suggest two rules to determine which law is more probable to apply: *lex rei sitae*, or the place where the crash took place, and 'the significant contacts' rule, which involves many more factors than the first (considered unfair) rule.[123] These authors refer to the following contacts: crash site location, residence of all defendants, residence of the plaintiff, nature and purpose of the flight, where the negligence occurred, where the product was designed and manufactured, and other significant factors.[124] In the United States, the Restatement (Second) of Conflicts of Laws adopts the *most significant interest approach,* recognising four important factors:[125] (a) the place where the injury occurred;[126] (b) the place where the conduct causing the injury occurred;[127] (c) the domicile, residence, nationality, place of incorporation and place of business of the parties;[128] and (d) the place where the relationship, if any, between the parties is centered, or where the agreement or contract between the parties was formed.[129]

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[122] See, *McCormick & Papadakis*, *supra* note 39 at 246.
[123] *Ibid.*
[124] *Ibid.* at 247.
[125] *Ibid.* at 372, citing § 6 and § 145 of the Restatement.
[126] This factor should not be considered alone, but in combination with other factors, such as *a state's interest in deterring tortuous activity of a resident defendant or providing financial protection of its citizens,* as suggested by *McCormick & Papadakis, ibid.*
[127] In air crash events, this may be the same as the place where the injury occurred. It can also be other than the crash site: the defendant's place of business or the place of design or manufacture of the aircraft. See, *ibid.*
[128] Three basic interests are behind these factors: (1) deterring tortuous conduct within the state's borders; (2) assuring proper compensation to damaged state residents; and (3) protecting resident defendants. *See, ibid.* at 373.
[129] *McCormick & Papadakis* suggest that Courts tend to give more attention to this factor when smaller airlines are involved (contrary to larger airlines because of the multiplicity of purchase sources). *See, ibid.*, providing reference to case law as well.

The following observations provided by the mentioned authors are worth taking into consideration in choice of law and choice of jurisdiction: "A judge would rather use the local law he is most familiar with... A State court judge would rather not subject a citizen to a harsh law of a foreign jurisdiction... federal judges exercise a lot of discretion in both jurisdiction and choice of law matters...".[130]

'Forum-shopping' is an expression often used in private international law, to refer to those activities taken by litigators, in order to decide where it is more suitable to their clients to bring a claim, according to their prevailing interests. These activities will mainly consist in an exhaustive legal research of the domestic laws (both substantive and procedural) that could possibly apply to the specific case.[131] Once this is known, forum-shopping will serve to determine the appropriate jurisdiction (the Court where to bring the case to). In other words, conflict of laws lies on the judge (to decide which law will be applied) and forum-shopping is a prior activity left to the litigators (in which conflict of jurisdictions and public order will also play an important role). McCormick & Papadakis provide some reasons for forum-shopping in aviation cases, including: "known favorable courts, favorable local rules, proximity to plaintiff and plaintiff's law office, jurisdiction where witnesses may easily be forced to appear, favorable substantive law, favorable damage law, favorable laws as to who may be plaintiff, favorable limitations rules,... and inability to hold certain defendants".[132]

Harold Caplan sustains that increasing forum shopping will come under the Montreal Convention in relation to claims against the contracting and the actual carrier. He states that: "...following the incorporation of the 1961 Guadalajara Convention in the new Convention...the fifth jurisdiction allows claimants to pursue an action against the contracting carrier even if the actual carrier does not satisfy the jurisdiction tests (new

[130] *Ibid.* at 247.
[131] As for the differences that exist at the domestic level (in a federal State) among state law in the United States, which may serve as an argument to support forum shopping, see, *ibid.* at 372.
[132] *Ibid.* at 247.

Article 46). Compared with the simplicity of the 1961 formulation, the new provisions will open a wide world of fifth forum-shopping".[133]

Closely connected to choice of law and forum shopping is 'the power of a court to control the parties and cases before it and to prevent its process from becoming an instrument of abuse or injustice', referred to as the doctrine of *forum non conveniens*:[134] "...Through this power, a federal trial court may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, where it appears that the convenience of the parties and the court and the interest of justice indicate that the action should be tried in another forum".[135]

The doctrine of *forum non conveniens* is often resorted to by defendants in aviation cases.[136] Through this doctrine, litigators are able to convince the courts that a claim must not be heard in a specific jurisdiction, thus giving them opportunity to bring the claim in a more favourable forum. Questions of choice of law and forum shopping obviously appear at this stage, sometimes involving issues of public order/policy of the State subjected to analysis. Some courts have decided *forum non conveniens* by taking into consideration both public and private factors.[137] English courts have expressed that *forum non conveniens* doctrine shall not take into consideration factors of public interest, while US courts have considered this factors to be very relevant.[138]

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[133] Harold Caplan, "Novelty in the New Convention" [1999] TAQ 193-205, 204 [*Caplan*].

[134] Mariza Kei Yan Wong v. United Airlines, Inc, DBA United Airlines 2001 U.S. Dist. LEXIS 291 [*Wong v. United Airlines*] referring to *In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1153-54 (5th Cir.1987)* and *Pan American World Airways, Inc. V. Lopez, 490 U.S. 1032, 109 S.CT. 1928, 104 L. Ed. 2d 400 (1989).*

[135] *Wong* v. *United Airlines, ibid.* citing *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981); Koster v. Lumbermens Mult. Cas. Co., 330 U.S. 518, 530-31, 67 S.Ct. 828, 91 L.Ed. 1067 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 67 S.Ct. 839, 91 L. Ed. 1055 (1947).*

[136] "The doctrine of forum non conveniens...is designed to prevent plaintiffs from choosing an inconvenient forum that may "'vex,' harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." See, Allan I. Mendelsohn and Renee Lieux, "The Warsaw Convention Article 28, the Doctrine of Forum non conveniens, and the foreign plaintiff" (2003) 68 J.Air L. & Com. 75, 86 citing 15 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure 3828 (2d ed. 1987).

[137] For an exposition of the weight given to this factors in English courts as opposed to American courts, see, Michael M. Karayanni, "The Myth and Reality of a Controversy: "Public Factors" and the Forum Non Conveniens Doctrine", (2003) 21 Wis. Int'l L.J. 327, 327 [*Karayanni*].

[138] As enunciated in *Gulf Oil Corp v. Gilbert* 330 U.S. 501 (1947), cited by *Karayanni, ibid.*

Karayanni argues in favour of the existing interconnection between both public and private factors that could lead the courts to determine in relation of *forum non conveniens*. In his view, the following three categories respond in a better way (rather than restricting the courts' analysis to a public-private factor dichotomy) to the needs of modern international litigation: geographic convenience, litigation efficiency and substantive justice.[139] As for the first categorisation of factors (those related to geographic convenience), he argues that modern technology and communications will constitute a real obstacle for lawyers who want to rely mainly on these kind of obstacles. Litigation efficiency may involve factors such as choice of law, location of evidence and witnesses, as well as the possibility of recognition and enforcement of judgements. Substantive justice will sometimes deal with issues of public policy and the rights of the plaintiffs under its jurisdiction.[140]

Turley proposes an 'eight-step' analysis in order to assist aviation practitioners to solve choice of law issues:[141]

"1. Identify all jurisdictions with possible contacts to the matter

2. Determine all legal theories which the plaintiffs and defendants are asserting...

3. Determine the choice of law rule for each issue as to each jurisdiction in question

4. Take into account any possible escape devices...

5. List all contacts involved in the litigation...

6. Identify the possible interests various states might have in applying their laws to the issues in question

7. Contemplate the resulting choice of law in both state and federal court. Contemplate a possible removal to federal court

8. Choose the available forum which will make the most choices of law you desire on the issues most important to your case".[142]

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[139] *Ibid.* at 331 and 376.
[140] *Ibid.* at 377-379.
[141] *Turley*, *supra* note 10 at 421.
[142] *Ibid.*

Public order/policy may constitute an important exception for the applicability of foreign law. Friedrich K. Juenger citing Story raises [Story's] following statement: "...the right and duty of every nation to protect its own subjects against injuries from the unjust and prejudicial influence of foreign laws...justifies the forum's refusal to enforce alien rules that are...repugnant to its own interests and policy".[143] In this sense, stronger approaches have been taken throughout the history of the Warsaw System, in the pursuance of plaintiffs to avoid the limitations of liability. Forum shopping was not the solution, but rather questioning the constitutionality of this limits. [144] Clear examples of this are found in the United States[145] and Italy.[146]

d. Conflict of Conventions

It has been asserted how conflict of laws may arise in international carriage by air. Unfortunately, the existing international framework not only lacks a complete coverage of all the issues related to air transport, but it also creates a complicated scheme of possible applicable conventions and agreements which any lawyer dealing with an aviation case should bear in mind.

The possible combinations of applicability as well as the different historic backgrounds in which interpretation by the Courts has developed, will be a starting point in which forum-shopping, choice of law and comparative law will easily appear. States, air carriers, insurers, passengers, and any party which is involved in a case related to international air transport, are always uncertain as what is the legal instrument that binds them. Even within the US, where an impressive amount of case law exists, as well as outstanding

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[143] Friedrich K. Juenger, *Choice of Law and Multistate Justice* (The Netherlands: Martinus Nijhoff Publishers, 1993) at 79.

[144] As for a theory to challenge the constitutionality of Article 22(1) of the Warsaw Convention in Canada, see, Andrew J. Hatnay, *The Constitutionality of the Limit of Liability of the Warsaw Convention in Canada* (LL.M. Thesis, McGill University Institute of Air and Space Law 1995) [unpublished] at 50 [*Hatnay*].

[145] *Hatnay* cites two US Cases in which the constitutionality of the limits of liability under the Warsaw System was challenged: *Burdell* v. *Canadian Pacific Airlines* and *Re Air Crash at Bali, Indonesia* in *ibid.* at 24.

[146] See, *ibid.* at 31. See also, Michael Hirt, *The Federal Republic of Germany and the United States of America in Relation to Article 22 of the Warsaw Convention* (LL.M. Thesis, McGill University Institute of Air and Space Law 1990) [unpublished].

academic interest on Warsaw related matters, there is no absolute certainty as to the applicable regime in a given case. Example of this, is the transmitted message of President George W. Bush to the Senate of the United States, appealing for the prompt ratification of The Hague Protocol due to the latent uncertainty within the air transport industry and the treaty relations of the US with other countries: "...A recent court decision held that since the United States had ratified the Warsaw Convention but had not ratified The Hague Protocol, and the Republic of Korea had ratified The Hague Protocol but had not ratified the Warsaw Convention, there were no relevant treaty relations between the United States and Korea".[147] The message insists on the concern that US carriers may not be able to rely on the international regime in cases involving states which are only party to the Warsaw Convention as amended at The Hague.[148]

In this context, we may refer to conflict of Conventions – within the Convention(s), for example, some 'undefined' concepts and 'untouched' issues-, conflict as for the applicability of the Conventions –conflict of Conventions stricto sensu- and conflicts of interpretation of the Conventions. A good example of this last point, is the often reference to the original French text of the Warsaw Convention by the US courts in cases dealing with the interpretation of Article 17.[149] For instance, the elaborated analysis made in *Ehrlich v. American Airlines* (2004)[150] as to find the proper significance of 'dommage survenu' in order to determine a causal link between mental and bodily injury for compensation to be awarded under the Warsaw Convention, proves the dynamic interaction that exists within the Conventions' terminology.

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[147] Message to the Senate of the United States, The White House, President George W. Bush, online: The White House http://www.whitehouse.gov/news/releases/2002/07/20020731-4.html (last visited: April 4, 2004) [*Message to the Senate*]. The case in reference is *Chubb & Son, Inc. v. Asiana Airlines* F. 3d, 2000 WL 732168 (2nd Cir.). Note that the 'message' does not clearly refer to this case, but it is deduced from the reviewed literature in this respect. See, Bin Cheng, "The Laberynth of the Law of International Carriage by Air" (2001) ZLW 50. Jg. 2, 155, 164 [*Cheng*].

[148] *Message to the Senate, ibid.*

[149] *Le transporteur est responsable du dommage survenu en cas de morte, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit a bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.*

[150] 2004 U.S. App. LEXIS 4403

Article 55 of the Montreal Convention is an unfortunate (or fortunate, for some developing countries) provision which brings more complexity and confusion to the existing regime.[151] Professor Bin Cheng provides a horrifying image of what the applicable regime may look like in the light of the above provision: he enumerates 18 possible combinations that can co-exist along with the Montreal Convention, plus the existing unilateral agreements which affect international air transport. Any student, practitioner, or judge may find himself/herself incredibly confused and helplessly lost in affronting a reality like the one visualised by Professor Cheng: "...without going into any of the finer points which might slightly affect the figure, a rough computation would yield some 109 possible permutations".[152] His proposed solution is 'to hope' that the Montreal's ratifying countries would withdraw from the old scheme, which I believe could rather make the 'jungle' an even more dangerous adventure for the aviation industry and the passengers-consumers.

Withdrawal and denunciation of the existing regime is believed to be the solution for conflicts. To advise States to become party to those treaties that actually fulfil their economic and commercial needs, as well as their interest in the extent to which they consider their citizens should be protected in terms of liability under the international scheme would be helpless considering the high level of confusion that the existing (and surviving) regime provides.

The belief that the more treaties a State is party to, the less conflict of conventions they will encounter and the healthier treaty relations will exist among States, is tested by the future trends in international civil aviation, where risk management and insurance premiums prove to play a determining factor in terms of liability, which at the end, will have to push States to finally ratify the Montreal Convention and withdraw the old scheme.

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[151] See, *Cheng*, *supra* note 147 at 160.
[152] *Ibid.* at 164.

Issues of public international law may arise because of the potential conflicts between the existing international treaties. Lawyers involved in an aviation case, must not only be 'experts' in private international law and private international air law (not to mention they shall have even better knowledge of the available venues available under their domestic laws), but also have a comprehensive understanding of public international law, specially in the law of treaties.

Chapter II

The Purpose of the Unification of Law in International Carriage by Air

Unification of law, as we will see in the evolution of this thesis work, has been one of the leading, if not the principle reasons for the creation of an international legal framework governing international carriage by air. This effort for unification began at the *Comite International Technique d'Experts Juridiques Aériens* (CITEJA) created by a French initiative in the Conference of Paris in 1919, and absorbed in 1947 by the Legal Committee of ICAO.[153] It was in Warsaw, Poland, on October 12, 1929, when the Convention for the Unification of Certain Rules Relating to International Carriage by Air was signed, and which is, of the existing instruments, the one with the most ratifications among the international community.[154]

The question is why is it important to unify law? And who is it important to? Is it important to the airlines, the governments, the passengers, or the insurance companies? *To unify* means "to cause to become one; to form into a single unit."[155] In the same context, something that is *uniform* is something "characterised by a lack of variation; identical or consistent."[156] As we will see, there has been an evolution in the achievement of this goal: from unification, to disunification to reunification of law in the field of international civil aviation, and more precisely, in international air transport.

a. The Warsaw System

The Warsaw System consists of a series of international agreements applicable under the umbrella of the original Warsaw Convention. The system is comprised of the following instruments:

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[153] Michel G. Folliot, *Les Relations Aeriennes Internationales* (Paris : Pedone, 1985) at 265 [*Folliot*].
[154] See, *Warsaw Convention, supra* note 18, entered into force on 13 February 1933. As for 9 February 2004, its status is of 151 Parties. The Hague Protocol has 135 Parties. The Montreal Convention has 54 Parties. See, *List of Parties*, *supra* note 35 (last visited: July 9, 2004).
[155] *Black's Law Dictionary*, 7th ed., *s.v.* "unify".
[156] *Ibid. s.v.* "uniform".

1. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw, Poland, on 12 October 1929.[157]
2. The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, signed at The Hague on 28 September 1955.[158]
3. The Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961.[159]
4. The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971.[160]
5. The Additional Protocol No.1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, signed at Montreal on 25 September 1975.[161]
6. The Additional Protocol No.2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975.[162]
7. The Additional Protocol No.3 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

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[157] *Warsaw Convention, supra* note 18.

[158] *Hague Protocol, supra* note 20, entered into force on 1 August 1963. See, *Contracting Parties, supra* note 33.

[159] See, *Guadalajara* Convention, supra note 84. See also, *ICAO* List and Status of International Air Law Multilateral Treaties [*List and Status*], ICAO, online: http://www.icao.int/cgi/goto_m.pl?/icao/en/leb/treaty.htm (last visited: June 14, 2004).

[160] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March* 1971, 8 March 1971, ICAO Doc. 8932 [*Guatemala City Protocol*] not in force. See, *List and Status, supra* note 159.

[161] *Additional Protocol No.1, supra* note 77. Entered into force, 15 February 1996. See, *List and Status, supra* note 159.

[162] *Additional Protocol No.2, ibid.* Entered into force, 15 February 1996. See, *List and Status, supra* note 159.

1955 and at Guatemala City on 8 March 1971, signed at Montreal on 25 September 1975.[163]

8. The 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, signed at Montreal on 25 September 1975.[164]

We must be careful in asserting that the Warsaw System applies to all international carriage by air. This may not be the case. The existence of the following agreements and unilateral actions of some States and air carriers must be taken into account, since they may affect international air transport at a certain stage:

1. The Montreal Agreement of 13 May 1966,[165] in which a maximum limit of liability is increased to $75,000 US Dollars. It only applies to carriage of passengers (not cargo or baggage); the carrier is strictly liable for death or injury (the "all necessary measures" defense is waived), but it can still rely on the defense of contributory negligence of the passenger.[166] This agreement is limited to traffic to, from and through the United States of America.
2. The Malta Group solution, in terms of the *Study on the Possibility of Community (EC) Action to Harmonize Limits of Passenger Liability and Increase the Amounts of Compensation for International Accident Victims in Air Transport*[167] by which

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[163] *Additional Protocol No.3 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 and at Guatemala City on 8 March 1971, signed at Montreal on 25 September 1975*, 25 September 1975, *ICAO* Doc. 9147 [*Additional Protocol No.3*]. Not in force. See, *List and Status*, *supra* note 159.

[164] *Montreal Protocol No.4, supra* note 105. Entered into force, 14 June 1998. See, *List and* Status, *supra* note 159.

[165] The official title is 'Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol' (Civil Aeronautic Board, Agreement No. 18900 approved by CAB Order No. E-23680). Effective May 16, 1966 [*Montreal Agreement*]. See, *Giemulla*, *supra* note 24 at 5 and 6, providing an explanation of how a large number of international airlines felt obliged to enter into this Agreement in virtue of the threat of the United States denunciation of the Warsaw Convention to become effective on 15 May 1966.

[166] See David A. Glass & Chris Cashmore, *Introduction to the law of carriage of goods* (London: Sweet & Maxwell, 1989) at 245.

[167] Submitted to the Commission of the European Communities pursuant to Contract No. C1, B91, B2-7040, SIN 001556 by Sven Brise, Consultant, dated 15 September 1991; Vol. 2 – Appendices, at 1-3., cited by Michael Milde, *"Warsaw" System and Limits of Liability – Yet Another Crossroad?* (1993) 28: 1 Ann.Air & Sp.L. 201, 226 [*Milde*].

some European countries[168] or their airlines, extended the limit of liability to 100,000 SDR.

3. The Judgment of the Constitutional Court of Italy, 2 May 1985 Nr. 132, which declares unconstitutional the national law giving effect to the Warsaw Convention in terms of the limit of liability, with the upcoming Law of 7 July 1988 Nr.274 implementing a 100,000 SDR compensation and strict liability upon the carrier, and establishing the obligation of the air carrier to provide sufficient insurance to cover the civil liability for damages suffered by passengers. Professor Milde suggests a hint of extraterritorial application of Italian law, as well as weak commitment for the maintenance of uniformity, due to the unilateral action of Italian 'judicial abrogation' of an international treaty.[169]
4. The Japanese Initiative 1992, by which the Warsaw limits were abolished and the "all necessary measures" defense was prohibited for claims under 100,000 Special Drawing Rights (SDR)[170] for Japanese airlines. Milde notes that this provision is only applicable to passengers of Japanese airlines, though creating more ambiguity (as if we needed more already) in the uniformity of international air transport, as well as differentiated treatment in favor of Japanese carrier's passengers.[171]
5. The IATA Intercarrier Agreement (IIA) 1995 (often known as the *Kuala Lumpur Agreement*), where the limit of liability is raised up to 100,000 SDR if the carrier can prove it took all necessary measures to avoid the accident.[172]
6. The IATA Measures to Implement the IIA (MIA), which according to McCormick and Papadakis, results in uncertainty for US carriers in terms of liability. This is because they are bound by the Montreal Agreement until they file the appropriate tariffs containing the new liability limits.[173]

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[168] Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. See, *Milde, ibid.*
[169] *Ibid.*
[170] See, *Goldhirsch, supra* note 21 at 9.
[171] See, *Milde, supra* note 167 at 230.
[172] See, *Goldhirsch, supra* note 21 at 9. For a comprehensive chronological description of how the Agreement came to be, see, Michael Milde, "Warsaw requiem or unfinished symphony?" [1996-97] TAQ 37-51, 42 ff [*Milde-Symphony*].
[173] *McCormick & Papadakis, supra* note 39 at 289.

7. The amendment to the Australian Civil Aviation Carriers' Liability Act 1959 increasing the liability to 260,000 SDR entering into force 20 January 1996.[174]
8. The European Council Regulation of 9 October 1997 on air carrier liability in the event of accidents. In this regulation, the Council of the European Union admits that the limits of liability under the Warsaw System are too low for *today's economic and social standards*, leading to *lengthy legal actions which damage the image of air transport*; it recognizes the variety of existing limits of liability, as well as the on going efforts of ICAO to develop a reviewed Warsaw Convention. The regulation establishes unlimited liability of the carrier if it is not able to prove that it took all necessary measures to avoid the accident. However, the carrier may be exonerated wholly or partly of his liability, if he can prove that the damage was caused by contributory negligence of the deceased or injured passenger.[175]
   The Regulation requires community air carriers to make advance payments, no later than fifteen days after the identity of the natural person entitled to compensation has been established in order to meet immediate economic needs. This payment does not mean recognition of liability and is returnable only in case of contributory negligence.[176]

Other unilateral actions in the same respect as to raising the limits of liability were taken by Austrian Airlines, Finnair (Finland), Scandinavian Airlines Systems (Denmark, Norway and Sweden), Swissair and Crossair (for Switzerland).[177]

The Montreal and the IATA Agreements do not constitute international treaties *per se*, but merely international agreements among air carriers (private character). It is important to become familiar with the provisions of these instruments; how they differ from each other, and whether they complement each other. Most importantly, one should know which countries (and air carriers) are bound to which instruments and which ones are not.

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[174] See, Angela Cheng-Jui, Lu, *The Crisis of Unification of Private Air Law-Problems and Solutions*- (LL.M. Thesis, McGill University Institute of Air and Space Law 1997) [unpublished] at 31.
[175] See, European Council Regulation 2027/97 [*ER*], Article 3(3).
[176] See, *ibid.* Article 5(3).
[177] See, Claudia Vazquez Marazzani, *The Crisis of the Liability Regime Under the Warsaw System* (LL.M Thesis, McGill University Institute of Air and Space Law 1997) [unpublished] at 33 [*Marazzani*].

This will be a determining source of information for the international lawyer, when dealing with conflict of laws (choice of law) and conflict of jurisdictions in an aviation case with foreign elements. Unfortunately, the existence of these instruments has lead to deeper disunification of law.[178]

At this juncture, the reader may be wondering why the original Convention has so many amendments and following agreements and Protocols. The evolution is based in terms of the limits of liability, once unrealistic in the actual world, as well as some other clarifications on the concepts used in the instruments, which at the time of a suit, can make a difference for both the plaintiff and the defendant. The Warsaw System creates then, the following possible combinations:[179]

1. The Warsaw Convention 1929;
2. The Warsaw Convention 1929 as amended by Additional Protocol No.1, 1975;
3. The Warsaw Convention as amended at the Hague 1955;
4. The Warsaw Convention as amended at the Hague 1955 as amended by Additional Protocol No.2, 1975;
5. The Warsaw Convention as amended at the Hague 1955 and at Guatemala City 1971;
6. The Warsaw Convention as amended at the Hague 1955 and at Guatemala City 1971 and by Additional Protocol No.3, 1975;
7. The Warsaw Convention as amended at the Hague 1955 and by Protocol No.4, 1975; and
8. The Guadalajara Convention 1961.

Combination 5 and 6 are still not possible to cause trouble, since Guatemala City has not come into force.

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[178] See, *Milde*, *supra* note 167 at 202, expressing that these actions offer 'only partial and selective remedies'.

[179] The same analysis of the Warsaw System in terms of its complexity, is found in Yasidi Hambali, *The Consolidation of the Warsaw System* (LL.M Thesis, McGill University Institute of Air and Space Law 1983) [unpublished] at 9 [*Hambali*].

i. The Warsaw Convention 1929

The Warsaw Convention represents the intent of the drafters for the unification of certain rules of international carriage by air. The historical background of this Convention is also important to mention, given that 1929 is a period of history where the aviation industry was considered as an *infant industry*, promoting the interest of governments and air carriers to protect themselves against unlimited liability claims.

The Warsaw Convention is the result of two International Conferences on Private Air Law (Paris 1925 and Warsaw 1929) with a primary effort for unification of law in order to avoid conflict of laws, conflict of jurisdictions and diversity of applicable legal regimes to the aviation industry in their transport operations. This attempt for unification is in principle, partial. Only *certain* rules of international carriage by air were subject of the international drafting history,[180] which in general terms refer to the contract of carriage (of persons, baggage and cargo), the documentation requirements and the liability of the carrier. The idea was good in principle, and deserves universal recognition. However, the fast development of the once *infant industry* emerged into a variety of discrepancies of opinions against the limits of liability and some other issues. As a result, the legal framework was forced to evolve.

ii. Evolution and Crisis of the System[181]

The Warsaw System suffered what has been called a *crisis*. Professor Milde refers to it as a *chronic crisis* –of the unified private air law of liability.[182] This crisis refers basically to the fact that the Warsaw Convention and its following instruments were originally

[180] For a comprehensive historical background of the Warsaw Convention 1929, see, *Hambali, ibid.* at 20 ff.
[181] For detailed work on the history, evolution and crisis of the System, see, *Milde, supra* note 167. *Hambali, ibid.* Lasantha Hettiarachchi, *The Profound Subtleties of the Warsaw Private International Air Law Regime: Then, Now and Tomorrow* (LL.M Thesis, McGill University Institute of Air and Space Law 1992) [unpublished] [*Hiettiarachchi*], Geoffrey Mah, *The Warsaw Convention: Points of Controversy* (LL.M Thesis, McGill University Institute of Air and Space Law 1996) [unpublished] [*Mah*], *Marazzani, supra* note 177. *Giemulla, supra* note 24. Jacqueline Etil Serrao, *The Montreal Convention of 1999: a "Well-Worn" Restructuring of Liability and Jurisdiction* (LL.M Thesis, McGill University Institute of Air and Space Law 1999) [unpublished] [*Serrao*].
[182] See, *Milde-Symphony, supra* note 172 at 37.

thought to protect the infant aviation industry. As for the coming years, it was much questioned whether the limits of liability established under the original Warsaw Convention should prevail or not, and under which conditions should this limits be granted to the air carriers.

Much has been said in this context.[183] It has been set in above lines the different instruments that constitute the System, which speak by its own content, of the evolution of the original Warsaw Convention. Unfortunately, this evolution translated into disunification and brought the system into a crisis. In order to explain this, I will proceed in terms of liability limits, which in my view represent the major reason for the creation of the new instruments. In terms of the Convention, the carrier is liable in the following circumstances:

1. for injuries to the passenger (Article 17 of the Warsaw Convention)
2. for damage to goods and baggage (Article 18 of the Warsaw Convention)
3. for damage by delay (Article 19 of the Warsaw Convention).

It is to be noted, however, that a causal link must exist between the accident and the damage, which also has to be connected to aviation risks (on board the aircraft, or in the operations of embarking or disembarking). International carriage by air may bring the possibility of claims for damages caused to passengers, baggage or cargo: death or bodily injury of the passenger, damage caused by delay, and destruction, loss or damage to baggage or cargo. In general terms, liability may arise from a breach of contract (contractual responsibility) or from an act or omission outside the terms of a contract – torts- (extra-contractual responsibility).

iii. Liability of the Carrier: What are the limits?

Articles 17, 18 and 19 read in the context of Article 20(1)of the Warsaw Convention, are the basis for a comprehensive departure in respect to liability issues:

[183] See, *Milde, Hambali, Hettiarachchi, Mah, Marazzani, Giemulla, Serrao*, supra note 181.

Article 17 of the Warsaw Convention establishes:

"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".[184]

Article 18(1):

"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".[185]

Article 19:

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods".[186]

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".[187]

To question the limits of liability (and the reasons for it) is not the purpose of this work. Under the Warsaw System, we will find fault-based liability, evolving into strict liability of the carrier. The Montreal Convention will add unlimited liability for death or injury, consolidating some unilateral actions taken in the past.

Strict liability theory and regulation has evolved in relation to products and its defects (product liability for design, manufacture or failure to warn), with an obvious concern towards consumer's protection. In the case of international carriage by air, the Warsaw

[184] *Warsaw Convention, supra* note 18, Article 17.
[185] *Ibid.* Article 18(1).
[186] *Ibid.* Article 19.
[187] *Ibid.* Article 20(1).

System protected the airlines against excessive amounts of compensation for liability claims,[188] and provided the following criteria for liability:

1. a fault-based liability with reversed burden of proof (Warsaw Convention)
2. a strict liability (Guatemala City)

The evolution of law in terms of liability under the Warsaw System is evident through the Preamble of the Montreal Convention, which recognizes *the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.*[189] The Montreal Convention establishes unlimited liability for the air carriers in cases of death or injury to passengers; however, it keeps limits for cargo and baggage claims, as well as for delay.

This unlimited liability of the air carrier has two exceptions in terms of Article 21 paragraph 2 (a) and (b):

"...The carriers 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".[190]

Unlimited liability shall not mean 'astronomically high' compensation.[191] By *astronomical* liability is meant the eccentric amounts of compensation, translated into monetary terms, which some jurisdictions[192] grant to the claimants, especially for death and injury cases.

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[188] See, *McCormick & Papadakis*, *supra* note 39 at 247.
[189] *Montreal Convention*, *supra* note 16. Preamble.
[190] *Ibid.* Article 21 (2) (a) (b).
[191] See, *Milde*, *supra* note 167 at 233.
[192] The best example is the United States of America.

In the jurisdictions where *astronomic* compensation arises the requirement of caution for claims does not exist (i.e. the United States - contrary to what happens in jurisdictions such as Germany or Singapore-), as well as issues of discovery *versus* jury decisions, in which the preponderance of evidence will decide civil matters in the courts. In this respect, J.T.H.Johnson points out the following aspect: "...a jury, depending on which "experts" it must believe, and where its sympathies lie, can award vastly different amounts in very similar cases..."[193] Johnson gives three reasons that contribute to the psychological flaws of the American tort system: greed, revenge and jury psychology; to these, he adds the lost of objectivity, as well as exaggeration and fraud. Through his analysis, he explains in a certain way, how *astronomical* amounts for compensation have been awarded in the American courts.[194] He argues, for example, that there is no constitutional right to claim this kind of damages: "When we allow one side to claim unprovable damages of great magnitude or punitive damages of any magnitude, we are in effect legalising one parties' enrichment beyond loss, and legalising taking from another party to do so. Nowhere in the Constitution is that right recognised."[195] In Johnson's point of view, the future of the American tort system depends on education and values: "...we have to educate the public in the basic concepts that life will always have its risks, that we have to choose and be responsible for our decisions... that the law is for justice, not profit, that money cannot cure pain and suffering..."[196] Assumption of risk, especially in aviation-related matters should play a more important role when awarding compensation for damages. The passenger, when agreeing on a contract of carriage with an air carrier, knows that he or she is engaging in a *risky* activity, and that unexpected situations may arise. To what extent is the passenger convinced of the risks and still contracting the service? Isn't it more probable that the American legal culture, through which the most sophisticated firms get their most fruitful profits, encourage these kind of claims? To what extent is the passenger or his family or dependants being really restituted in their

[193] J.T.H.Johnson, *Our Liability Predicament –The Practical and Psychological Flaws of the American Tort System-* (Lanham, Maryland: University Press of America, 1997) at 25 [*Johnson*].
[194] See generally, *ibid.*
[195] *Ibid.* at 215.
[196] *Ibid.* at 226. Towards the same sense, see, *Milde*, *supra* note 167 at 233 arguing that compensation should not lead to unjust enrichment of the claimants or of their lawyers.

rights? These are some questions, which a more detailed study of the American tort system would try to solve, unfortunately, not part of this thesis work.

It is too early to draft conclusions here; however, since this is not a thesis on liability issues only, this might be the only moment to make a statement on this subject. I believe, maybe mostly influenced by the civil legal system that rules in Mexico that *astronomic* compensation should not be awarded by the judicial systems in the world. Going back to Johnson's arguments, he states that: "...there comes a time when a system becomes so flagrantly expensive and inequitable that it falls of its own excesses."[197]

Although the Montreal Convention 1999, does not expressly prohibits *astronomic* compensation, it does requires the claimant to claim the actual damage suffered, in other words, the claimant will be able to be compensated in an amount equal to the damage he/she can prove before the court. The criteria for compensation under the Montreal Convention allows specifically for recovery of compensatory damages. An appropriate definition follows: "Compensatory damages are damages which are intended to compensate for the actual harm which the claimant has suffered as a result of the accident. If an action is framed in tort, the purpose of compensation is to make good to the claimant as nearly as possible "that sum of money which will put the person who has been injured...in the same position as he would have been if he had not sustained that wrong"."[198] Within these types of damages, there are also, *special damages* and *general damages*. Special damages will cover the damages occurred from the date of the accident to the date of the trial, and the general damages will cover those damages that *are predicted to occur after the trial date*, i.e. pain and suffering.[199] It is deduced from the above explanation, that aggravated damages (those imposed to give *public recognition of disapproval of behaviour*) and exemplary damages (or punitive damages) [200] are not recoverable under the Convention.

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[197] *Johnson, supra* note 193 at 227.
[198] David K. Allen & John T. Hartshorne & Robyn M. Martin, *Damages in Tort* (London: Sweet & Maxwell, 2000) at 15 [*Allen*].
[199] See, *ibid.* at 15.
[200] *Ibid.* at 16.

As for punitive damages, Article 25 (1) of the Warsaw Convention establishes: "...The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct".[201] Schlueter and Redden explain that *in common law countries, wilful misconduct would be sufficient for the imposition of punitive damages*, but they cite the *Hijacking of Pan Am. World Airways, Inc. at Karachi Int'l Airport* and *Air Disaster at Lockerbie, Scotland*, in which it was concluded that *punitive damages are unavailable under Warsaw Convention, regardless of whether airline is guilty of wilful misconduct.* They also refer to *Floyd* v. *Eastern Airlines* where it was stated that *Article 25 does not create an independent cause of action for wilful misconduct, which would support punitive damages.*[202] Article 29 of the Montreal Convention clearly establishes that "...punitive, exemplary or any other non-compensatory damages shall not be recoverable".[203] Economic or pecuniary damages are awarded in terms of the actual loss of the victim in monetary terms.

Non-economic damages are awarded only in some jurisdictions. These types of damages can range from compensation for mental distress, anxiety, loss of expectation of life, loss of companionship and loss of enjoyment of life. Allen *et al.* explain the type of damages that may be recoverable in the common law system: "Physical injury, either traumatic injury or a slow-developing condition or disease... Injury to the mind, taking the form of a medically-diagnosable psychiatric injury, or a less specific disturbance of the mind or depression, or grief or injury to emotions such as loss of confidence or humiliation...Damage to personality, such as loss of reputation or loss of privacy...financial loss, which could take the form of financial loss consequent on personal injury...such as loss of earnings or loss of income from damage to

[201] *Warsaw Convention*, *supra* note 18, Article 25 (1).
[202] See, Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages II* (New York: LEXIS 2000) at 89 (ff.) [*Schlueter & Redden*].
[203] *Montreal Convention*, *supra* note 16, Article 29.

equipment...or pure economic loss unrelated to other damage..."[204] The same authors provide the *hierarchy of losses* which has developed in case law since 1932:[205]

1. Traumatic personal injury;
2. Property damage;
3. Consequential economic loss;
4. Damage of interference with beneficial use of land;
5. Iatrogenic (non-traumatic) personal injury;
6. Diagnosable psychiatric injury;
7. Pure economic loss;
8. Injury to reputation;
9. Non-specific types of damage, such as emotional suffering, damage to privacy and personal integrity and loss of expectation of future benefits.

From a literal analysis of Article 17(1) of the Montreal Convention, damages should be awarded in the case of death or *bodily injury* of the passenger. By *bodily injury*, it is assumed that mental trauma is not recoverable under the Montreal Convention. However, the treaty language leaves some flexibility to national courts in order to determine whether or not mental injury should be compensated or not.[206]

It is surprising that in the United States, for example, we find that "...non-economic (pain and suffering, punitive, etc.) awards average at least twice as much as the economic ones."[207]

In the case of fatal accidents, there are two available actions in behalf of the decedent under common law: wrongful death and survival action for conscious pain and suffering.[208] These actions are due to mention, especially for those lawyers who are not familiar with the common law system: *wrongful death,* being a civil cause of action for

[204] *Allen*, *supra* note 198 at 4.
[205] See generally, *ibid.* at 5.
[206] See, text below.
[207] *Johnson*, *supra* note 193 at 103.
[208] See, *ibid.* at 40.

damages resulting form the death of a person[209] and *survival action,* which "...continues the claim that the deceased person had..."[210]

As for the limits of liability, I provide the following chart, which includes the Warsaw System, unilateral actions and private agreements, as well as the Montreal Convention.

	WC	HP	GC'61	GC'71	M#1	M#2	M#3	M#4	MA	MG	IL	JI	IIA	ER	MC
Passengers	1	2	1 or 2	4	16	19	5		3	24	29	28	30	27	6
Registered Luggage (Baggage)	7	7	7	14	17	17	20								20
Carry-ons	8	8	8	14	18	18	20								20
Registered Goods (Cargo)	7	7	7	7	17	17	17	17							17
Exceptions	9, 22	10, 11, 23	9 or 10 and 11	12, 13, 15	9	10, 11	12, 13, 15	11, 13, 21, 23							13, 15, 21, 25, 26

1. 125,000 francs (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900).

2. 250,000 francs (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900).

3. 75,000 U.S. dollars. Strict liability of the carrier for a passenger's bodily injury or death up to the liability limit even if the carrier can prove that it was not negligent in causing the accident.[211]

4. 1,500,000 francs (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) for death or personal injury of the passenger. 62,500 francs for delay in the carriage of persons. Strict liability with possibility of national supplementary compensation systems.

5. 100,000 SDR or 1,500,000 monetary units (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) per passenger for those countries which are not members of the IMF. 4,150 SDR for delay in the carriage of persons or 62,500 monetary units

[209] See, *Schlueter & Redden*, *supra* note 202 at 592.
[210] *Ibid.* at 598.
[211] See, *Montreal Agreement*, *supra* note 165, Explanatory Statement.

(French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) per passenger for those countries which are not members of the IMF.

6. 27 and 4,150 SDRs (or 62,500 monetary units) for delay in the carriage of persons.

7. 250 francs per kilogram (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900).

8. 5,000 francs per passenger (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900).

9. Willful misconduct or default of the carrier or its agents.

10. Inherent defect, quality or vice of the cargo carried.

11. If the damage resulted form an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result (Article XIII Hague Protocol, IX Montreal Protocol #4, Article 22(5) Montreal Convention).

12. For death or injury of a passenger, the carrier is not liable if the damage resulted solely from the state of health of the passenger. For baggage, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage (Article IV Guatemala City Protocol).

13. Contributory negligence or wrongful act or omission of the passenger or the person making the claim for compensation.

14. 15,000 francs for each passenger. By virtue of Article IV, "baggage" means both checked baggage and objects carried by the passenger.

15. 11 but only applicable to baggage and cargo.

16. 8,300 SDR or 125,000 monetary units (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) per passenger for those countries which are not members of the IMF.

17. 17 SDR per kilogramme or 250 monetary units (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) per kilogramme for those countries which are not members of the IMF.

18. 332 SDRs per passenger or 5,000 monetary units (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) per passenger for those countries which are not members of the IMF.

19. 16,600 SDRs per passenger or 250,000 monetary units (French franc consisting of 65 ½ milligrams gold of millesimal fineness 900) per passenger for those countries which are not members of the IMF.
20. 1,000 SDRs per passenger or 15,000 monetary units per passenger for those countries that are not members of the IMF. By virtue of Article IV, "baggage" means both checked baggage and objects carried by the passenger.
21. For cargo, 10, as well as defective packing, act of war or armed conflict, act of public authority carried out in connection with the entry, exit or transit of the cargo (Article IV Montreal Protocol #4, Article 18 (2) Montreal Convention).
22. The "all necessary measures" defence and negligence of the carrier in the carriage of goods and luggage.
23. 22 without negligence.
24. 100,000 SDR.
25. Inherent defect, quality or vice of the baggage.
26. The "all necessary measures" defence as for damage occasioned by delay in the carriage of passengers, baggage or cargo.
27. Unlimited liability in the event of death, wounding or other bodily injury. "All necessary measures" exception for claims exceeding 100,000 SDR and possibility of exoneration in cases of contributory negligence.
28. Unlimited liability and no defense for claims up to 100,000 SDR.
29. Strict liability and 100,000 SDR compensation.
30. Up to 100,000 SDR if the carrier can prove it took all necessary measures to avoid the accident.

b. The Montreal Convention 1999

The Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal on 28 May 1999 is a result of an ICAO International Air Law Conference convened on May 1999 with the aim of modernizing the Warsaw System. Dr. Assad Kotaite, President of the Council of ICAO expressed that "[i]n developing this new *Montreal Convention,* we were able to reach a delicate balance between the needs and

interests of all partners in international civil aviation, States, the traveling public, air carriers and the transport industry..."[212] But, are the conflicts solved? If conflict of laws and conflict of jurisdictions are somehow solved, does conflict of conventions survive? And even worst, do they increase? Entering into force in November 4, 2003, achievements and failures are to be seen in the practice.

The Montreal Convention has the following achievements:

1. it represents a final step of the parties to agree on a new scheme that covers must of the gaps and defects found under the mutilated Warsaw System;
2. it recuperates most of the unilateral actions and private agreements undertaken by some States and air carriers in terms of liability limits;[213]
3. it allows a fifth jurisdiction criteria for the brought of claims.[214]

c. The role of International Organisms: ICAO and IATA

The international community has been aware of the difficulties faced by the aviation industry. This concern evolved in the establishment of two important organisms: the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA).

i. The International Civil Aviation Organization (ICAO)

ICAO is the result of several years of effort in the development of international air law, as well as in the establishment of an international body in this subject. ICAO saw its birth on November 1944 at the International Civil Aviation Conference in Chicago, through the establishment of the Provisional International Civil Aviation Organization (PICAO)[215]as to secure international co-operation and uniformity in regulations, standards and

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[212] See generally, *ICAO*, What's new? September 2003, *ICAO*, online: http://www.icao.org/cgi/goto.pl?icao/en/new.htm (last visited: October 28, 2003). [*What's new?*]
[213] For a detailed study of liability under the Montreal Convention, *see*, *Serrao*, *supra* note 181.
[214] For a detailed study of jurisdiction and its effect on the level of damages under the Montreal Convention, see, *ibid.*
[215] See, *Diederiks*, *supra* note 5 at 39.

procedures in civil aviation.[216] ICAO became a specialized agency of the United Nations Organization on 13 May 1947, when the Convention on International Civil Aviation signed at Chicago on 7 December 1944 came into force.

ICAO is conformed of an Assembly and a Council, which works through different committees, including legal, air navigation, air transport, joint support of air navigation services, finance, and, unlawful interference with international civil aviation and its facilities.[217] Duane Freer refers to ICAO as "...one of the United Nations most successful agencies."[218] It figures also, as one of the largest UN agencies, showing with this its large acceptance and success throughout the international community. With 188 Contracting States,[219] ICAO has its headquarters in Montreal, Canada and regional offices in Paris, Lima, Cairo, Bangkok, Mexico City, Dakar and Nairobi.

1. A Forum for the Unification of Law

Since the establishment of CITEJA (the main ancestor of ICAO Legal Committee), where delegates were appointed in order to submit proposals in the area of private air law, a forum for unification of law in this area has been actively operating. The role of ICAO in the unification of law must be addressed in terms of its legal committee. This is the body entrusted to study and draft Conventions, which must be approved at a Diplomatic Conference.[220]

Among the eight strategic objectives of ICAO, is to "strengthen the legal framework governing international civil aviation by developing new international air law instruments as required and by encouraging the ratification by States of existing instruments...".[221]

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[216] See, *ICAO* online: http://www.icao.org (last visited: March 3, 2004).
[217] See, *Diederiks*, *supra* note 5 at 39.
[218] Duane Freer, "ICAO at 50 Years: Riding the Flywheel of Technology", ICAO Journal, Vol. 49 No. 7, September 1994, pp.19-32, available at: http://www.icao.org/cgi/goto.pl?icao/en/history.htm (last visited March 23, 2004).
[219] *ICAO*, Contracting States, *ICAO*, online: http://www.icao.org/cgi/statesDB4.pl?en (last visited: March 23, 2004).
[220] See, *Diederiks*, *supra* note 5 at 40.
[221] *ICAO* Memorandum, *ICAO*, online: http://www.icao.org/cgi/goto.pl?icao/en/pub/memo.pdf (last visited June 15, 2004).

The organization recognizes that: "[w]ithin the more than one hundred and eighty Contracting States of ICAO there are many legal philosophies and many different systems of jurisprudence. There is need, therefore, for a unifying influence, in certain areas, for the development of a code of international air law. It is a function of ICAO to facilitate the adoption of international air law instruments and to promote their general acceptance. So far international air law instruments have been adopted under the Organization's auspices involving such varied subjects as the international recognition of property rights in aircraft, damage done by aircraft to third parties on the surface, the liability of the air carrier to its passengers, crimes committed on board aircraft, the marking of plastic explosives for detection and unlawful interference with civil aviation."[222]

The Assembly of ICAO, decided that the modernization of the Warsaw System should be given 'a high level of priority on the work programme of the Legal Committee' in the light of the fragmented legal regime governing international carriage by air.[223]

2. To what extent do they solve or help solving problems of conflict of laws? Do they encourage harmonization?

ICAO provides an exceptional forum for the unification of law. However, not every issue concerning specific matters may be addressed and convened at an international (read - multilateral -) forum. The divergence and multiplicity of opinions among States, different (economic and political) interests, different legal systems and cultures, provide a pluralistic view which slows down the process towards harmonization.

The role of ICAO in the development of the Warsaw System and the new Montreal Convention has been outstanding. The Organization in itself is an advantageous tool for negotiations among the international community. Unfortunately, it is important to realize that its governmental nature somehow hand-ties States' representatives as to the

[222] *ICAO* aims, *ICAO*, online: http://www.icao.org/cgi/goto.pl?icao/en/aims.htm (last visited June 15, 2004).
[223] See, K.O. Rattray, "The New Montreal Convention for the Unification of Certain Rules for International Carriage by Air – modernisation of the Warsaw System: the search for consensus" [2000] TAQ 59-78, 60 [*Rattray*]. For the evolution of ICAO's work in this respect, see, Vijay Poonoosamy, "The Montreal Convention 1999 – a question of balance" [2000] TAQ 79-85, 80 [*Poonoosamy*].

harmonization of some legal issues. Only the States, which according to their own national interest and public policy, may or may not support any of the resolutions taken at the international level by ICAO.

ii. The International Air Transport Association (IATA)

The International Air Transport Association is an international organism comprised of the private sector of air carriers. Founded in 1919, it comprises 271 airline members[224] which constitute an approximate 95% of international scheduled air traffic.[225] It covers matters related to passengers, airports, cargo, civil aviation and travel agents.[226] It provides efficient solutions for consumers, third parties, airlines and governments; its function relies on *lobbying* according to the industry's needs, through its interaction among the proper authorities, as well as its representation among different forums.

1. The Principle of Co-operation between World Airlines

Apparently, the best solution found in aviation industry for the unification of law according to the air transport industry and its actual and always evolving needs, has been the inter carrier approach. The day-by-day dealing with new problems and situations makes the private sector to be in a more convenient position in order to attack the inefficiencies of the existing regulatory system.

The principle of co-operation between world airlines is visible through the conclusion of international agreements, both in the public and in the private area, comprising subjects such as frequency, capacity and technical co-operation.[227] Also, the tariff system and issues related to aviation security provide good examples of co-operation among airlines. This is obviously related (in commercial terms) to international carriage by air and the whole regulatory framework behind it. Limits of liability and inter-carrier relations were

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[224] *IATA*, Airline Membership, *IATA*, online: http://www.iata.org/membership/airlines/allairlinemembership.htm?area=all (last visited June 15, 2004).
[225] *IATA*, About Us, *IATA*, online: http://www.iata.org/about/index (last visited June 15, 2004).
[226] See generally, *IATA*, online: http://www.iata.org, (last visited June 15, 2004).
[227] See, *Folliot*, *supra* note 153 at 88.

always a strong ground for the establishment of new agreements under the Warsaw System and its evolution during recent years.

2. IATA's Efforts and Initiatives towards Harmonization: The Private Sector Approach

Although IATA is constituted by air carriers around the world, it maintains a strong relationship with ICAO (public-governmental body) in a continuous interaction for the development of new and better strategies for the benefit of the aviation industry.

IATA's efforts towards modernization of the liability limits established under Warsaw are evident through the IIA-MIA Agreements developed under its auspices.[228] The benefits of this constant interaction are visible in many areas; in international carriage by air, the concern of air carriers and insurers had strongly influenced ICAO to draft a new legal framework which could consolidate and reunify the existing Warsaw System. Disunification of law is then, not to be blamed on IATA itself, but on the unilateral actions taken by some air carriers around the world.

It is also worth noting the *weight* of IATA at the international level. As Diederiks-Verschoor refers when pointing out that some airlines are still 100% state owned, he argues that if a Convention has IATA's support, it is most probable that governments will adopt it, otherwise, it will be difficult to secure a global acceptance of measures which are not supported by this international body.[229] Michael Milde, when referring to the IATA Intercarrier Agreement on Passenger Liability (IIA or the Kuala Lumpur Agreement 1995) refers to the Association as a "...'benign cartel'... [which] appears to lead the way to modernizing the international unification of private air law...".[230] Milde emphasizes the fact that IATA air carriers have taken action in the absence of ICAO's Contracting States initiatives on the past years. It is interesting how Professor Milde anticipated what was to come in the *new* Montreal Convention: IATA introducing the urgent need for revising

[228] See, above text.
[229] See, *Diederiks*, *supra* note 5 at 44.

and reunifying the existing international instruments, and ICAO's effort to consolidate the existing needs and interests among all Contracting States.[231]

In Milde's view, even though IATA has made representative efforts towards the modernization of private air law, its initiative[s] represent no more than an encouragement towards disunification: "...the IATA initiative –even if and when implemented in air carriers' tariffs with the approval of the respective governments- cannot be a permanent substitute for a concerted action of the governments expressing their political will on the unification of private air law in accordance with the international law of treaties".[232]

Unification of law and harmonization shall come together with State's full support and commitment at the legislative level as well as inside the judicial system.

[231] See, *ibid.* at 47.
[232] *Ibid.* at 37.

Chapter III

Future Trends to Solve Conflicts

Amendments and new conventions may be drafted, but as far as these are not universally adopted, there will always be a place for conflicts of laws and conflicts of jurisdictions to coexist along with conflicts of conventions.

a. Merits and Demerits of the Warsaw System

The objective for the unification of certain rules for international carriage by air deserves the merit of the original drafters, helping to avoid conflict of laws and conflict of jurisdictions. Their concern to protect the aviation infant industry, in an era when most airlines were owned by governments, provided an affordable scheme on a limitation of liability basis. Unification of law revealed in the following aspects: 1.The format and legal significance of the documents of carriage, and 2. The regime and limits of liability.

Warsaw placed a reversed burden of proof on the carrier, which in principle was aimed to benefit the claimant in cases where some legal systems did not provide so much protection to the consumer. This is in part due to the nature of the contract of air transport, which may fill in the category of a *contrat d'adhesion* and in which the passenger-consumer has no say about the clauses he is entering into with the air carrier.

Including monetary limits of liability expressed by a gold clause (Warsaw Convention and Hague Protocol) and in later years by SDR units (Montreal Protocols 1,2,3) helped maintain an standard value for compensation, taking into account the inflationary factors of economy.

The Guadalajara Convention 1961 represented a progress with the introduction of the *actual carrier* to the applicability of the Warsaw Convention, different from the original inclusion of the contracting carrier as the sole liable. Guatemala City Protocol 1971

modernized and simplified the documents of carriage and allowed them to be replaced by electronic methods.[233]

The disadvantages are numerous. The Warsaw System is a *mixed salad* of international agreements, in which States and air carriers (not passengers or consumers) can choose from a variety of *dressings* (unilateral actions and private agreements). The multiplicity of signing parties, ratifying parties, parties to one Convention but not to the other, makes it hard to think about uniformity of law in international civil aviation. The ambiguity and complexity of the System arises with questions of interpretation: definition of concepts (from one jurisdiction to the other) represent a problematic solution and brings confusion to the system, which definitely has to be decided on a case-by-case basis, always depending on the specific facts related to the claim.

The Warsaw Convention could not follow the rhythm of technological advances: the formalities of the documents of carriage presented an obstacle to electronic ticketing, as well as for the determination of the applicable limit of liability. The requirement of "notice" to the passenger also created confusion in this ground. Finally but not less important, the mix of concepts of civil law and common law under the System resulted in different opinions among the jurisprudence in several countries.

b. Merits and Demerits of the Montreal Convention

The initial purpose of the drafters was to consolidate the fragmented Warsaw System into one single instrument which could bring some sort of unification. The consolidation of the Warsaw System in one single document by taking the best out of the amending documents is a visible achievement of the Montreal Convention.[234] Examples of this are the provisions related to the 'actual carrier' (taken from Guadalajara 1961), the 'fifth jurisdiction' provision of Guatemala 1971 and the Montreal Protocol #4 in respect to

[233] This merit is introduced in the Montreal Convention.
[234] See also, George N.Tompkins, Jr., "The Montreal Convention of 1999: this is the answer" [1999] TAQ 114-117, 115.

cargo.[235] Interesting is the point of view of Harold Caplan, who refers to those 'genuine innovative' features of the Montreal Convention as opposed to those innovations which rely on the Warsaw System and/or airline agreements.[236] Namely, these genuine innovations are the following, related to: (a) language/s, (b) damages, (c) freedom of contract, (d) advanced payments, (e) baggage, (f) cargo, (g) monetary units, (h) review of limits, (i) charters and code-sharing, (j) insurance, and (k) ratifications.[237]

In the modern context, international air transport is a very well remunerated industry in which no special treatment should be awarded to the airlines as under the Warsaw System. The Preamble of the Convention recognises the importance of ensuring protection to the interest of consumers, as well as the need for equitable compensation based on the principle of restitution (punitive, exemplary and other non-compensatory damages are not recoverable). The Montreal Convention introduces a two-tier system of compensation:

a) Up to 100,000 SDR the carrier is strictly liable and cannot exclude or limit his liability (possible exoneration in the case of contributory negligence of the passenger). In this respect, it is alleged that contributory negligence *is not only concerned with whether the claimant is partly responsible for the* cause *of the damage, but also whether the claimant is partly responsible for the damage.*[238] As these authors explain, the defendant will try to prove that the passenger contributed to his own damage, in order to be fully or partially exonerated of its liability.

b) Beyond 100,000 SDR liability based on fault with reversed burden of proof. The carrier is not liable if it proves that the damage was not due to the negligence or wrongful act or omission of the carrier, servants or agents (hard to prove). Claimants will have to proof actual damage. This may resolve the problem of claims for astronomic compensation.

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[235] See also, *Caplan*, *supra* note 133 at 193.
[236] *Ibid.* at 196.
[237] *Ibid.* at 197-201.
[238] Nicola Salomon & Simon Middleton & John Pritchard, *Personal Injury Litigation* (London: Sweet & Maxwell, 2002) at 130.

All documents of carriage must be simplified and capable of electronic data processing, and there is no linkage between the liability and the formalities of the ticket.[239]

One of the major innovations of the Montreal Convention is the so-called 'fifth jurisdiction'.[240] In these terms, conflicts of interpretation are also avoided, since Article 33(3) defines 'commercial agreement'[241] and 'permanent residence'. However, the fifth jurisdiction is not allowed for the claimant in terms of baggage claims, leaving the four jurisdictional criteria of the Warsaw System applicable.[242]

The Montreal Convention also requires the carrier to submit proof of adequate insurance guaranteeing the availability of financial resources in cases of aircraft accident.[243] It establishes the commitment of the Parties to revise the limits of liability in a five-year basis, in order to adjust them to the economic reality and inflationary phenomenon of the coming years.

Another major improvement in the Montreal Convention is the *advance payments* provision of Article 28, which is somehow similar to the EC Regulation.[244] In this sense, it encourages States to adopt national laws that could grant advance payments for passenger death or injury. However, Suvongse Yodmani makes an interesting comment in this respect: Article 28 of the Montreal Convention establishes that "in the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its

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[239] See, Pablo Mendes de Leon & Werner Eyskens, "The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System", 66 J.Air L.& Com. 1155, 1173 [*Mendes de Leon*], pointing out some flaws.

[240] See, *ibid.* at 1159. However, see, *ibid.* at 1161 for a detailed analysis and 'six qualifications' of the fifth jurisdiction under the Montreal Convention. See also, Suvongse Yodmani, *The Warsaw System: A Case for Thailand to Ratify the Montreal Convention 1999 or Not* (LL.M. Thesis, McGill University Institute of Air and Space Law 2003) [unpublished] at 66 [*Yodmani*] citing Milde, and expressing that the 'fifth jurisdiction' provision is in no way revolutionary.

[241] For code-sharing and alliances examples, see, *Mendes de Leon, supra* note 239 at 1163 n.16 and 17. Also, for an inquiry in terms of the geographical situation of the carrier's place of business when offering tickets through websites, see, *ibid.* at 1163.

[242] See, *ibid.* at 1177.

[243] Raising the question of what should be considered as 'adequate insurance' and the different solutions each state may reach, see, *Caplan, supra* note 133 at 200.

[244] To see how the European Regulation is more precise than Article 28 of the Montreal Convention, *see, Mendes de Leon, supra* note 239 at 1178.

national law, make advance payments..."[245] In this sense, Yodmani correctly underlines the problematic provision, which lies on the national law of the carrier (not of the court seized of the case).[246] This author expresses his concern as to conflict of laws which may arise in virtue of the lack of reference in the Convention to which carrier's law should we refer to (contracting or actual carrier).[247] The Convention also clarifies the liability of the carriers in code-sharing agreements (contractual-actual carrier obligations). [248]

ICAO refers to the new Montreal Convention as a replacement of the Warsaw System in terms of compensation for international air accidents.[249] If we adopt this idea, then, does it mean that it is all that the Montreal Convention does? Is it only unification in terms of compensatory limits for liability? Is there finally some consolidation of the Warsaw System that covers all, passengers, baggage and cargo issues? Is universal unification to be achieved? In this context, Dr. Assad Kotaite, President of the Council of ICAO commented the following: "Victims of international air accidents and their families will be better protected and compensated under the new *Montreal Convention,* which modernises and consolidates a seventy-five year old system of international instruments of private international law into one legal instrument..."[250] Personally, I think this argument does not take into account the still surviving Warsaw scheme which still applies to those countries which are not yet party to the new Montreal Convention. By eliminating the limits of liability for passengers, the Montreal Convention opens a new gap for those countries that are not party to the Convention. Conflict will remain between the States that are party to the Convention and those who are not yet party.

However, the search for a global unification of law may become a reality since the United States of America ratified the Montreal Convention on September 5, 2003, making them

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[245] *Montreal Convention*, *supra* note 16, Article 28.
[246] *Yodmani*, *supra* note 240 at 83.
[247] *Ibid.*
[248] As for code sharing agreements, Abeyratne refers to the US DoT technical definition as "...a common airline industry marketing practice where, by mutual agreement between cooperating carriers, at least one of the airline designator codes used on a flight is different from that of the airline operating the flight", *Abeyratne*, *supra* note 117 at 442, citing *The Avmark Aviation Economist*, October 1994, 16.
[249] See generally, *What's new?*, *supra* note 212.
[250] *Ibid.*

the 30th Contracting State.[251] The entry into force of this instrument on November 4, 2003 means that for those States being Party to both the Montreal Convention and any or all of the instruments which constitute the Warsaw System, the former will prevail.[252]

Another aspect to take into consideration is the role of a Regional Economic Integration Organization (REIO), as defined in Article 53 (2) of the Montreal Convention. The question is whether it would complicate even more the relationships between the existing regulations that apply to international carriage by air. It is of concern whether we will not only have to look at the Montreal Convention and the applicable domestic legislation, but also into the regional trade agreements under which the REIOs were constituted, in order to see whether there are overlapping and contradicting obligations among the States.[253]

A major disadvantage of the Montreal Convention is the lost opportunity of clarifying concepts of radical importance, such as *accident*, *bodily injury* and *delay*; reference to past court decisions should be kept into consideration in case of conflict and interpretation. In respect to *bodily injury*, the question remains whether *mental injury* may be recoverable under the Convention. The drafters did not agree on adding the term *personal injury*, which could automatically include compensation for mental trauma. However, they did not make any pronunciation of whether mental trauma can or cannot be compensable, leaving the decision in the hands of the domestic jurisdiction to which the case is brought. The Montreal Convention does not exonerate the carrier in case the death or injury of the passenger resulted from the state of health of the passenger.

In regards to unlimited liability, Weigand points out an interesting issue: the Montreal Convention does not stipulate any reservation/exclusion for non-family claims (public social insurance or similar bodies) for passenger death or injury. He expresses: "The result will be that in many jurisdictions (particularly in Europe), not only will social security agencies be eligible to claim full reimbursement from carriers, but also

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[251] *Ibid.*

[252] See, *Montreal Convention*, *supra* note 16, Article 55.

[253] For example, the Treaty of Rome (EEC Treaty) – Treaty of Maastricht (EU) is said to apply its competition rules to air transport. See, *Diederiks*, *supra* note 5 at 48.

employers and life and accident insurers. This goes well beyond the protection of consumers and creates an unexpected bonanza for large groups of insurers and social agencies who have hitherto been content to honour their contracts without any thought of reimbursement".[254]

The Montreal Convention, contrary to the Warsaw Convention (in which the French text prevailed), has six authentic texts of equal value (English, Arabic, Chinese, French, Russian and Spanish). At a first sight, this constitutes a positive step, but it must be noted that conflicts may arise in practice, at the moment that judges and lawyers find out inconsistencies and lack of similarities from one text to the other within the legal terminology. Since there is no prevailing text in the Montreal Convention, this might represent a problem of uncertainty in future litigation. When it comes to problems of interpretation under the Warsaw System, it is established that the French language should prevail in case of discrepancy. Now, we may have the *new* convention written in six official languages, maybe, as an original idea to avoid problems of interpretation among domestic courts. However, the fact is that if any discrepancy of opinions would come from one jurisdiction to the other, there would not be a ruling language to solve the difference under the new scheme. Then, the question will remain on who is right or wrong and under which basis is this being determined. Even under the Warsaw System, the question of a prevailing French language represents a problem; for example, the fact that a judge (unfamiliar with the French language), needs to apply or to refer to a certain provision of the Warsaw Convention: even if he/she takes the services of an official translator, the legal sense of the provision must be fully understood by the judge in order to be applied in a proper manner. Only complete knowledge and familiarity with foreign law and language could provide real justice to the parties.

As is the case with the Warsaw system, the Montreal Convention fails in its original objective of providing an absolute level of certainty in the applicable legal regimes. Article 55 of the Montreal Convention allows the Warsaw System to survive, so the level of confusion and complexity grows, or in the best scenario, it remains.

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[254] *Caplan, supra* note 133 at 205.

c. Uniformity of Interpretation: A Hard Task for National Courts

In general terms, interpretation of the international treaties governing international carriage by air shall be governed by Article 31 of the Vienna Convention on the Law of Treaties.[255] In terms of the Warsaw Convention, it is the French text which constitutes the basis for interpretation of concepts under the treaty.[256] However, this argument may lack some solidity, since *it has not been uniformly determined if local courts are required to apply the French legal meaning.*[257] Goldhirsch provides some US jurisprudence in order to illustrate the courts' tendencies towards both positions.[258] Kadletz argues that Article 36 of the Warsaw Convention is not a choice of law provision, and that in case of conflicts of laws and in order to determine a gap, one has to compare the internally enacted version of the Convention to the French format of the Warsaw Convention.[259]

The major problems of interpretation arising under the Warsaw System are those related to: (1) the contracting/actual carrier, (2) successive/combined transport, (3) the types of damages awarded; and (4) the French and English interpretation of legal concepts (along with differences of legal systems -common law and civil law-).[260]

In *King v. Bristow Helicopters Ltd.,* the UK House of Lords expressed that: "It really goes without saying that international uniformity of interpretation of article 17 is highly desirable".[261]

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[255] *Vienna Convention on the Law of the Treaties*, 22 May 1969. 1155 U.N.T.S. 331. See also, *Kadletz, supra* note 1 at 16.
[256] *Kadletz* citing Sand, who refers to this mechanism as 'an indirect choice of law rule'. *Kadletz, ibid.*at 38 n. 168. For an explanation of a French 'frozen' and 'dynamic' interpretation, see, *ibid.* at 39 ff. See also, *Warsaw Convention, supra* note 18, Article 36, and *Hague Protocol, supra* note 20, final paragraph.
[257] See, *Goldhirsch, supra* note 21 at 222.
[258] *Ibid.*
[259] *Kadletz, supra* note 1 at 42.
[260] "When we seek to extrapolate the French legal meaning of particular words or phrases in the Warsaw Convention, we may turn to French legal materials for assistance in determining how French jurists would have understood those words or phrases in 1929". In D.NY. 2004 *appeal docketed*, No. 029462 (2dCir. 2004) [*Ehrlich v. American Airlines*].
[261] [2002] UKHL 7

In *Ehrlich v. American Airlines*[262] the US Court of Appeals made an interesting approach towards the interpretation of the Warsaw Convention through a combination of historical, teleological and grammatical interpretation, which in the end looks up for a 'unified interpretation' among the signing Parties.[263]

i. The Concept of Accident

Article 17 of the Warsaw Convention and the Montreal Convention does not define the concept of "accident".[264] T.A.Weigand states that "[d]espite modernization efforts culminating in the...Montreal Convention, no attention, clarification or "modernization", has been directed to the element of accident resulting in a divergent and inconsistent application by the courts, especially as to passenger disturbances, medical aid cases, and passenger torts".[265] This leaves the door open for domestic courts in order to define the concept. The importance of having a definition is obvious, since the applicability or not of the conventional regime depends on whether the facts brought in a claim constitute an accident, and from there, the limitation or not of the carrier's liability. Although there may be no limits of liability under the Montreal Convention for passengers, there are still limits for baggage, cargo and delay.

There are three conditions to determine the liability of the air carrier for accident:
1. The accident must be an unusual and unexpected event, external to the passenger, that causes an injury and that is related to the operation of the aircraft.[266] Weigand believes, in respect to whether or not an event is related to the operation of the aircraft, that 'passenger upon passenger torts' and 'absent carrier involvement or complicity' are not

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[262] *Ehrlich v. American Airlines*, *supra* note 260.
[263] This can be appreciated when US Courts refer to judicial decisions of 'sister signatories' such as Australia and England. See, *ibid.* For a confirmation of the US approach in this sense, see, *Olympic Airways v. Rubina Hussain* 540 U.S. ___ at 11 fn 9.
[264] *Giemulla* (et al) explain that the term can be interpreted 'liberally' or 'strictly'. *Giemulla*, *supra* note 24, Article 17(7).
[265] *Wiegand*, *supra* note 40 at 906.
[266] *Giemulla* (et al) provide the generally accepted definition of accident in German courts: "...a suddenly intruding event which is external to the passenger". *Giemulla*, *supra* note 24 at Article 17 paragraph 8.

related to this operation and that they shall not constitute a justification to find the carrier liable.[267]

2. The passenger must have suffered death, wounding or any other bodily injury.

3. The accident must have taken place on board of the aircraft, or in the operations of embarking or disembarking. In this last aspect, three factors are relevant: the location of the accident; the activity in which the injured person was engaged, and the control by the defendant of such injured person at location and during the activity taking place at the time of the accident. This last element is the most important one, since it determines when the process of embarkation begins and disembarkation ends.[268]

To determine whether the accident took place in the operation of embarking or disembarking, the following aspects should serve as guidelines:

1. The level of control of the airline over the passenger's movement;

2. The activity in which the passenger was involved;

3. The configuration of the airport. This is important to know, because it can lead to other possibilities as to determine embarkation or disembarkation, such as:[269]

- The moment when the passenger is called to go to the gate;
- The moment when the passenger goes across security;
- The moment when the passenger is at a point of *no return*;
- The moment when the passenger surrenders the boarding pass.

In respect to the operations of embarking and disembarking, this is some of the leading jurisprudence in US courts:[270]

In *MacDonald* v. *Air Canada (1971) A.Ct.*, disembarking operation was not applicable. Disembarking has terminated by time passengers has descended from plane, by use of whatever mechanical means have been supplied, and has reached a safe place inside of

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[267] *Wiegand, supra* note 40 at 967.

[268] For a useful distinction between *transit* and *forced transfer stopovers*, see, *Giemulla, supra* note 24 at Article 17 paragraph 33.

[269] Personal notes from Professor Milde's lecture on Private International Air Law, McGill Faculty of Law, Fall 2003 [*Milde-Lecture*].

[270] For additional case law, see, *Giemulla, supra* note 24 at Article 17 paragraph 36 (ff).

terminal, even though he may remain in status of a passenger while inside the building.[271]

In *Day* v. *TWA* (1975) A.Ct, airline passengers were injured, and representatives of passengers kicked during a terrorist attack at Hellenikon Airport in Athens, Greece. The Court of Appeals of the United States held that where the attack occurred after the passengers had surrendered their tickets, passed through passport control and entered an area reserved exclusively for those about to depart on international flights, the passengers were in the course of embarking within the meaning of the Warsaw Convention.[272]

In *Martinez Hernandez v. Air France* (1976) the court held that passengers involved in a terrorist attack in the baggage area at the airport, were not in the course of disembarking since they "...had already emerged from the aircraft, descended the stairs from the plane to the ground, traveled approximately 1/3 to ½ mile from the aircraft to the terminal building, presented their passports to the Israeli authorities and then passed through passport control."[273]

In *Schmidkunz v. Scandinavian Airlines System* (1980) the court held that the plaintiff, "...who fell on a moving sidewalk in terminal while proceeding to connecting SAS departure light was not in the course of embarking because she was still within the common passenger area of the terminal, was not at the gate imminently preparing to board and at the time was not under the direction of SAS personnel...".[274]

In *Rullman* v. *Pan Am* (1983) N.Y.S.Ct., it was considered that the passenger was not in course of "operations of embarking or disembarking" within the meaning of the WC, during delay in airport; the passenger was not imminently preparing to board the plane,

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[271] 439 F.2d 1402

[272] 528 F. 2d 31 (2d Cir. 1975) LEXIS. This decision has been adopted as the '*Day test*' by several other US courts to determine, both the process of embarking and of disembarking. See, *Rabinowitz v. Scandinavian Airlines*, 741 F. Supp. 441, 444 (U.S. Dist., 1990) citing *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir. 1990); *Schmidkunz v. Scandinavian Airlines System*, 628 F.2d 1205 (9th Cir. 1980); *Upton v. Iran National Airlines Corp.*, 450 F. Supp. 176 (S.D.N.Y. 1978), *aff'd without opinion*, 603 F.2d 215 (2d Cir. 1979); *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc); *Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165 (S.D.N.Y. 1984). For disembarking examples, citing *Knoll v. Trans World Airlines, Inc.*, 610 F. Supp. 844 (D.C. Colo. 1985); *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), *cert. denied*, 431 U.S. 974, 53 L. Ed. 2d 1072, 97 S. Ct. 2939 (1977); *Martinez Hernandez v. Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950, 97 S. Ct. 1592, 51 L. Ed. 2d 800 (1977), *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Felisima v. Trans World Airlines, Inc.*, 13 Av. Cas. (CCH) P17,145 (S.D.N.Y. 1974).

[273] 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950, 97 S.Ct. 1592, 51 L. Ed. 2d 800 (1977), cited in *Rabinowitz v. Scandinavian Airlines*, 741 F.Supp. 441, 444 (U.S. Dist., 1990) LEXIS.

[274] 628 F.2d 1205 (9th Cir. 1980) LEXIS

was free to move about the terminal and was not under the direction of the airline personnel (she even said that there was no Pan Am personnel available to help her through her illness). There was no allegation in the complaint that Pan Am negligently operated the Jetway.[275]

In *Buoconore v. Trans World Airlines, Inc.* (1990), the Second Circuit Court of the United States, held that "...plaintiff, having checked in and received his boarding pass but remaining in a public area nowhere near the departing gate, with two hours to freely roam the airport was not in the course of disembarking because he was in a public area, not imminently boarding, and without airline supervision..."[276]

In *Rabinowitz v. Scandinavian Airlines* (1990), the passenger suffered injury while standing on a moving sidewalk. The court decided that the plaintiffs were not embarking or disembarking when the incident occurred, since they left the arrival gate, and entered the public concourse area as they proceeded to the gate of their departing flight. The court decided upon the plaintiff's argument that the accident occurred only five minutes after arrival, that this was not a determinative factor "...because plaintiffs had entered a public area, containing duty free shops, restaurants, restrooms and general seating areas not restricted to SAS passengers".[277]

In *McCarthy v. Northwest Airlines* (1995), a US court considered the three factors – activity, location, and control- as forming a single unitary unit, rather than separate factors.[278] The court pronounced that "...for Article 17 to attach, the passenger must not only do something that, at the particular time, constitutes a necessary step in the boarding process, but also must do it in a place not too remote from the location at which he or she is slated actually to enter the designated aircraft".[279]

In *King v. American Airlines, Inc.* (2002), the court adopted a flexible approach through considering four factors: "(1) the activity of the passengers at the time of the accident; (2) the restrictions, if any, on their movements; (3) the imminence of actual boarding; (4) the

[275] 122 Misc.2d 445, 471 N.Y.S.2d 478
[276] 900 F.2d 8 (2d Cir. 1990) LEXIS.
[277] 741 F.Supp. 441, 444 (U.S. Dist., 1990) LEXIS.
[278] 56 F. 3d 313, 316-317 (U.S. App., 1995) LEXIS.
[279] *Ibid.*

physical proximity of the passengers to the gate".[280] The court determined that the plaintiffs suffered their injury while "in the course of [one of] the operations of embarking within the meaning of Article 17, as they had already checked in for their flight, received their boarding passes, and boarded the vehicle that was to transport them from the terminal to the aircraft.[281]

In *Muehlig v. American Airlines, Inc.*,[282] the United States District Court for the District of New Jersey decided that the passengers were not in the course of embarking or disembarking, since the incident occurred in a common area and there was no evidence that the airport terminal escalator was exclusively limited to the use of the specific air carrier's passengers.[283]

Case law determining what is an accident:[284]

DeMarines v. *KLM Royal Dutch Airlines* (1978) established that "if the event on board an airplane is an ordinary, expected, and usual concurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be...an unusual or unexpected happening."[285] The court also established that normal cabin pressure changes are not "accidents" within the meaning of Article 17.

Air France v. *Saks* (1985) defines 'accident' as an *abnormal, unusual or unexpected occurrence.*[286] On Appeal, the Ninth Circuit found that normal pressurization changes that caused the plaintiff's deafness constituted an accident.[287] The Supreme Court granted certiori to resolve a circuit split, in which it resolved that the plaintiff could not prove

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[280] 284 F.3d 352 (U.S. App., 2002) LEXIS, citing *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990).
[281] *Ibid.*, relying on *Evangelinos v. Trans World Airlines, Inc.*550 F.2d 152, 156 (3d Cir. 1977), and *Day v. Trans World Airlines*, 528 F.2d 31, 33-34 (2d Cir. 1975).
[282] *Muehlig v. American Airlines, Inc.*, No. 02-5063 (WHN) (D.N.J. July 6, 2004)
[283] It would be interesting if the *Muehligs* brought suit against the Airport Operator, given the specific circumstances of the injury.
[284] For an extensive reference to case law and attached opinions on what should or should not be considered an accident, see, *Giemulla, supra* note 24 at Article 17 paragraph 15 (ff).
[285] 580 F. 2d 1193
[286] 470 U.S. 392, 84 L. Ed. 2d 289, 105 S.Ct. 1338 (1985) [*Air France* v. *Saks*]
[287] Saks, 724 F.2d.

accident "...by showing that her injury was caused by the normal operation of the aircraft's pressurization system".[288]

In *Karfunkel* v. *Air France (1997) D.Ct.* it was argued that *hijacking* is an accident within the meaning of the Warsaw Convention.[289] *Krys* v. *Lufthansa German Airlines* (1997) determined that a heart attack does not constitute an accident.[290]

In *Waxman v. C.I.S. Mexicana DeAviacion, S.A. de C.V.* (1998), the court resolved that the injury caused to the plaintiff by the failure of the airline and the subcontractor to remove a hypodermic needle from the passenger's seat, "...was an unusual, unexpected departure from ordinary procedures...[though] their faulty cleaning of the airplane resulted from an 'accident'..."[291] In *Bousso v. Iberia Lineas Aereas de Espana* (1998), the court held that "...the passenger's injury, a cracked tooth, was caused by an accident...[a] passenger biting into a foreign object present in an in-flight meal was an "unexpected" and "unusual occurrence" that was "external" to the passenger".[292] In *Ronai v. Delta Air Lines, Inc.* (2000), an allegation of inadequate medical care failed to meet the definition of an accident under the Warsaw Convention.[293] In *Maxwell v. Aer Linqus Ltd.* (2000), the plaintiff was "...struck by a bag of liquor bottles when the overhead bin was opened upon arrival of her flight".[294] The court determined it could be considered an accident under the Convention.

An interesting approach is found in *Louie v. British Airways, Ltd.* (2003) where it was held that "...A comfortable seat with a leg rest was not an unexpected or unusual event in business class...the failure to warn of DVT [deep vain thrombosis] was not unexpected or unusual given that the passenger did not show that there was an established industry

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[288] *Air France* v. *Saks*, *supra* note 286 at 396.
[289] 427 F.Supp. 971
[290] 119 F.3d 1515. The same reasoning is found in Rajcooar v. Air India, Ltd., 89 F. Supp. 2d 324; 2000 U.S. Dist. LEXIS 3684 and in McDowell v. Continental Airlines, Inc., 54 F. Supp. 2d 1313;1999 U.S. Dist. LEXIS 10847
[291] 13 F. Supp. 2d 508; 1998 U.S. Dist. LEXIS 10572
[292] Bousso v. Iberia Lineas Aereas De Espana, 1998 U.S. Dist. LEXIS 3939 (U.S. Dist. , 1998)
[293] Ronai v. Delta Air Lines, Inc., 2000 U.S. Dist. LEXIS 21064 (U.S. Dist. , 2000).
[294] 122 F. Supp. 2d 210; 2000 U.S. Dist. LEXIS 17206.

standard in 2000 of giving such warnings".[295] It must be said that the air carrier cannot afford to become some sort of 'insurer' of the passengers. Arguments which could lead to such unrealistic determinations may be found in relation to DVT cases.

Courts have required that a passenger incident involve some risk connected with aviation, as opposed to any other mode of transportation, before finding a qualification of accident under the Warsaw Convention. In this sense, the following is leading jurisprudence:
In *MacDonald* v. *Air Canada* (1st.Cir. 1971), plaintiff fell while standing in the baggage claim area of the terminal after an international flight; no proof that fall was connected to the flight.[296] In *DeMarines* v. *KLM Royal Dutch Airlines* (1978), there was no evidence of ear damage due to unusual occurrence during the flight.[297] In *Rullman* v. *Pan Am* (1983) N.Y.S.Ct, airline passenger's injury did not result from "accident" under the Warsaw Convention where passenger nearly fell and fainted while on jetway which did not involve some risk connected with aviation.[298]

In *Air France* v. *Saks* (1985), the District Court dismissed the case, where the plaintiff sued the airline because she became deaf as a result of changes in air pressure during flight. The Court held that Saks could not recover under the Convention without evidence of some malfunction in the aircraft's operation. This conclusion was rejected in Appeal. Supreme Court expressed that no accident had occurred because her deafness resulted from her own "internal reaction to the usual, normal, and unexpected operation of the aircraft".[299] In *Wallace* v. *Korean Airlines* (1999), the United States District Court for the Southern District of New York concluded that sexual assault was not a risk characteristic of air travel, and therefore was not an accident under the Warsaw Convention.[300] This decision was appealed, vacated and remanded by the US Court of Appeals for the Second Circuit.[301]

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[295] Louie v. British Airways, Ltd., 2003 U.S. Dist. LEXIS 24750 (U.S. Dist. , 2003)
[296] 439 F.2d 1402
[297] 580 F. 2d 1193
[298] 122 Misc.2d 445, 471 N.Y.S.2d 478
[299] 470 U.S. 392, 105 S.Ct. 1338
[300] Wallace v. Korean Air, 1999 U.S. Dist. LEXIS 4312
[301] 214 F. 3d 293; 2000 U.S. App. LEXIS 12245

In *Olympic Airways v. Rubina Husain*,[302] the Supreme Court of the United States had to decide on: "...whether the "accident" condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin."[303] The Court decided that it is. It was concluded that the air carrier's flight attendant refusal to provide the passenger with the appropriate accommodation due to his asthmatic condition, was considered an "accident", qualifying it of 'unexpected and unusual' in the light of *Saks*.

In *Blassett v. Continental Airlines Inc.*, [304] the United States Court of Appeals for the Fifth Circuit noted that some air carrier's departures from industry standards may constitute an 'accident' while others may not; this in relation to a DVT claim where Continental's policies did not include DVT warnings to the passengers. In this case, the Fifth Circuit decided in favor of the air carrier, since it complied with FAA expectations.

The importance of determining the link of the event to aviation risks must be taken into account. Some events make take place not exclusively on board the aircraft, but also on any other similar mode of transportation or public place, like a bus, a metro, a train, a movie- theatre, or a concert area.[305] In Giemulla's (et al) view, hijacking and terrorist attacks should not be viewed as accidents.[306] The same criterion is sustained "if the injuries result from the passenger's own conduct or acts of third parties".[307]

Another important issue when determining if an event constitutes an accident in terms of the conventions is whether or not it is *the cause creating the damage*. This means the existence of a causal link between *accident* and *damage*. If the plaintiff is not able to prove the causal link, it is most probable that the Court would dismiss the case because it

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[302] 540 U.S. ___ (2004). 124 S.Ct. 1221 (2004)
[303] *Ibid.*
[304] ___ F. 3d ___, 2004 WL 1627247 (5th Cir. July 21, 2004)
[305] In the same sense, see, *Giemulla, supra* note 24 at Article 17 paragraph 13, referring to 'mere coincidences' that could have happened in any other 'spheres of life'.
[306] *Ibid.* at Article 17 paragraph 7a.
[307] *Ibid.*, citing *Levy* v. *American Airlines*, 24 Avi 17,581, US District Court, SDNY, 1993.

will not fall under the Article 17 criteria. The claimant must be very careful in the way he/she brings the facts to the court.

There is also a difference between risks related to aviation and the commission of a criminal act during the operation of the contract of transport by air. Due to the regulations and measures recently adopted by the United States in its policy to fight terrorism, the possibility of having U.S. Marshalls on board the aircraft may represent a risk, to which the passengers are exposed with the consent and previous knowledge of the air carrier: "would a lost shot be considered an accident within the meaning of the Convention?"[308]

Perhaps it would be convenient to be more precise on the terminology: a lost opportunity in Montreal 1999. Rephrasing Article 17 in the following way could have avoided differences of criteria for future interpretation:
The carrier is liable for damage sustained in case of death or injury of a passenger ***upon condition only that the event which caused the death or injury*** *took place in board the aircraft or in the course of any of the operations of embarking or disembarking* ***and that the event is connected to risks inherent to air travel.*** *The carrier is not liable if the death or injury resulted solely from the state of health of the passenger...*

ii. The Concept of Bodily Injury

Article 17(1) of the Montreal Convention establishes:
"...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."[309]

In the same sense, Article 17 of the Warsaw Convention establishes:

[308] *Milde-Lecture, supra* note 269.
[309] *Montreal Convention, supra* note 16, Article 17(1).

"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."[310]

Guatemala City Protocol 1971 replaced the concept of bodily injury for *personal injury*, which could award compensation for mental injury. However, the Protocol is not in force and the new scheme, is still uncertain as to whether mental injuries are recoverable or not. Case law has shown that mental injuries are compensable only if accompanied by bodily injury. The following cases provide an idea of what is the criterion followed by some courts:

In *Eastern v. Floyd (1991) S.Ct.*, the Supreme Court of the United States held that Article 17 of the Warsaw Convention does not allow recovery for mental or psychic injuries unaccompanied by physical manifestation of injury.[311] The same criterion was followed in an Australian court.[312] In *Zicherman* v. *Korean Airlines Co. Ltd* (1996) and the *Roselawn* case (1997) it was held that the Warsaw Convention does not preclude recovery for any damages which could be granted by the applicable domestic laws (according to choice of law principles).[313]

In *EL AL v. Tseng (1999) S.Ct.*, the Supreme Court of the United States held that recovery for personal injury suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of Warsaw Convention, is not available at all.[314] The Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does

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[310] *Warsaw Convention, supra* note 18, Article 17.
[311] 499 U.S. 530, 111 S.Ct.1489
[312] See, *Abeyratne, supra* note 117 at 249 refering to *Kotsambasis* v. *Singapore Airlines* (1997) citing David B. Johnston (1997), 'Australian Court Holds that Damages for Pure Psychological Injury are not Recoverable in Warsaw Convention Cases', *Aviation Insurance and Law*, 16, No.(9), *September*, p.166.
[313] *Ibid.* Also, *Zicherman* v. *Korean Airlines Co. Ltd* 11 b S.Ct. 629 (1996). And, *In re Aircrash Disaster Near Roselawn, Indiana* on 31 October 1994, 954 F. Supp. 175 (N.D.I 11.1997).
[314] 525 U.S. 155, 119 S.Ct. 662

not satisfy the conditions for liability under the Convention.[315] The plaintiff alleged personal injury but alleging no bodily injury. The United States District Court for the Southern District of New York stated that the claim was not compensable because the Convention does not permit recovery for solely psychic or psychosomatic injury.[316] In *Weaver v. Delta Airlines (1999) D.Ct.* the United States District Court, D. Montana, Billings Division, it was held that chronic post-traumatic stress disorder is "bodily injury" since evidence was provided that the passenger experienced biochemical reactions as result of her terror that had physical impact upon her brain and neurologic system.[317]

The UK House of lords in *King v. Bristol Helicopters*[318] stated that: "[t]he expression 'bodily injury', or 'lesion corporelle', in article 17 means, injury to the passenger's body...The brain is part of the body. Injury to a passenger's brain is an injury to a passenger's body just as much as an injury to any other part of his body... This does not mean that shock, anxiety, fear, distress, grief or other emotional disturbances will as such now fall within article 17. It is all a question of medical evidence".[319]

In any case, whether or not mental injury is allowed under the appropriate domestic jurisdiction, the plaintiff must prove that he/she suffered mental injury as a result of an act of the defendant.[320] However, on a recent decision, the US Court of Appeals for the District of New York held that "a carrier may be held liable under Article 17 [Warsaw Convention] for mental injuries only if they are caused by bodily injuries.[321] In this sense, the plaintiff must proof the causal link between the bodily injury and the mental injury that he/she claims to be compensated for. The position in Elhrich v. American Airlines relies on other court decisions like In re Air Crash at Little Rock, Arkansas and other

[315] 525 U.S. 155, 156, 119 S.Ct. 662
[316] 525 U.S. 155, 155, 119 S.Ct. 662, *citing Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 552, 111 S.Ct. 1489, 113 L.Ed.2d 569.* In the same sense, see *Terrafranca* v. *Virgin Atlantic Airways (1997) A.Ct.* (151 F. 3d 108) and *Burnett* v. *TWA (1973) D.Ct.* (369 F. Supp. 1152).
[317] 56 F. Supp. 2d 1190
[318] *Supra* note 261.
[319] *Ibid.*
[320] See, *Abeyratne*, *supra* note 117 at 234.
[321] *Ehrlich v. American Airlines, supra* note 260. Note that the Court took into consideration some of the discussions held in Montreal 1999 around the subject, although the case was to be decided under the Warsaw Convention.

cases, in which: "...recovery for mental injuries is permitted only to the extent the [emotional] distress is caused by the physical injuries sustained".[322]

d. Reasoning in Favor of the Ratification of the New Scheme

The Montreal Convention represents a positive step towards re-unification and consolidation of the fragmented Warsaw System; however, it has been demonstrated in previous pages how conflict situations will subsist. A proper assessment of the advantages that ratification of the new scheme may bring to States is necessary in order to know whether or not the Montreal Convention brings some hope for reunification of private air law. The general argument is that industrialized countries with strong economic systems are better equipped to face the new scheme than those developing countries which still lack a proper economic and legal background to assess international obligations as those contained in the new Convention.

For instance, Yodmani argues the following: "[c]onsidering the fact that the liability of the carrier for death and injury of passengers is unlimited under the Convention, it is not incorrect to imply that the Convention obliges States to require their carriers to maintain unlimited coverage insurance. If this is really an intention of the Convention, a State should make sure that its carrier is financially strong enough to afford such unlimited coverage insurance before deciding to ratify the Convention. Some carriers especially in developing States may not be able to meet the requirement of this compulsory insurance".[323] In the same sort of ideas, Idorenyin states that: "...the end product is an instrument that reflects neither the effective participation nor any input from the developing world. Most pitifully, the developing nations were further arm-twisted to sign the instrument, thus giving the impression of their apparent satisfaction with the so-called consensus package wherein nothing was conceded to them".[324] It is then, of much

[322] *Ibid.*
[323] *Yodmani*, *supra* note 240 at 84.
[324] Idorenyin Edet Amana, *The Montreal Convention of 1999: Problems and Prospects* (LL.M. Thesis, McGill University Institute of Air and Space Law 2002) [unpublished] at 107 [*Amana*].

concern, how many of these developing countries will decide to stay under the 'old regime'.

i. A Regional Approach[325] towards a Multilateral Unification[326]

The benefits of a regional approach towards unification of air law may not be obvious, however, the 'regionalisation' of responsibilities within ICAO may provide a clear example of how the interaction within countries among defined regions, brings clearer and better results. The categorisation of States by ICAO (for purposes of air navigation services and facilities) provides a clear example of how regions around the world are linked together in relation to international air transport activities. This categorisation of States relies in two main groups: the 'provider States' and the 'user' States: "...a State may be both a 'provider' and a 'user' State in the region in which it is situated or in other regions in which it has territories. A State may also have provider interests in a number of regions due to its location in an area where the various air route networks associated with the regions overlap. An example of this is the United States which has provider interests in the Pacific, the North Atlantic, the Caribbean and the North American Regions. On the other hand, a State may have user interests in any number or all of the established air navigation regions depending on the international routes flown by its airlines. Examples are France, Japan, the United Kingdom and the United States, whose airlines operate globally.[327] To reinforce this argument, IATA recognises that "...the airlines have created a modern interdependent world over the past 50 years".[328]

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[325] "The countries need first of all to co-operate with each other on regional basis and to seek solutions together to their common problems..." See, *ibid.* at 120 citing Naveau. "Co-operation with the industrialized countries is however not to be neglected but adequately exploited", in *ibid.* at 120.

[326] Diederiks-Verschoor argues that bloc-formation (i.e. ECAC) hampers unification. See, *Diederiks*, *supra* note 5 at 46.

[327] *ICAO*, Categorization of States, *ICAO*, online: http://www.icao.org/icao/en/ro/rocateg.htm (last visited: June 15, 2004) [*ICAO Categorization*].

[328] *IATA*, About Us, From a New Trade Association to a New Strategic Thrust, *IATA*, online: http://www.iata.org/about/history_5.htm (last visited: June 15, 2004).

ICAO's regional offices serve the Contracting States accredited, and keep relations with non-Contracting States, other territories and international organisations as well.[329] ICAO's regional offices have the responsibility of serving their accredited Contracting States,[330] as well as keeping relations with non-Contracting States[331] and other territories.[332] ICAO works with the following three main regional bodies: the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC) and the Latin American Civil Aviation Commission (LACAC).

The Montreal Convention has entered into force on November 4, 2003, which reflects a positive attitude of the international community towards a global unification of rules. Since its drafting, most developed countries fully supported it.[333] Several arguments in favour of the ratification of the Convention have been expressed.[334] As of July 9, 2004, 54 States have ratified the new Convention.[335]

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[329] For the Asia and Pacific Office (APAC), see, http://www.icao.int/apac/apacresp.htm (last visited: March 23, 2004). For the Middle East (MID) Office, *See*, http://www.icao.int/mid/ (last visited: March 24, 2004). For the Western and Central African (WACAF) Office, *See*, http://www.icao.int/wacaf/ (last visited: March 24, 2004). For the South American Regional Office, *See*, http://www.lima.icao.int/ (last visited: March 24, 2004). North American, Central American and Caribbean (NACC) Office, *See*, http://www.icao.int/nacc/ (last visited: March 24, 2004). Eastern and Southern Africa (ESAF) Office, *See*, http://www.icao.int/esaf/ (last visited: March 24, 2004). Europe and North Atlantic (EUR/NAT) Regional Office, *See*, http://www.icao.int/eurnat/ (last visited: March 24, 2004).

[330] "A Contracting State of *ICAO* is a State which has adhered to the Chicago Convention on International Civil Aviation, whether or not it is a member of the United Nations and/or any of its other Agencies...". *ICAO Categorization*, *supra* note 327.

[331] "A non-Contracting State of ICAO...is a State which has not signed and does not adhere to the Chicago Convention, but which is a member of the UN and/or any of its other Agencies...". *Ibid.*

[332] See, *ICAO*, General Responsibilities of Each Regional Office, *ICAO*, online: http://www.icao.or/icao/en/ro/roresp.htm (last visited: March 23, 2004).

[333] *Yodmani*, *supra* note 240 at 44, citing also that countries supporting the draft at the Diplomatic Conference held in Montreal 1999 –ICAO Headquarters- included 37 member states of ECAC and 21 member states of LACAC, citing ICAO DCW Doc. No. 8 and No. 14, respectively.

[334] See, Anthony G. Mercer, "The 1999 Montreal Convention – a new Convention for a new millennium" [2000] TAQ 86-106, 105. *Poonoosamy*, *supra* note 223 at 85. *Rattray*, *supra* note 223 at 78. George N. Tompkins, Jr., "The Montreal Convention of 1999: this is the answer" [1999] TAQ 114-117, 116. Wolf Müller-Rostin, "The Montreal Convention of 1999: Uncertainties and inconsistencies" [2000] TAQ 218-224, 224. See also, *Amana*, *supra* note 324 at 118, arguing that "...developing nations have no choice but to ratify the Convention. If not for economic reasons...at least to enable them sustain one of their symbols of independence and sovereignty".

[335] See, *List of* Parties, *supra* note 35.

For instance, North America has shown its commitment towards the reunification and consolidation of the regulatory framework. Canada[336] and the United States[337] have signed and ratified the new instrument.

1. Latin America

I prefer referring to Latin America (rather than Mexico as part of North America), the Caribbean and South American region together, since these countries face a similar political and economic reality contrary to the inadequacy of placing Mexico in an equivalent place in relation to the United States or Canada.

The following Latin American countries have signed (but not ratified, yet) the new Convention: Bahamas, Costa Rica, Cuba, Dominican Republic, Jamaica, Bolivia, Brazil, Chile and Uruguay. States which have ratified it are: Barbados, Belize, Mexico, Saint Vincent and the Grenadines, Colombia, Panama, Paraguay and Peru.[338] There is uncertainty towards the position that the non-ratifying States will adopt.

Through Recommendation A15-16, the Latin American Civil Aviation Commission (LACAC) in its XV Assembly encourages Member States to the prompt ratification of several conventions and protocols, within them, the Montreal Convention 1999.[339] The Commission expresses the following argument in order to encourage States: "...it is highly desirable to achieve complete participation of the Member States in the air law Conventions and Protocols in order to benefit, as much as possible, from the unification of international instruments..."[340]

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[336] Signed 1 October, 2001. Ratified 19 November, 2002. See, http://www.icao.int/icao/en/leb/mtl99.htm (last visited: March 4, 2004).
[337] Signed 28 May, 1999. Ratified 5 September, 2003. See, http://www.icao.int/icao/en/leb/mtl99.htm (last visited: March 4, 2004).
[338] See, *List of Parties*, *supra* note 35. Note that Belize and Jamaica are not party to the Warsaw-Hague formula.
[339] Comision Latinoamericana de Aviación Civil, online: http://clacsec.lima.icao.int/ (last visited: April 01, 2004) [*CLAC*].
[340] *Ibid.*

In relation to South America, Abeyratne argues the following: "[t]he real sustenance of South American aviation under a wider Aviation umbrella would be predicated upon the essential need for airlines of the region to ride with the tide of change that is sweeping the global air transport scene in order to stay afloat with the other regions of the world".[341] I would extend his point of view as applicable to the rest of Latin American countries and also as to encourage states of this region for the ratification of the new scheme. As such, Argentina, Ecuador, Suriname, Venezuela, El Salvador, Grenada, Guatemala, Honduras, and Trinidad and Tobago are not party yet. Guyana, Antigua and Bermuda, Nicaragua, Saint Kitts and Nevis, and Saint Lucia are not party yet to any treaty.[342]

2. Europe

Through a news release of 29 April, 2004, ICAO informed that fourteen European countries deposited instruments of ratification.[343] This was an important event for the rest of the contracting states, which were looking forward for this decision, since the European Community expressed its wishes to ratify as a whole and at once, although Greece and Portugal ratified in advance.[344]

Malta just ratified it last May 5, 2004 becoming effective on July 4, 2004. Iceland ratified on June 17, 2004, entering into force on August 16, 2004. States which have previously ratified it are: Bulgaria, Czech Republic, Estonia, Greece, Portugal, Romania, Slovak Republic, Slovenia, and The Former Yugoslav Republic of Macedonia.[345] Lithuania, Monaco, Poland, Switzerland and Turkey are the remaining countries still looking forward to ratify the new scheme.

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[341] See, *Abeyratne*, *supra* note 117 at 438.
[342] Compare, *List of Parties*, *supra* note 35 with *Contracting Parties*, *supra* note 33 and with *ICAO*, Contracting Status to NACC Office, *ICAO*, online: http://www.icao.int/cgi/goto_m_esaf.pl?esaf/about.htm (last visited: July 24, 2004).
[343] The countries are: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Norway, Spain, Sweden and the United Kingdom.
[344] *ICAO*, News Release, *ICAO*, online: http://www.icao.org (last visited: May 8, 2004).
[345] See, *List of Parties*, *supra* note 35.

Among the Contracting States accredited to the *ICAO* Europe and North Atlantic (EUR/NAT) Office, Algeria, Armenia, Azerbaijan, Belarus, Croatia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Morocco, Republic of Moldova, Russian Federation, Serbia and Montenegro, Tunisia, Turkmenistan, Ukraine and Uzbekistan are not parties yet. Albania, Georgia, San Marino and Tajikistan are not party to any instrument.[346]

3. Africa[347]

Ruwantissa notes that in African civil aviation, both economic and legal factors should be addressed together, emphasising that it is the legal infrastructure which will place economic issues in their right order.[348] The economic power (almost non-existent) of the African countries brought visible consequences in the adoption of the Montreal Convention. Idorenyin makes a clear statement: "Notwithstanding that Africa as a whole...accounts for no more than 2% of total air transport gross output...the rules of equality as provided for by the Vienna Convention on the Law of Treaties ought to have been respected during the Montreal Diplomatic Conference".[349]

Yodmani expresses that India and 53 African countries strongly opposed the Montreal Convention draft, by arguing that the unlimited liability provision *would be against the interest of the small and middle sized air carriers*, bringing benefit to passengers of developed countries mainly.[350] These countries also showed their opposition towards the 'fifth jurisdiction' provision.[351]

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[346] Compare, *List of Parties*, *supra* note 35 with *Contracting Parties*, *supra* note 33 and with *ICAO*, Contracting States to NACC Office, *ICAO*, online: http://www.icao.int/cgi/goto_m_eurnat/about.htm (last visited: July 24, 2004).

[347] For a good analysis of the Montreal Convention in the eyes of developing and African Nations, see, *Amana*, *supra* note 324 at 107 ff.

[348] *Abeyratne*, *supra* note 117 at 411.

[349] *Amana*, *supra* note 324 at 107 citing E.A. Jones for the statistic figures and building his argument in relation to the 'Friends of the Chairman Group' resorted by the President of the Conference. See, *ibid.* at 41, questioning about the 'legality' of the Conference strategies.

[350] *Yodmani*, *supra* note 240 at 45, citing *ICAO* DCW Doc. No. 18.

[351] *Ibid.*, citing *ICAO* DCW Doc. No. 22.

The following African States have signed (but not ratified) the new Convention: Madagascar, Mauritius, Mozambique, South Africa, Swaziland, Zambia, Burkina Faso, Central African Republic, Cote d'Ivoire, Gabon, Ghana, Niger, Senegal and Togo. States that have ratified it are: Benin, Cameroon, Gambia, Nigeria, Botswana, Kenya, Namibia and the United Republic of Tanzania.[352]

As the UK Department of Transport recognizes in relation to the liability limit in case of destruction, loss, damage or delay of baggage: "What will be a benefit for passengers will of course be a cost to airlines... baggage claims represents a significant cost to airlines and the result of implementing this provision will mean higher costs to airlines unless improvements are made to the handling of baggage. These costs may well be transferred to handling agents and ultimately to insurance companies".[353] No matter who carries the burden of liability limits, when it comes to developing countries, this represents a serious consideration in economic terms for all parties involved, understanding that it is the passenger who will have to pay higher fares if States are to engage in the new unlimited liability scheme for passengers.

In this context, the following States (accredited to the Western and Central African Office) are not party to the Montreal Convention: Benin, Cape Verde, Congo, Democratic Republic of the Congo, Equatorial Guinea, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania and Sierra Leone.[354] Chad and Sao Tome and Principe are not party to any treaty.[355] In the Eastern and Southern African region, Angola, Comoros, Ethiopia,

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[352] See, *List of Parties*, *supra* note 35. Note that Mozambique and Namibia are not party to the Warsaw-Hague formula. Compare *List of Parties* and *Contracting Parties, supra* note 33.

[353] UK Department of Transport. Implementing 1999 Montreal Convention, UK Department of Transport, online: http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/page/dft_aviation_503572.hcsp (last visited: April 01, 2004).

[354] Compare, *List of Parties*, *supra* note 35 with *ICAO*, WACAF – Areas of Responsibility, *ICAO*, online: http://www.icao.int/cgi/goto_m_wacaf/about.htm (last visited: July 24, 2004).

[355] Compare, *List of Parties*, *supra* note 35 with *Contracting Parties*, *supra* note 33 and with *ICAO*, WACAF – Areas of Responsibility, *ICAO*, online: http://www.icao.int/cgi/goto_m_wacaf/about.htm (last visited: July 24, 2004).

Lesotho, Malawi, Rwanda and Zimbabwe are not parties to Montreal.[356] Burundi, Djibouti and Eritrea are not party to any treaty.[357]

4. The Arab States and the Middle East

It is interesting the approach taken by this region. In Montreal 1999, the member States of the Arab Civil Aviation Commission proposed a three tier system of liability ranging from 100,000 SDR, 250,000-400,000 SDR and over 400,000 SDR.[358] Ultimately, Pakistan and Sudan have signed, but not ratified, the new scheme. Bahrain, Cyprus, Jordan, Kuwait, Saudi Arabia, the Syrian Arab Republic and the United Arab Emirates have ratified it.[359] States which have not signed or ratified are: Afghanistan, Egypt, Iran, Iraq, Israel, Lebanon, Lybian Arab Jamahiriya, Qatar and Yemen.[360]

5. Asia and the Pacific

Asia is a very important market in the aviation industry. Abeyratne notes that the Asia/Pacific region has the largest share of the world economy.[361] The Annual Report of ICAO Council 2002 reports that this region grew by 4.8 per cent in 2002, noting its significant contribution to the world economy, with an average GDP of 6.5 per cent.[362]

It is also worth noting the existence of strategic alliances reached in 1997 by some Asian airlines: "Japan Airlines with Air France, Singapore Airlines with Air New Zealand and

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[356] Compare, *List of Parties*, *supra* note 35 with *ICAO*, ESAF – Areas of General Responsibility, *ICAO*, online: http://www.icao.int/cgi/goto_m_esaf.pl?/esaf/about.htm (last visited: July 24, 2004).
[357] Compare, *List of Parties*, *supra* note 35 with *Contracting Parties*, *supra* note 33 and with *ICAO*, ESAF – Areas of General Responsibility, *ICAO*, online: http://www.icao.int/cgi/goto_m_esaf.pl?/esaf/about.htm (last visited: July 24, 2004).
[358] See, *Rattray*, *supra* note 223 at 73.
[359] Compare, *List of Parties*, *supra* note 35 with *ICAO*, MID Office – Areas of General Responsibility, *ICAO*, online: http://www.icao.int/cgi/goto_m_mid.pl?/mid/about.htm (last visited: July 24, 2004).
[360] *Ibid.*
[361] *Abeyratne*, *supra* note 117 at 397 citing *Annual Reports of the Council*, Montreal: ICAO, 1998, p.30.
[362] *ICAO*, Annual Reports of the Council-2002, *ICAO*, online: http://www.icao.org (last visited: March 3, 2004).

Ansett Australia and Air India with Air France".[363] In 2000 there was a major alliance involving Air New Zealand, United Airlines, Thai Airways, Malaysia Airlines, South African Airways and Lufthansa.[364]

Within the Contracting States to which the Asia and Pacific Regional Office of ICAO (APAC) is accredited,[365] Bangladesh, Cambodia and China have signed (but not ratified) the Montreal Convention. Japan, New Zealand and Tonga have adhered –and ratified- to it. Contracting States to *ICAO* which have not signed or ratified the Montreal Convention are: Australia, Brunei Darussalam, Democratic People's Republic of Korea, Fiji, India, Indonesia, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nauru, Nepal, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Vanuatu and Vietnam. States not party to any (Warsaw, Hague or Montreal) are: Bhutan, Cook Islands, Kiribati, Marshall Islands, Micronesia, Palau and Thailand.[366]

In the specific case of Thailand, Yodmani states that this country is one of the few countries which have not yet ratified any instrument of the Warsaw System.[367] He argues that if Thailand decided to ratify any of the old scheme instruments, it would be 'stepping backwards', thus supporting the ratification of the new Convention, instead. He also raises an interesting issue, which is that neither Thailand or Thai Airways International have been *adversely affected* by the fact that Thailand is not party to any agreement.[368]

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[363] *Abeyratne*, *supra* note 117 at 297 citing 'The World of Aviation', Montreal: ICAO, 1997-2000 (Circular 273-AT/113), p.17.

[364] *Ibid.*

[365] To access the list of States, see, *ICAO*. APAC-Areas of Responsibility, *ICAO*, online: http://www.icao.int/apac/apacresp.htm (last visited: March 23, 2004). Or see also, *ICAO*, APAC – Areas of Responsibility, *ICAO*, online: http://www.icao.int/cgi/goto_m_apac.pl?/apac/about.htm (last visited: July 24, 2004).

[366] Compare, *List of Parties*, *supra* note 35 with *Contracting Parties*, *supra* note 33 and with *ICAO*, APAC – Areas of Responsibility, ICAO, online: http://www.icao.int/cgi/goto_m_apac.pl?/apac/about.htm (last visited: July 24, 2004).

[367] *Yodmani*, *supra* note 240 at 4.

[368] *Ibid.* at 106 arguing that Bangkok International Airport is one of the major airports in Asia, and that Thailand's national air carrier is one of the leading airlines in Asia (also member of Star Alliance) as for 2000. See, Star Alliance, online: www.staralliance.com (last visited: April 2, 2004).

ii. Solutions

For those countries, presently wondering whether they should or should not ratify the Montreal Convention, my first suggestion would be that they should ratify it in order to leave aside any possibility of gaps in the applicability of the law. I would argue that the more conventions a State is party to (as long as they do not conflict with each other), the greater the degree of legal security in cases of international air transport. This is due to the nature of aviation; a State, an airline, a passenger or an insurance company can never be one hundred percent sure of all the possibilities that may arise in the operations of air transport. Harold Caplan argues that "[e]very Sovereign State which concludes the time is ripe to translate the main features of IATA agreements into law, binding upon all carriers everywhere, big and small, can embrace the New Convention".[369]

It is obvious that for countries party to any or all of the existing instruments of the Warsaw System, they should not withdraw from them, even if they are party to the new Convention. Doing this would create greater chaos within the international community. The question now is whether the old regime should still remain open for adherence or ratification by new States or should those States (which are not party to any of the agreements) be only allowed to join the new Convention. How much would this help avoid deeper conflicts?

It all comes to *who* signed *what*. For those States which haven't signed or ratified the new Convention, it is appropriate to know in which stage of liability they stand, making an individual study by taking into consideration the international treaties they are party to, as well as any unilateral agreement/airline agreement raising their levels of liability.

As for those issues not specifically covered in the international regime, and those in which the Conventions directly refer to the *lex fori*, it is always necessary to look into the national laws of each State, and any other agreements (regional economic agreements) or

[369] *Caplan*, *supra* note 133 at 205.

resolutions that may bind the governments, the air carriers, third parties, as well as limit or extend the passenger's/consumer's rights in a specific jurisdiction.

Conclusion

The international community lies on uncertainty and unpredictability when it comes to decide on an aviation case where the legal framework governing international carriage by air is involved. Although certain rules are stated, conflict of laws and conflict of conventions are still very probable to appear under both the Warsaw System and the new Montreal Convention.

Good knowledge of private international air law is of extreme importance for the different actors in the aviation industry: air carriers, aircraft manufacturers, insurance companies, passengers, governments and aviation practitioners. Choice of law rules and forum selection are key elements, which proof to constitute a determining element for success or failure in international litigation.

A clear understanding of the international regime is effective for a good interpretation of controversial concepts. The Montreal Convention provides some clarification and evolution of the old system; however, a better improvement could have been achieved in 1999.

Recent court decisions prove to be of great impact in air carrier's liability. Imminent concern still exists on which law should apply when States are party to one international instrument but not to the other(s), and what happens when there is no treaty relation between the parties involved.

The importance of looking at the dates of ratification and entry into force of the international treaty governing a specific issue in air transport goes parallel to the date when the accident took place, in order to determine and clarify the applicability of the law. There is still no 'magic book' or tool that could provide us with all the solutions, although exhaustive research has been done and is develops on the field. A case-by-case analysis must always be accomplished, leaving no detail without proper reasoning.

Global interpretation of the international regime governing international carriage by air is a relevant effort of the courts in the various countries, in order to achieve some sort of uniformity. Comparative law analysis, as in the common law jurisdictions (United States, United Kingdom and Australia) should be considered an important trend to decide on conflict of laws, conflict of jurisdictions, conflict of conventions and conflicts of interpretation.

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