Choice of Forum in Passenger Claims Under the Montreal Convention 1999: A Two-Dimensional Solution to a Three-Dimensional Problem

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I. INTRODUCTION

In the wake of an aviation accident—although rarely the immediate concern of the representatives of the victims—the issue of compensation will inevitably arise at an early stage. Law firms specializing in aviation litigation are quick to respond, some sending agents (referred to as "runners") to offer their services to victims and their families. Similarly, law firms representing potential defendants dispatch their own runners to settle potential claims. In speaking to lawyers from both the plaintiff and defense sides, one hears shocking anecdotes with accusations, made by both sides against one another, of all forms of skullduggery and unethical behavior in this post-accident free-for-all. Evidently, there is little love lost between them. The question of the extent to which these anecdotes have been exaggerated is not a question that this Article seeks to address, but it does demonstrate the emotive and morally charged backdrop against which the matter of aviation litigation unfolds.

It is always important to remember that these cases involve terrible events where lives have been lost in violent and often terrifying circumstances. There is loss and suffering on all sides, not only for the families and friends of those injured or killed, but also for the carrier involved, for which the accident will likely be the worst moment in its history, and in which it too has suffered tragic human losses. Conscious and respectful of this, the goal of this Article is to explore a particular aspect of the legal regime through which those suffering damages arising from passenger death or injury during international carriage by air seek compensation. That particular aspect is choice of forum. My interest in the issue of choice of forum in the litigation of international aviation passenger claims arose from a narrower research interest in the question

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of the availability of the doctrine of *forum non conveniens* (FNC) within the Warsaw Convention System (WCS)[1] and the Montreal Convention 1999 (MC99).[2] Both are international treaties aimed at governing the liability of the carrier for international carriage by air. WCS originated with the Warsaw Convention of 1929 and consists of various amending protocols, supplementary conventions, and agreements. MC99 is a modernization and consolidation of WCS, but it is a new convention that is neither supplemental to nor an amendment of WCS.[3]

However, there is a great deal of commonality between the two regimes. Many of MC99's provisions were taken, with little or no alteration, from WCS. Presently, there are 137 Contracting States to MC99, including the majority of States that are big-time players in the

1. The term Warsaw Convention System (WCS) refers to the general body of instruments built around the Warsaw Convention. The term refers to the following: Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]; Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 Oct. 1929, Sept. 28, 1955, 478 U.N.T.S. 373 [hereinafter Hague Protocol]; 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, Sept. 18, 1961, 500 U.N.T.S. 31 [hereinafter Guadalajara Convention]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, Mar. 8, 1971, 10 I.L.M. 613, ICAO Doc. 8932 [hereinafter Guatemala City Protocol or GCP]; 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 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, Sept. 25, 1975, 2097 U.N.T.S. 23 [hereinafter MAP1]; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on Oct. 12, 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, Sept. 25, 1975, 2097 U.N.T.S. 63 [hereinafter MAP2]; 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 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955 and at Guatemala City on 8 Mar. 1971, Sept. 25, 1975, ICAO Doc. 9147 [hereinafter MAP3]; Additional Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 Oct. 1929 as amended by the Protocol done at The Hague on 28 Sept. 1955, Sept. 25, 1975, 2145 U.N.T.S. 31 [hereinafter MAP4]. WCS also includes several inter-carrier agreements, including the Montreal Agreement 1966 and the IATA inter-carrier agreements of 1992-1995. For the text of these and others, *see* INT'L AIR TRANSP. ASS'N, ESSENTIAL DOCUMENTS ON INTERNATIONAL AIR CARRIER LIABILITY (3d ed. 2012).

2. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 309 [hereinafter MC99].

3. As recognized by the U.S. courts. *See* Schopenhauer v. Compagnie Nationale Air Fr., 255 F. Supp. 2d 81, 87 (E.D.N.Y. 2003).

carriage by air industry.[4] Thus, it is fair to say that MC99 currently governs most international carriage by air, but it must be remembered that WCS continues to apply in an ever-decreasing number of cases.[5]

Where applicable, WCS and MC99 lay down the conditions upon which the carrier is liable for damages arising from certain events during international carriage by air. These "conditions" cover matters such as monetary limitations of liability, available defenses, limitation periods for bringing a claim, and so on. Both WCS and MC99 also have jurisdictional regimes that specify the places to whose courts a claim for damages can be brought. Under WCS, there are four specified jurisdictions;[6] MC99 added a fifth.[7] Although it is possible that a plaintiff may have a choice of four or five forums, in most cases there are overlaps that will mean a plaintiff will only have a choice between two or three forums, and sometimes only one.[8] In addition, under both jurisdictional

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4. Having entered into force on November 4, 2003, MC99 currently has 137 Contracting Parties. *List of Parties*, INT'L CIV. AVIATION ORG. (n.d.), *available at* https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (last visited Sept. 15, 2021).

5. *See, e.g.*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Mar. 4, 2015, Bull. Civ. I, No. 48 (Fr.) (*also published as* Cass Civ (1ère) Arrêt n 327 du 4 mars 2015, Airbus c. Armavia, n. 13-17392, [2015] R.F.D.A.S. 92) (Fr.). This case involved the crash of an aircraft on a flight from Yerevan, Armenia, to Sochi, Russia. Although the crash occurred in 2006, the resulting litigation was not governed by MC99. This was because Armenia was not then party to MC99, but it was to the Warsaw Convention, so it was the latter that governed. Armenia has since ratified MC99, it came into effect for Armenia on June 15, 2010.

6. Warsaw Convention, *supra* note 1, at art. 28(1) ("An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination."). These four jurisdictions are repeated in MC99. *See* MC99, *supra* note 2, at art. 33(1) ("An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.").

7. MC99, *supra* note 2, at art. 33(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 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.").

8. *See, e.g.*, Roberts v. Guyana Airways Corp., [1998] 77 O.T.C. 266 (Can. Ont. S.C.) (Guyana was the jurisdiction under all four bases).

regimes, there is a provision to the effect that the rules of procedure shall be governed by the law of the court seized on the case.[9]

Although this Article identifies the need to reform MC99's jurisdictional regime, the need identified is actually quite precise and limited. For the most part, the jurisdictional regime of MC99 functions extremely well. Certainly, some minor alterations might be made to bring greater clarity and certainty to the requirements necessary to invoke the third jurisdiction (i.e., jurisdiction at the place where the carrier has a place of business through which the contract has been made), specifically clarity as to what does and does not constitute a place of business. Likewise, the rather convoluted definition of the fifth jurisdiction is a target of complaint by some lawyers who regard it as inviting unnecessary litigation. Some might argue there is a question of whether the identification of a particular venue within a Contracting State under MC99's jurisdiction is affected by the Convention. These are, in my mind, minor issues (or, in some cases, non-issues). It is important to state that this Article is generally very supportive of MC99's jurisdictional regime. However, this Article believes a major issue with the jurisdictional regime of MC99 is the availability of FNC within that regime and what that means for choice of forum.

It is fair to say that there have been two major controversies regarding the jurisdictional regime of WCS and MC99. First was the criticism leveled at WCS—predominantly by the United States—that it did not guarantee the plaintiff a forum in their home state; the United States had fought for the inclusion of such a jurisdiction since at least 1970.[10] Eventually, with MC99, the so-called fifth jurisdiction found its place within the regime, putting that controversy to bed.

The other major controversy arose with respect to FNC. The question was whether FNC was applicable in WCS or MC99 cases. Could the plaintiff's choice of forum, from those available under the relevant instrument, be upset by a procedural rule, such as FNC, or was the plaintiff's choice to be regarded as inviolable? To put it another way, was the application of FNC consistent with the plaintiff's right—as granted under the Convention—to choose their forum?

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9. *See* Warsaw Convention, *supra* note 1, at art. 28(2); MC99, *supra* note 2, at art. 33(4). Article 28(2) provides (as does Article 33(4) of MC99), that: "Questions of procedure shall be governed by the law of the Court seized of the case."

10. *See* Gerald F. Fitzgerald, *The Revision of the Warsaw Convention* (1970), 27 CAN. Y.B. INT'L L. 284, 302 (2016). The possible amendment of the Warsaw Convention to make provision—in response to U.S. insistence—for a fifth jurisdiction was raised at the 17th Session of the ICAO Legal Committee in 1970, and a draft proposal agreed which was considered at the Diplomatic Conference held in Guatemala City in 1971.

Resolving the conundrum regarding the place of FNC within WCS and MC99 was the catalyst for my initial research into choice of forum. After all, FNC is ultimately a procedural device for resolving a conflict between the parties over the chosen forum where concurrent jurisdiction exists. In a previous article,[11] I presented the findings from my research, concluding that whilst FNC *is not available* under WCS, *it is available* under MC99. However, what had become clear early on was that the conundrum surrounding FNC was only a symptom of a larger problem centered around choice of forum. Taking FNC as a prism through which to examine choice of forum granted insight into the interests driving the plaintiff's initial choice, as well as those manifested in the defendant's opposition thereto. It was at the level of these interests' analysis that a bigger picture was revealed, one that takes us beyond WCS and MC99; finding an answer to the question of the availability of FNC did not solve the bigger problem. In a narrow sense, even though FNC is available, we were still left asking whether it *should* be. In a broader sense, once we perceive the bigger picture, we realize that any solution focused on MC99 is doomed to fail because, when it comes to choice of forum, MC99 is not a hermetically sealed system insulated and protected from outside influence—it is just one part of a larger aviation accident passenger compensation system. The discontent felt with respect to choice of the forum requires engaging with the bigger picture to find a solution.

This bigger picture consists of two interrelated aspects. The first concerns the availability of alternative remedies for passenger claims; that is, alternatives to a claim against the carrier. The second considers the influence of other stakeholders, specifically third parties to the passenger-carrier relationship. Let us examine each aspect a little more closely.

The typical plaintiff in an aviation accident is not limited to solely pursuing the carrier through MC99 or WCS; this is, in fact, just one option amongst many. Due to the nature of aviation accidents—which typically involve a multitude of contributing factors—the aviation plaintiff usually has several options from which to choose. Often there is a possibility of bringing a claim against several alternative defendants, typically aircraft or component manufacturers, or—as has become fashionable of late—an aircraft lessor. These actions are not based on a cause of action governed by MC99/WCS; they arise independently,

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11. David Cluxton, *The West Caribbean Conundrum: The USA Versus France on the Availability of FNC Under MC99*, 85 J. AIR L. & COM. 3 (2020). In many respects, this present article is a continuation of my earlier article, so readers are encouraged to read this earlier article first.

usually under national tort law.[12] Whilst an MC99 action is a highly attractive option to a plaintiff (something American lawyers colloquially refer to as a "slam-dunk"), the reality is that there has been a proliferation in aviation litigation outside MC99. Why? The answer comes down to choice of forum.

The plaintiff's choice of the defendant is frequently driven by their choice of forum in which to litigate. This is because the forums available to a plaintiff depend on, and often differ between, each of the various potential defendants. For example, the plaintiff might only have the option of suing the carrier under MC99 in either Cyprus or Greece, whereas if the plaintiff decides to sue the manufacturer, the action could be taken to the United States.[13] Interests of forum selection often drive the decision of which defendant to sue. In simple terms, an action against the carrier under MC99 may not provide as advantageous a forum for the plaintiff as an action against the manufacturer or some other defendant.

It almost goes without saying that the United States is the forum of choice for litigating passenger claims. Many factors make trials in the United States desirable. The availability of contingency fees is a major advantage, without which the possibility of suing a rich corporate defendant would be beyond the means of many plaintiffs. Likewise, the absence of the loser pays principle, when it comes to legal costs, makes litigation in the United States less risky for the plaintiff. The broad

12. In the United States, it is common in aviation litigation to find claims brought against several defendants under a variety of theories of liability. Most commonly, liability is based on some theory of negligence, strict products liability, and/or negligent entrustment. *See In re* Air Crash Disaster over Makassar Strait, Sulawesi, No. 09-CV-3805, 2011 U.S. Dist. LEXIS 2647 (N.D. Ill. Jan. 11, 2011). Plaintiffs brought their actions in the United States on these three theories against the manufacturer of the aircraft (Boeing), the aircraft maintenance provider (World Star Aviation), the alleged lessors (Triton Aviation and Wells Fargo Bank) as well as the manufacturer of an avionics system (Honeywell International). The case was dismissed on the grounds of FNC in favor of the courts of Indonesia where the accident occurred. *See also* Fatkhiboyanovich v. Honeywell Int'l, Inc., No. 04-CV-4333, 2005 U.S. Dist. LEXIS 23414 (D.N.J. Oct. 5, 2005). There, the litigation arose from the mid-air collision of the aircraft of Bashkirian Airlines and DHL over Überlingen, Germany. Claims were brought in negligence and strict products liability against several defendants, including the manufacturers of the Traffic Collision Avoidance System (TCAS), Honeywell International, Thales Avionics, and L-3 Communications. Again, the complaint was dismissed on the grounds of FNC.

13. *See* Clerides v. Boeing Co., 534 F.3d 623 (7th Cir. 2008). The plaintiff sued the U.S. manufacturer of the aircraft in Illinois in relation to the death of a passenger in an air crash. The flight in question was operated by the Cypriot airline Helios Airways between Larnaca, Cyprus and Athens, Greece. As such, the likely forums available under MC99 against the carrier were either Cyprus or Greece, but not the United States. However, the manufacturer could be sued in the United States. A similar scenario would likely have been at issue under WCS in *Ahmed v. Boeing Co.*, 720 F.2d 224 (1st Cir. 1983).

general jurisdiction of U.S. courts is also attractive to plaintiffs' lawyers because it permits unified litigation against multiple defendants in a single forum. The robustness of the U.S. judicial process, with its liberal and far-reaching pre-trial discovery rules, is the envy of many foreign litigators and augments the United States' appeal as a forum. Additionally, a potential plaintiff can rely on the existence of (and competition between) highly qualified law firms with a wealth of experience in aviation litigation. These are among the most compelling factors that make passenger aviation accident litigation trials in the United States desirable, but at the crux of the matter, the decisive factor behind the choice of a U.S. forum is the quantum of damages.

The potential recovery in a U.S. forum is likely to be far greater than in the plaintiff's home forum because of the right to trial by jury and the broad heads of damages available.[14] Even when courts are likely to engage with choice of law rules that will lead to applying foreign law to determine damages, a jury award in the United States will nearly always be higher than if the foreign court were to make the determination. Provided a jury determines damages of a general nature, then there is a good likelihood that a jury will award an amount far in excess of the sum that a judge would have granted in the plaintiff's home forum.[15] For these reasons, the United States is spoken of as the El Dorado for injured plaintiffs,[16] that "promised land" where they can expect an award akin in value to winning their national lottery.[17]

The fact that a plaintiff will elect to forego a tailor-made remedy against a carrier under MC99 in favor of an alternative general remedy provokes searching questions about the efficacy of MC99 as a system for

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14. *See* WARREN FREEDMAN, PRODUCT LIABILITY ACTIONS BY FOREIGN PLAINTIFFS IN THE UNITED STATES 13 (1988) ("The amount of potential recovery in a US court is a special factor favoring the choice of US forums; the jury system and the recognition of numerous elements of damages produce awards for personal injury or death which are much higher than in any other national jurisdiction.").

15. *Id.* at 13 (Freedman noting, "[s]urvival and wrongful death statutes in virtually all [s]tates recognize elements of damages far beyond those recognized in many foreign jurisdictions; these elements include loss of future earnings, loss of society, loss of parental guidance, pain and suffering, and ever fear of impending death"). Some of these elements of damages are particularly prone to large awards by juries precisely because they are not readily quantifiable in objective terms.

16. *Id.* at 1 ("[t]he United States is indeed the mecca or El Dorado for injured plaintiffs because the American tort system is geared to full recognition of the rights of consumers.").

17. Michael W. Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl*, 38 U. MIAMI INTER-AM. L. REV. 141, 145 (2006) ("[I]t shouldn't be a mystery why foreign plaintiffs choose the United States as a forum; it is a combination of court systems in which their own nationals have reason not to have confidence combined with the perceived riches of a U.S. judgment akin in magnitude to their own national lotteries.").

compensating passengers. As will be shown, this reflects the very different legal landscape MC99 exists within, compared to what existed at the time of the Warsaw Convention's drafting. One has to ask if MC99, as successor to WCS, has failed to appreciate its place in the bigger picture of modern international aviation litigation. It is worth repeating that plaintiffs are opting for alternative remedies rather than pursuing the bespoke "slam-dunk" regime provided under MC99, and we should also remember that the reason they do so is choice of forum.

The existence of alternative remedies has also played a part in the emergence of the second aspect of the bigger picture: the involvement of third parties. The natural tendency is to look upon MC99 litigation as being only two-party in form, i.e., as plaintiff passenger versus defendant carrier. However, an analysis of the interests actually involved brings to light a complex web of devices by which third parties can affect the litigation. The truth is that disputes between the nominal parties to MC99 litigation are only the tip of the iceberg. Beneath the surface is the behemoth of third-party influence, linked to the carrier (qua nominal defendant) by numerous devices for risk allocation and loss spreading.

These devices for risk allocation take many forms, either arising by force of law or by contractual agreement. Whatever the source, through these devices third parties gain considerable interest in and over the litigation. The most direct manifestation of this is something so patently obvious that it is staggering that it is so infrequently commented upon: that is, the fact that in the majority of cases, the substantive and operative interests are those of the carrier's insurer. The truth is that it is not the defendant carrier who calls the shots, but its insurer. Through subrogation or contractual assignment, the insurer holds claims control in the vast majority of cases wherein carriers are being sued for passenger liability.

Furthermore, linked to the defendant carrier are various third-party defendants with whom the carrier may bear concurrent liability, and against whom the carrier's insurer has a subrogated claim to contribution or indemnity. The true picture is that the plaintiff is not simply faced with litigating against the carrier—a formidable foe in its own right—but they must also contend with other parties often possessing extraordinary resources and influence. The ugly truth is that the insurer, acting in the carrier's name, often cooperates with potential third-party defendants and/or their insurers (not infrequently the same insurer as the carrier) to secure a jurisdictional advantage that will translate to lesser net liability. The cheaper the award against the carrier, the cheaper the third-party's contribution or indemnity payment. In many cases, and well in advance of any litigation, the potential defendants will have already reached a

sharing agreement with respect to liability for a given accident, and will coordinate their efforts to secure the outcome that best serves their common interest.

This bigger picture reveals the fallacy of the two-party paradigm upon which MC99 (as successor to WCS) is established. Although the court docket presents a simple picture, the reality is that on account of these risk allocation and loss spreading devices the true litigation relationship does not conform to this two-party paradigm. While the courts are constrained to dealing with the parties appearing before them, the same constraint does not limit policymakers; and yet, these third-party interests have not been given the consideration they demand in the context of MC99. The result has been the myopic exclusion of vital factors that contribute to making up the bigger picture, of which MC99 comprises only one part. Consequently, MC99 is premised on a skewed appreciation of the interests actually involved, and has not kept pace with developments in aviation litigation.

This Article argues that MC99, as the successor to WCS, is predicated on an anachronistic understanding of itself as a discrete system grounded on the two-party paradigm of plaintiff passenger versus defendant carrier. It also argues that this does not correspond to the reality in which MC99 is merely a component of a bigger, interdependent aviation accident passenger compensation system. The interdependency between MC99 and this bigger system means that evaluating the fairness and efficacy of choice of forum under MC99 requires us to understand how this system is organized and how it operates. This evaluation is achieved by identifying the third-party stakeholders and by elucidating the nature of their relationships and interests. In so doing, a fuller appreciation of the wider issues can be achieved.

To outline this Article, Part II fundamentally provides background and context. However, it also seeks to establish a fundamental thesis, i.e., that the Warsaw Convention System is built upon the foundation of a two-party understanding of the legal relations it sought to regulate. It begins by looking at Europe's legal landscape in the 1920s and accounts for why this gave rise to the need for an international treaty to regulate the liability of the carrier for international carriage by air. It will identify the mischief that the Warsaw Convention sought to address and in so doing describe the basic features and define the purpose of the liability regime. The focus will then shift to demonstrating that the drafters of the Warsaw Convention were, at least in 1929, justified in adhering to a two-party paradigm as the basis for their regime. We will then jump forward ninety years and consider the Montreal Convention 1999, demonstrating how, as the successor to WCS, it remains tethered to the two-party paradigm;

at the same time, the key changes to the liability regime and their general purpose are noted.

Part III will reveal the bigger picture of international aviation litigation by illuminating the complex interplay of liability relations between plaintiff passengers, defendant carriers, and third parties. After providing some background and illustration, this section will describe the emergence of alternative litigation options for plaintiffs seeking compensation for passenger death or injury. It will then build upon this analysis by looking at the multi-party nature of aviation litigation and the impact of third-party (non-contractual) actions for contribution or indemnification. Finally, attention will shift to risk management devices and how they provide another avenue for third-party influence. This analysis will be done by first examining the contractual indemnities agreed between commercial stakeholders to international air transport, whereby they allocate risk amongst themselves; and second, by revealing the reality of aviation insurance, that allows for the spreading of risk, and on account of which the insurer assumes the controlling interest in aviation litigation on the defense side.

The fourth and final section of this Article applies the lessons learned, and conclusions reached, in the preceding parts. It will conclude that the regulation of choice of forum under MC99 is fundamentally unfair to the plaintiff passenger and that it frustrates the policy objectives of MC99. A reform proposal shall be put forward that will: (1) take account of the existence of alternative remedies and the influence of third parties; (2) change how choice of forum operates so that it is fair to all parties; and (3) promote the policy objectives of MC99 and the industry generally.

A quick note about scope is necessary. This Article concentrates on choice of forum within litigation about passenger liability. It is concerned only with the liability for damage arising from passenger death or injury; liability for damage concerning passenger baggage and delay is not herein considered, neither is liability for cargo. Furthermore, on a point of terminology, reference to the two-party paradigm of plaintiff passenger versus defendant carrier is a term of convenience. It simplifies what is in reality a more complex issue. The quintessential passenger aviation litigation action is not taken by a passenger at all, but by a relative of theirs, e.g., a spouse. In other words, the passenger death case is the archetypal case. Strictly speaking, these plaintiffs are third parties to the contract of carriage. Furthermore, in some death cases, e.g., wrongful death, the plaintiff is exercising a cause of action distinct from that of decedent passenger's contractual cause of action. Yet, this does not alter the fact that the litigation in question is essentially two-party in nature,

insofar as liability is premised on a single core legal relationship between the carrier and passenger. This Article is interested in revealing the consequences of third parties entering on the defense side into the core legal relationship upon which the principal litigation is grounded.

II. WCS, MC99, AND THE TWO-PARTY PARADIGM

It is axiomatic that international air transport, by its nature, exposes carriers and their customers (be they passengers or shippers) to the diversity of laws across multiple jurisdictions. Within each jurisdiction the law may differ, to a greater or lesser extent, not only from the national law of the passenger, shipper, or carrier, but from each of the individual States otherwise connected to the flight in question. As an international industry, commercial air transport is thus in a position to be hindered by potential exposure to a multitude of divergent legal regimes. Indeed, the fundamental question of the existence of an enforceable contract of carriage might be resolved very differently in the forum State than the State of the carrier or passenger. Likewise, the enforceability of contractual clauses exempting or limiting the carrier's liability might be tolerated in the carrier's State, but fall afoul of public policy considerations in the forum where the case is heard. Some systems may perceive the passenger's claim as delictual rather than contractual, bringing with it a whole host of new problems and considerations that the parties most likely would not have countenanced when forming the contract of carriage. Add to the mix issues of jurisdiction, choice of law, statutes of limitation, and so on, and one can see the potential for the conflict and confusion of laws.

From early on, aviation was awake to the issues of non-uniformity in regulation. In 1910[18] and again in 1919,[19] the international community convened in Paris to agree to uniform principles and rules for the regulation of international civil aviation. However, these initiatives only sought to address issues of public air law. Between 1922 and 1924, at least three international organizations passed resolutions calling for the

18. The 1910 International Conference on Aerial Navigation did not result in a signed treaty, but the draft produced was instrumental in the 1919 Conference. For a record of the Conference, *see* CONFÉRENCE INTERNATIONALE DE NAVIGATION AÉRIENNE; PARIS (18 MAI - 29 JUIN, 1910): PROCÈS-VERBAUX DES SÉANCES ET ANNEXES [INTERNATIONAL CONFERENCE ON AERIAL NAVIGATION; PARIS (MAY 19 - JUNE 29, 1910): MINUTES OF MEETINGS & ANNEXES] (1910).

19. Convention relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173.

formulation of a uniform code for regulating private air law.[20] The consensus was clear: uniformity of certain rules relating to international carriage by air, specifically those governing the legal relationship between carrier and shipper/passenger, were a necessity. The Warsaw Convention of 1929 was the solution adopted by the international community.[21]

A. Background

The Warsaw Convention emerged from a background consisting of national law efforts to regulate the liability of the air carrier. As a new form of carriage, there were considerable doubts in many jurisdictions about how, or even if, carriage by air fit into the existing codes or legal regimes governing carriage under *le droit commun*. Critically, the extent to which national regimes could restrict air carriers employing exemption clauses was particularly troublesome. For example, French civil law generally permitted exemption clauses in contractual liability, but not to the extent of exempting *dol* or *faute lourde* (i.e., willful misconduct or gross negligence).[22] Article 103 (now Article L 133-1) of the French Commercial Code (as amended by the so-called *Loi Rabier* of 1905) prohibited a carrier from excluding itself entirely from liability, but allowed reasonable limitation of liability.[23] However, the *Loi Rabier* only applied to goods; thus, nothing prevented the carrier from using exemption clauses to evade any liability short of *dol* or *faute lourde* in the carriage of passengers. Indeed, prior to the Warsaw Convention coming into force, the standard conditions of carriage used by the

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20. Stephen Latchford, *The Growth of Private International Air Law*, 13 GEO. WASH. L. REV. 276, 276 (1944). *See also* John J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. 27, 27 (1932); Alexander N. Sack, *Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345, 346 (1933).

21. *See* Robert P. Boyle, *The Warsaw Convention—Past, Present, and Future*, *in* ESSAYS IN AIR LAW 1, 2 (Arnold Kean ed., 1982) (("The answer provided by Warsaw was to establish an integrated system of international air law to assure that the same law would be applied no matter where the liability arose, and no matter where action to assert a claim might be brought (always assuming, of course, that by its terms the Warsaw Convention applied to the transportation.")).

22. French courts are hostile to enforcing exemption clauses, especially where they attempt to exempt the party from delictual liability based on fault and will almost certainly not enforce exemptions for *dol* or *faute lourde*. *See* Simon Whittaker, *The Law of Obligations*, *in* PRINCIPLES OF FRENCH LAW 333, 356 (John Bell et al. eds., 2008).

23. DANIEL GOEDHUIS, NATIONAL AIR LEGISLATIONS AND THE WARSAW CONVENTION 53 (1937).

International Air Traffic Association[24] sought to exclude the carrier from all liability in the carriage of goods and passengers.[25]

Against this backdrop of uncertainty, the French legislature introduced the Air Navigation Law of 1924.[26] The Act confirmed the contractual basis for air carrier's liability and recognized, while at the same time limiting, the use of exemption clauses.[27] A limitation of liability was imposed on goods, but liability for passenger death or injury was unlimited.

The French Air Navigation Law of 1924 is of great relevance given the temporal coincidence with the initiation by the French government of the process that would ultimately lead to the conclusion of the Warsaw Convention in 1929. Although fundamentally based on a regime of strict liability, by authorizing the use of exemption clauses and only limiting their use to cases of the personal fault of the carrier, the French national regime was in effect more closely aligned to a fault-based model of liability. According to contemporary commentators, similar laws to the French Act were introduced in Chile (1925), and Yugoslavia (1928),[28] while the regime in Italy (1923) was described by one commentator as being practically the same.[29] Other civilian legal systems did not follow

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24. To be distinguished from the post-World War II I.A.T.A., i.e., the International Air *Transport* Association. INT'L AIR TRANSPORT ASS'N (n.d.), *available at* http://www.iata.org (last visited Apr. 5, 2021).

25. *See* GOEDHUIS, *supra* note 23, at 85.

26. *Loi du 31 Mai 1924 Relative à la Navigation Aérienne* [Law of May 31, 1924, Relating to Aerial Navigation], J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 2, 1923, p. 1 (Fr.). An English translation of the relevant articles (i.e., arts. 41, 42, 43, and 48) can be found in GOEDHUIS, *supra* note 23, at 52. For some background to the Act, *see* Georges Ripert, *Responsabilité du Transporteur Aérien*, 7 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 353 (1923); Louis Josserand, *La Loi du 31 Mai 1924 Relative a la Navigation Aérienne et le Droit Commun de la Responsabilité*, 10 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 137 (1926). *See also* Lincoln H. Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 AIR L. REV. 25, 201-06 (1936).

27. For goods, Article 41 of the Act affirmed the applicability of the *Loi Rabier* defense of inherent vice and provided a limitation of liability in the absence of a declaration of value. Under Article 42 (for goods) and Article 48 (for passengers), exemption clauses were explicitly permitted against risks of the air or for piloting errors, both of which applied on the conditional basis that the aircraft was airworthy and the crew licensed on departure. Article 43 provided that exemption clauses were prohibited in two cases. First, any clause by which the carrier sought to exempt itself from liability for its own act or that of its employees in the commercial handling of goods. Second, any clause that sought to exempt the carrier from liability for its own personal faults.

28. Sack, *supra* note 20, at 360 n.65.

29. GOEDHUIS, *supra* note 23, at 78.

the fault-based model but adhered to a risk-based model, e.g., Germany (1922)[30] and Switzerland (1920).[31]

On the international plane, there were only a small number of international legal regimes governing carriage, e.g., the Hague Rules 1924 governing carriage of goods by sea,[32] and the CIM 1924 and the CIV 1924 for the carriage of goods and passengers by rail,[33] but these clearly did not include carriage by air.

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30. The text of the German law of 1922 is reproduced (in French) in *Loi Réglant la Navigation Aérienne*, 7 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 59 (1923) (Fr.). The only defense expressly provided in the Act was for the fault of the victim (art. 20). Article 23 of the German law provided monetary limitations on liability for individual death or personal injury (1 million marks or an annual annuity of 50,000 marks) for multiple death or injury in the same accident (2.5 million marks or an annual annuity of 250,000 marks) and for loss or damage to goods (250,000 marks). The use of exemption clauses was not prohibited by the Act and remained governed by general principles of German law that permits such clauses provided they are not *contra bonos mores* or seek to exempt liability for willful misconduct. For greater detail on the German law, *see id.* at 65-73.

31. Arrêté du Conseil Fédéral Concernant la Réglementation de la Circulation Aérienne en Suisse du 27 Janvier 1920, 6 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [R.J.I.L.A.] 141 (1922) (Fr.). The Swiss law of 1920 provided for strict liability with the only possible exoneration provided by the fault of the victim. No monetary limitation of liability was provided under the law. No express prohibition was imposed on exemption clauses; thus, general principles of Swiss law presumably applied. Goedhuis opined that exemption clauses were probably not valid in Switzerland at the time. GOEDHUIS, *supra* note 23, at 95-96.

32. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules 1924]. The Hague Rules 1924 had arisen from the excessive use of exemption clauses by the ship-owning sector of the maritime industry to exclude or limit itself from liability, even in cases of negligence. Various States had attempted to unilaterally address this abuse by ship-owners of their dominant position in the industry through specific statutes, perhaps most famously the Harter Act of 1893 in the United States. The resulting patchwork of statutes produced an intolerable degree of uncertainty for the industry. *See* A.N. Yiannopolous, *Unification of Private Maritime Law by International Conventions*, 30 L. & CONTEMP. PROBS. 370, 386 (1965). For a history of the Hague Rules, *see generally* H.M. Cleminson, *International Unification of Maritime Law*, 23 J. COMP. LEGIS. & INT'L L. 163 (1941); Jose Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, 44 TEX. INT'L L.J. 277 (2009). The liability regime established by the Hague Rules is based on fault liability with the burden of proof resting on the carrier to demonstrate the absence of fault (art. IV(1)) and with a limitation of liability of a maximum of £100 per package or unit unless a special declaration as to value has been agreed (art. IV(5)). The carrier was prohibited from employing exemption clauses inconsistent with its obligations under the Hague Rules; such clauses would be null and void (art. III(8)). For commentary, *see* FRANCESCO BERLINGIERI, 1 INTERNATIONAL MARITIME CONVENTIONS ch. 4.4 (2014).

33. As early as 1874, international conferences were convened by the Swiss government in an attempt to unify the law with respect to the commercial transport of goods by rail in Europe. *See* A.C. Schröder, *The Berne Railway Transport Convention 1890*, 22 INT'L L. ASS'N REP. CONF. 220, 220 (1905). These efforts ultimately resulted in the Berne Convention

This background to the Warsaw Convention tells us that there was substantial uncertainty about the place of carriage by air within the existing legal orders governing carriage. At the same time, the industry demonstrated its intention to employ exemption clauses to the fullest extent possible while States were eager to avoid the kinds of abuses that had emerged in the cases of maritime and railway carriage. However, individual State action of introducing specific national statutory regimes fostered non-uniformity that fell heavily on the international air carrier industry at a time when it was seeking to establish itself.

The purpose of the Warsaw Convention was to establish a uniform legal regime consisting of certain rules relating to travel documentation and the liability of the air carrier sufficiently certain and predictable to both assure passengers/consignors of their rights, and to empower the carrier to protect itself through the foreknowledge of the extent of its liability.[34] The regime ultimately established sought to achieve this principle objective whilst pursuing a complementary goal of promoting public interest in the development of international air transport while striking an equitable balance between various interests. The purpose of the Warsaw Convention was twofold, consisting of a cardinal purpose and a supplementary purpose:

Avoidance of conflict of laws through unification of certain rules relating to carriage documentation and air carrier liability.

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of 1890, i.e., Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer, [International Convention concerning the carriage of goods by railway] Oct. 14, 1890 [hereinafter Berne Convention 1890]. The Berne Convention 1890 was subject to a number of revisions, the first substantial revision being made in 1924, i.e., Convention Concernant le Transport des Marchandises par Chemins de fer [Convention Concerning the Carriage of Goods by Rail], Oct. 12, 1924, 77 L.N.T.S. 367 [hereinafter CIM 1924]. The general principle was that the railway was presumptively liable for loss or damage to goods arising during international carriage by rail unless it could exonerate itself under one of the defenses provided. It was thus a regime of strict liability with limited exceptions (arts. 27-28). A limitation of liability applied under the CIM 1924, the railway's liability for loss or damage to goods was to be limited to a maximum of fifty francs per kilogram of gross weight (art. 29). The carrier was prohibited from exempting itself from liability arising from its willful misconduct or recklessness (art. 36). However, it was possible for a railway to offer to the public a special tariff whereby an alternative limitation of liability could be offered in exchange for a lower price for carriage (art. 34). Whilst the CIV 1924, i.e., Convention Concernant le Transport des Voyageurs et des Bagages par Chemins de fer [Convention Concerning the Carriage of Passengers and Baggage by Rail], Oct. 23, 1924, 78 L.N.T.S. 17 [hereinafter CIV 1924], sought to extend the CIM 1924 regime to the carriage of passengers and baggage by rail, it left the determination of liability for passenger death or injury to le droit commun, providing only a choice of law rule. *See id.* at art. 28(1).

34. For a fuller account of the purpose of the Warsaw Convention, *see* Cluxton, *supra* note 11, at Part II.A.

Furtherance of the public interest in the development of air transport whilst striking an equitable balance of interests between carriers, users, and plaintiffs.

B. The Warsaw Regime

Although it concluded in 1929, the history of the Warsaw Convention began in 1923 when France issued a diplomatic letter expressing its wish to convene an international conference on the liability of the air carrier.[35] Originally intended to take place in 1923, it was not until October of 1925 that the first International Conference on Private Aeronautical Law actually took place. At this conference, a French draft (*Avant Projet*) was considered; this draft was largely based on France's Air Law Navigation Law of 1924. The conference produced a revised draft, and it would be the job of the newly established *Comité International Technique d'Experts Juridiques Aériens* (C.I.T.E.J.A) to study the draft and the general question of the liability of the carrier. This was the task of the Second Commission of C.I.T.E.J.A.

The Second Commission was composed of delegates from several States, nearly all hailing from civil law systems, but one member of the Commission was from the United Kingdom, i.e., a with a common law system.[36] Over the following years, it conducted its work and submitted a revised draft (C.I.T.E.J.A. Final Draft) to the Second International Conference on Private Aeronautical Law, held in Warsaw in 1929, from which the Warsaw Convention resulted. As shall prove significant later in this Article, it must now be noted that the United States was not a member of C.I.T.E.J.A. until 1932,[37] and it did not officially participate in the First or Second Conference on Private Aeronautical Law; it only sent observers.[38]

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35. *See* GOEDHUIS, *supra* note 23, at 4; *see also* Ide, *supra* note 20, at 27-28.

36. Cha, *supra* note 26, at 32. Cha lists the membership of the Second Commission as follows: Richter (Germany); de Vos (Belg.); Sir Alfred Dennis (U.K.); Morales (Dom. Rep.); de las Penas (Spain); Ripert (Fr.); Figeroa (Guat.); Cogliolo (It.); Gorski (Pol.); Ibarra (Uru.); Akamine (Japan, although Cha lists his position as "reserved").

37. It would not be until 1932 that the United States would become a member of C.I.T.E.J.A. Even then, the participation of its nominated experts was limited to written correspondence due to the absence of adequate funding. It was only in 1935 that the funding was finally in place to permit active participation by U.S. experts in the work of C.I.T.E.J.A. A history of the United States' involvement in C.I.T.E.J.A. may be found in Ide, *supra* note 20, at 40-44.

38. Stephen Latchford, *The Warsaw Convention and the CITEJA*, 6 J. AIR L. 79, 87 (1935). Latchford argued that the decision of the United States not to actively participate was because there was not yet any federal legislation in the field of regulation of air navigation

Our concern is not with the substantive provisions of the Warsaw Convention, as accounts of those can be found elsewhere.[39] Nevertheless, a short summary of the Warsaw Convention's liability regime may prove useful and is provided below. Our concern is with the more general issue of how choice of forum operates in the litigation of international aviation passenger claims. However, it is critical to say a word about the general scope of the Convention because it is the first evidence that the drafters of the Warsaw Convention adopted a two-party conception for their regime, and it provides some explanation as to why this was the case.

Article 1(1) lays down the general scope of the Warsaw Convention, which remains fundamentally the same for MC99. It provides that the application of the Convention is conditional upon the carriage in question being an international carriage of persons, baggage, or goods, and it must be performed by aircraft for hire (or gratuitously by an air transport undertaking).[40] Article 1(2) provides a definition of *international carriage* that makes the contract of carriage its cornerstone.[41] Even the most superficial reading of the Warsaw Convention will impress upon the reader the centrality of the contract of carriage.[42] The text and drafting

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and that no executive body had been given authority to deal with the area. It seemed, therefore, that the United States did not think it worthwhile because it could not contribute much in the way of experience. *See* Latchford, *supra* note 20, at 282.

39. For a relatively recent study of the Warsaw Convention, *see* LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED - A LEGAL HANDBOOK (2d ed. 2000). For some older studies, *see* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT (1st ed. 1977); RENÉ H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER (1st ed. 1981).

40. Warsaw Convention, *supra* note 1, at art. 1(1) ("This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.").

41. *Id.* at art. 1(2) ("For the purposes of this Convention, the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.").

42. It is explicitly mentioned on multiple occasions and plays a critical function in various provisions. The contract of carriage is referred to in Articles 1(2), 1(1), 3(2), 4(4), 5(2), 11(1), 12(1), 13(3), 14, 18(3), 23, 28(1), 30(1), 32, and 33. This centrality was described by the Fifth Circuit in *Block v. Compagnie Nationale Air Fr.*, 386 F.2d 323, 333-34 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) ("The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the

history of the Warsaw Convention make it difficult to arrive at any conclusion other than that the drafters had a contractual understanding of the regime they created. This was made abundantly clear in the report on the C.I.T.E.J.A. Final Draft, which formed the basis for consideration at Warsaw, wherein Rapporteur de Vos stated:

[T]he text applies single-mindedly to the contract of carriage - first in its outward manifestations of form and then in the legal ties which are established between the carrier and the persons carried or who ship. It does not regulate any other question which might be raised by engaging in the carriage.[43]

The legal relationship upon which the Convention is predicated, i.e., its *vinculum juris*, arises from carriage being performed pursuant to an agreement between the parties, i.e., the parties to the contract of carriage.[44] The foundation of the Convention's applicability is thus quite simply defined: there must be carriage performed pursuant to a commercial undertaking whereby the carrier commits to provide international carriage by air to the passenger or shipper. This was expressed very clearly by the U.S. Court of Appeals for the Fifth Circuit in *Block v. Compagnie Nationale Air France*, which opinion stated that "[t]he Warsaw Convention, governs the relations between the party who assumes the liability for the transportation [(the carrier)] and the one who is transported [(the passenger)] or has something transported [(the shipper)]."[45] This is the core legal relationship upon which the Convention is built and without which the Convention does not apply. The drafters understood this relationship as fundamentally contractual. Indeed, for many of them, it was entirely consistent with the contractual principles of their domestic legal systems. However, it is vital to note that the Convention's conception of the contract of carriage is not

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carrier and the passenger carry out the Conference goal that the rules of limited liability be known to both parties.").

43. G. Nathan Calkins Jr., *The Cause of Action under the Warsaw Convention (Part One)*, 26 J. AIR L. & COM. 217, 219 (1959). The original French can be located in DEUXIÈME CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN [SECOND INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW] 160 (1930).

44. *See* Warsaw Convention, *supra* note 1, at arts. 1(1), 1(2), 31(2), and 32. The Warsaw Convention makes reference to *the parties*, on a number of occasions, always as referring to the parties to the agreement pursuant to which international carriage is performed.

45. *Block*, 386 F.2d at 343. The court also stated: "The applicability of the Convention undeniably is premised upon a contract but on a contract of a particular kind. It is based on a contract of carriage that arises from the relationship between a 'carrier' and the passengers. This contractual relationship requires only that the carrier consent to undertake the international transportation of the passenger from one designated spot to another, and that the passenger in turn consent to the undertaking." *Id.* at 330-31.

dependent upon concepts of national contract law; instead, it must be regarded as an autonomous concept, albeit one very closely aligned to the essence of contractual obligations under *le droit commun*. Although the topic of a future publication, it would be remiss not to point out that non-contractual liability of the carrier for passenger-related damages in a Convention case is possible, e.g., wrongful death, and is contemplated by Article 24 of the Warsaw Convention (Article 29 MC99).

Article 1 laid down the general scope of the Warsaw Convention, thereby defining the core conditions of its applicability. Once the Convention is applicable, various rights and duties arise, including those pertaining to jurisdiction and to the question of liability. The Warsaw Convention's liability regime was established on the basis of fault with monetary limits on the liability of the carrier. Its starting point is the presumption of the carrier's fault for damage arising under the circumstances covered by the Convention,[46] and in such cases the carrier is liable. However, the carrier may exonerate itself from liability by proving that it and its agents took all necessary measures to avoid the damage,[47] or that the damage was caused or contributed to by the negligence of the injured party.[48] Where the carrier cannot overcome the burden of proof, then it is liable, but the Convention sets monetary limits on that liability.[49] The carrier is prohibited from excluding or limiting its liability below the limits set by the Convention;[50] while the carrier loses its freedom of contract in this sense, it may agree to a higher limit by special agreement with the passenger/shipper.[51] The carrier is thus doubly insulated. First, it is only liable where it cannot prove the absence of fault; second, if liable, its liability is capped at a low level. There are two occasions in which the carrier may face unlimited liability: the first, where it fails to fulfil the mandatory documentary requirements of the

46. *See* Warsaw Convention, *supra* note 1, at arts. 17-19.

47. *See id.* at art. 20(1). In the case of goods and luggage, the Warsaw Convention (art. 21(2)) provided another avenue for exoneration where the carrier can prove the damage was the result of negligent pilotage or negligence in the handling of the aircraft. This controversial basis for exoneration was removed by the Hague Protocol in 1955.

48. *See id.* at art. 21.

49. The limit differs depending on the nature of the damage: for damage arising from the death or injury of passengers, the limit is 125,000 gold francs; for luggage and goods, 250 francs per kilogram; and for items for which the carrier takes charge himself, e.g., carry-on baggage, a limit of 5000 francs applies. *Id.* at art. 22.

50. *See id.* at art. 23.

51. *See id.* at art. 22.

Convention;[52] the second, when the damage is caused by the willful misconduct of the carrier or its agents.[53]

Very briefly,[54] Article 28 lays out the jurisdictional scheme of the Warsaw Convention. Article 28(1) provides four bases for identifying the places before whose courts an action for damages under the Convention may be brought. These are: (1) the place where the carrier is ordinarily a resident; (2) the carrier's principal place of business; (3) the place where the carrier has a place of business through which the contract has been made; and (4) the place of destination.[55]

The essential purpose of the jurisdictional scheme is the same as the Convention's cardinal purpose, i.e., to avoid conflict of laws through unification of certain rules. The drafters chose to establish harmonized rules of jurisdiction. The scheme's key features are: (1) a limited number of potential forums; (2) the guarantee of a forum in a Contracting State; (3) the centrality of the contract of carriage; and (4) that the forum has a substantial business connection to the carrier. These key features reflect two core policies – first, the need to ensure legal certainty and predictability, and second, the desire to balance the parties' interests. Primacy was given to legal certainty and predictability, balanced against the secondary concern for the interests of the parties.

C. Vindication of the Two-Party Paradigm

With the benefit of hindsight, it may seem a gross oversight by the drafters of the Warsaw Convention to focus their regime on the "contractual" relationship between the carrier and the passenger/shipper. In so doing, they apparently left the potential liability of third parties and how this might interfere with their regime out of consideration; however, this would be an unfair accusation. As Part III of this Article will show in detail, although the drafters' focus on a two-party paradigm would prove problematic, considering the law as it stood at that time, we realize the drafters of the Warsaw Convention were vindicated in establishing their regime on that basis.

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52. *See id.* at arts. 4(4) and 9.
53. *See id.* at art. 25.
54. A fuller account is provided in Cluxton, *supra* note 11, at 22-28.
55. Warsaw Convention, *supra* note 1, at art. 28(1).

i. Historical Inadequacy of the Common Law

Under the common law circa 1929, a plaintiff had extremely limited options for commencing proceedings for damages suffered in an aviation accident. The practice of carriers at the time was to exempt themselves from liability under the contract of carriage with the passenger. With no remedy against the carrier, the injured passenger also found themselves unable to succeed in tort liability against a manufacturer or other third party. This was as a consequence of the rule articulated in the 1842 case *Winterbottom v. Wright*[56] that stood for the proposition that no cause of action, whether in contract or tort, lay against a manufacturer in the absence of privity of contract.[57]

The rule from *Winterbottom* represented, in the absence of privity, a de facto immunity for manufacturers from claims of liability for damages caused by their defective products.[58] The rule was subject to a small number of exceptions,[59] wherein the courts recognized that a manufacturer had undertaken a duty to the public at large, e.g., in the case of inherently dangerous articles.[60] In these limited cases, the existence of a specific legal duty owed by the manufacturer in tort law remedied the

56. Winterbottom v. Wright (1842) 152 Eng. Rep. 402; 10 M. & W. 109 (Eng.).

57. Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 133 (1957).

58. *See* Francis H. Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q.R. 343, 343 (1929) (Bohlen explaining: "Prior to 1926 the so-called doctrine of *Winterbottom v. Wright*, in so far as it was applied to determine the liability of a manufacturer, seems to have crystallized in England into a fairly definite shape. A manufacturer who put upon the market an article dangerous for the use for which it was sold, was normally not liable to anyone other than his immediate vendee for injuries sustained while using the article.").

59. *See* J.J. Adams, *Note: Liability of Supplier of Chattels to Third Persons*, 38 MICH. L. REV. 116, 117 (1939) (Adams listing these four exceptions: "For almost a hundred years courts have said that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article he handles, though four well-established exceptions have been engrafted on this general rule. Where the article (1) is inherently dangerous, (2) contains a concealed defect known to the supplier but not to the user, (3) will be dangerous if negligently made, or (4) has been supplied by an invitor for use on his premises, the supplier is held liable to third persons for negligence in the construction, manufacture, or sale of the article he handles.").

60. The distinction between ordinary articles and inherently dangerous articles was accepted by the court in *Longmeid v. Holliday* (1851) 155 Eng. Rep. 752; 6 Exch. 761 (Eng.). *See* Bohlen, *supra* note 58, at 344 (Bohlen providing a definition: "If an article is of a class which is generally regarded as dangerous for certain uses, although safe for others, the maker is liable if he mislabels it or otherwise misrepresents its true character.").

absence of privity of contract.[61] Recognition of a cause of action in tort law without privity helped ameliorate the harshness of the rule in *Winterbottom*, but these exceptions were so limited that they offered little help in the vast majority of cases.

For a plaintiff to succeed against a manufacturer, they either had to be a party to the contract or bring themselves within the set of narrow exceptions whereby the court would recognize that the manufacturer owed a duty to the public, the breach of which would give rise to an actionable instance of negligence. As it stood at that time, there was no accepted general principle of tortious liability for negligence. In *Heaven v. Pender*,[62] Lord Justice Brett M.R. (later Lord Esher) attempted to articulate such a principle from the accepted instances in which a manufacturer or supplier of goods could be held liable without privity of contract. He stated:

The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[63]

Even though the majority decided the case on narrower grounds,[64] Lord Justice Brett's principle was a precise and potent articulation of what would become in 1932—with some adjustment—the accepted principle for the duty of care in *Donoghue v. Stevenson*.[65] Prior to this seminal case, however, Lord Justice Brett's principle found favor in the United States, where it was referred to in 1916's *MacPherson v. Buick Motor Co.*, the case that lay the foundations for products liability.[66]

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61. It was stated in *Thomas*: "The liability of the dealer in such case arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured." Thomas v. Winchester, 6 N.Y. 397, 405 (1852). *See also* Norton v. Sewall, 106 Mass. 143 (1870).

62. Heaven v. Pender [1883] 11 QBD 503 (Eng. C.A.).

63. *Id.* at 509.

64. *See* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 512 (1948) ("[T]he majority of the judges decided the case on the rather narrow point that the necessary workmen were in effect invited by the dock owner to use the dock and appliances.").

65. Donoghue v. Stevenson [1932] AC 562, 580 (HL) (appeal taken from Scot.) (Scot.).

66. MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916).

In *MacPherson*, Judge Cardozo of the New York Court of Appeals stated, "[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[67] In finding for the plaintiff, the court concluded that where there is an element of danger and knowledge that the thing will be used by third parties, then "irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."[68] Judge Cardozo thus laid down a general rule of manufacturers' liability for negligence based on a duty to take reasonable care to avoid causing reasonably foreseeable injury.[69]

This was the state of play under the common law in England and the United States during the time of the Warsaw Convention's gestation. We shall shortly draw some conclusions from this brief history, but not before first reviewing the situation in the civilian legal systems and perusing the Convention's *travaux préparatoires*.

ii. The Situation under Civilian Law

The adequacy of private law to provide remedies against third parties for those injured in aviation accidents was not much better under French civil law at the time of the Warsaw Convention's drafting. The place to begin this analysis is with Articles 1382 and 1383 of the Civil Code (now, since 2016, Articles 1240 and 1241 respectively). These are grounded in the concept of *faute délictuelle*, under which a plaintiff has to prove harm (*dommage*)[70] causally linked (*lien de causalité*)[71] to the fault (*faute*)[72] of the defendant. On the face of it, delictual liability under Articles 1382 and 1383 seems extremely broad, and we might thus expect that it would have provided a good source of redress against a manufacturer and other third parties; however, this was not the case. First, proving fault was very difficult, especially in defective product cases. Second, at the time of the Warsaw Convention's drafting, it was

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67. *Id.* at 389.

68. *Id.*

69. For a list of authorities by which the courts of other states adopted Judge Cardozo's rule, and for its subsequent development, *see* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100-02 (1960). Prosser stated that the rule "has become, in short, a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel." *Id.* at 1102.

70. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 657 (Tony Weir trans., 2d ed. 1987).

71. *Id.* at 659.

72. *Id.* at 661.

not generally accepted that placing a defective product into the market was an example of *faute délictuelle* upon which an action could succeed under Articles 1382 and 1383; indeed, this was not recognized as *faute délictuelle* until the 1970s.[73] For these reasons, actions based on contract or on the strict liability provision of Article 1384 were preferred.

The problem of privity was also at issue for an aviation plaintiff seeking a remedy in contract under French civil law. However, the French civil law was less constrained by privity than the common law.[74] For example—and of particular relevance to the field of defective products—is the concept of the *action directe en garantie*.[75] This permits a buyer to pursue sellers further up the chain of commerce. Thus, where the plaintiff sub-buyer has a contract of sale with his immediate seller but not with the manufacturer, he is permitted to reach back through the chain of contracts to sue the manufacturer directly for latent defects. In effect, the sub-buyer becomes the successor in interest to the original buyer's rights against the manufacturer. The *action directe en garantie*, which is contractual, was introduced precisely because the sub-buyer did not have a cause of action in contract or delict against the manufacturer.[76] This form of recourse was available at the time of the Warsaw Convention's drafting; in fact, it was available well prior.[77] However, this remedy was

73. SIMON WHITTAKER, LIABILITY FOR PRODUCTS: ENGLISH LAW, FRENCH LAW AND EUROPEAN HARMONIZATION 51 (2005).

74. Simon Whittaker, *Privity of Contract and the Law of Tort: The French Experience*, 15 OXFORD J. LEGAL STUD. 327, 367 (1995) (Whittaker stating that, "French law has certainly been much more willing to allow a contract to escape the bounds of privity than English law"). Whittaker gives, amongst others, the examples of the recognition of contractual benefits for third parties (*stipulation pour autrui*) and of the right of action against sellers further up the chain of commerce (*actions directes en garantie*). *Id.* at 367-68.

75. Whittaker describes this concept as follows: "In the context of sale, the courts have long accepted the idea that the various rights of the 'initial' buyer in a chain of distribution against his own seller (typically, the manufacturer) in respect of its latent defects attach to the property as its 'accessory,' with the result that any buyer in the chain may sue *any* seller further up the chain by way of a 'direct action' (*action directe en garantie*): there is no restriction that the buyer must be a consumer nor that the seller must be *professionel*." WHITTAKER, *supra* note 73, at 96.

76. Whittaker notes that "[i]t is clear that the original purpose of the recognition of these *actions directes en garantie* was to create a direct contractual claim for a sub-buyer against the original seller (often the manufacturer of goods or the builder of premises) at a time before any claim in delict has been established ... Such a direct action avoided the circuity of action of suit up the chain of contracts and had the advantage for claimants of side-stepping the insolvency of any intervening member of the chain." *Id.* at 97.

77. *See id.* at 96 n.344 (citing authorities from 1884, 1885, and 1886).

limited to sub-buyers of goods and thus would not have availed the aviation passenger plaintiff who purchased services, not goods.[78]

The final option available to the plaintiff was Article 1384(1) of the French Civil Code (now, since 2016, Article 1242). Similar to the common law doctrine of res ipsa loquitur,[79] Article 1384(1) provides for strict liability of the *gardien*[80] of a thing that causes damage.[81] Initially it only countenanced responsibility for damages caused by animals or buildings, but was subsequently interpreted as providing a much broader principle of liability on the *gardien* for anything that causes damage.[82] Since 1930, Article 1384(1) of the Civil Code established a presumption of strict liability for damage caused by things (*le fait d'une chose*).[83] This presumption arises regardless of whether the thing is defective or dangerous, and is not based upon any notion of fault of the *gardien*. The only defenses available are contributory negligence and *force majeure* (albeit with French law having a simpler definition, which entails unforeseeable and unpreventable harm).[84]

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78. *See id.* at 139 ("In the case of public transport ((in the sense of transport available to the public generally)), the provider of the service does not supply any product to any member of the public but does use products in the provision of the service, notably, the vehicle of transport itself.").

79. *See infra* Part III.A.

80. The meaning of this legal term is difficult to translate into English, but the terms *keeper* or *custodian* come close to conveying the gist. *See* ZWEIGERT & KÖTZ, *supra* note 70, at 703 ("A further requirement for liability under art. 1384 para. 1 is that the person being sued for damages be the custodian ['*gardien*'] of the thing which caused the harm.").

81. Article 1384.1 of the Code civil provides: "*On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.*" CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1384.1 (Fr.). ["We are responsible not only for the damage caused by our own act, but also for that which is caused by the acts of persons for whom we are responsible, or by things that are in our custody."], English translation by French Civil Code, LEGIFANCE.GOUV.FR (n.d.), *available at* www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf (last visited Feb. 15, 2021). Whittaker provides an alternative translation: "One is liable not only for the harm which one causes by one's own deed, but also for that which is caused by the deed of persons for whom one is responsible, or of things which one has in one's keeping." WHITTAKER, *supra* note 73, at 24.

82. WHITTAKER, *supra* note 73, at 52.

83. *Id.* at 7-8.

84. WHITTAKER, *supra* note 73, at 52. The courts sought to avoid a situation where an unforeseeable and unpreventable defect in a thing could be grounds for a defense of force majeure. This was achieved by specifying that force majeure must be external to the thing. The result of which was that a defect in the thing was included within the risks for which the *gardien* assumes liability toward third parties. *See id.* at 58. *See also* ZWEIGERT & KÖTZ, *supra* note 70, at 704 (noting, "[o]ne important effect of the rule that the cause must be 'external' or 'outside' the thing which does the harm is that a latent defect in the thing, such

This might seem like an ideal theory under which to pursue a manufacturer, but it is entirely dependent on the definition of *gardien*, and that definition generally did not apply to manufacturers. The definition attributed to *la garde* centers on the possession, use, direction, and control of the thing.[85] For instance, the legal owner of a car is presumed to be its *gardien*, but may rebut this presumption by showing that control (i.e., *la garde)* has been transferred to another party. In the context of an aircraft, such control at the operative moment when harm is caused to the passenger is not vested in the manufacturer; rather, it is most likely vested in the operator (or potentially the legal owner).[86] Thus, Article 1384(1)—useful though it might be against the carrier—would not have aided the aviation plaintiff against third parties circa 1929.

iii. The Warsaw Travaux Préparatoires

Given that the Warsaw Convention concerns the liability of the *carrier* for international carriage by air, it should not come as much of a surprise that the liability of third parties is seldom mentioned in its *travaux préparatoires*. However, a small amount of attention was given to the manufacturer in respect to the carrier's liability for inherent defects in the aircraft.[87] At the second session of the Warsaw Conference, Rapporteur De Vos provided a commentary on the substantive provisions of the Final C.I.T.E.J.A. Draft.[88] Moving from article to article, De Vos outlined the reasoning and objectives behind the adoption of specific principles and explained the various alterations made to the text since the Conference of 1925. In treating the topic of the possible exoneration of

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as a defect in the way it is made or the material it is made of, does not release the defendant even if it was quite impossible for him to discover and remove the defect.").

85. WHITTAKER, *supra* note 73, at 53.

86. It has since become accepted that there can be two *gardiens* at the same time, one in respect of its behavior (*gardien du comportement*), the other in respect of its structure (*gardien de la structure*). *See* ZWEIGERT & KÖTZ, *supra* note 70, at 717; WHITTAKER, *supra* note 73, at 341 ("[I]n the context of liability for a defective product, the manufacturer can be said to be *gardien* of its structure, while either the supplier or the victim himself may be the *gardien* of its behaviour."). In the context of an aircraft, the carrier would be the *gardien* of its behavior, while the manufacturer could be regarded as the *gardien* of the thing's construction and thus potentially liable under Article 1384(1). However, this does not appear to have been the law at the time of the Warsaw Convention's drafting. Whittaker cites cases dating from 1956 and 1960 for this theory. *Id.* at 341 n.121.

87. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCTOBER 4-12, 1929 WARSAW: MINUTES 21, 36, 43-54 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter WARSAW MINUTES].

88. *Id.* at 18-23.

the carrier on proof that the carrier had taken all reasonable measures, it was noted that the draft no longer permitted such exoneration in the case of the aircraft's inherent defect; rather, the carrier would be held strictly liable.[89]

Paragraph 1 of Article 22 of the draft provided: "The carrier shall not be liable if he proves that he and his servants have taken the reasonable measures to avoid the damage or that it was impossible for them to take them, unless the damages [arise] out of an inherent defect in the aircraft."[90] This solution had been adopted for the benefit of passengers who, it was stated, could not "turn against the manufacturer."[91] Instead the carrier would bear the burden of liability, with any unfairness mitigated by the fact that the carrier, unlike the passenger, would have "recourse against the manufacturer."[92] As explained by Pittard (the Swiss Delegate and Rapporteur of the 1925 Conference), excluding exoneration of the carrier in the case of inherent defect ensured that the victim would have access to a remedy against someone (i.e., the carrier) rather than no one.[93]

The written submissions made by the United Kingdom,[94] France,[95] and Sweden[96] on the Final C.I.T.E.J.A. Draft expressed misgivings about the inherent defect provision. During the Conference itself, there were proposals for its removal.[97] Although the delegates were sympathetic to the humanitarian interests involved,[98] it was nevertheless regarded as inequitable to impose liability on the carrier in the absence of its fault and in circumstances where the defect could not reasonably be detected by the carrier exercising due diligence.[99] The then-unperfected state of aeronautical science was also highlighted as another reason not to adopt this instance of strict liability.[100] Manufacturing defects were regarded as unavoidable, even where the greatest care and expertise were employed. Therefore, even assuming recourse was available, one could not rely on the carrier recovering against the manufacturer. Indeed, the

89. *Id.* at 21.
90. *Id.* at 265.
91. *Id.* at 21.
92. WARSAW MINUTES, *supra* note 87, at 21.
93. *Id.* at 45.
94. *Id.* at 296-97.
95. *Id.* at 286.
96. *Id.* at 316.
97. *See, e.g., id.* at 36, 52-53.
98. *See id.* at 44-45 (in particular, the views expressed by the Swiss Delegate).
99. *See, e.g., id.* at 39, 43.
100. *See, e.g., id.* at 50, 53.

delegates acknowledged that manufacturers were generally not disposed to offer carriers warranties.[101] Therefore, in practice, the carrier would often have no right of recourse against the manufacturer.[102] In the end, the drafters elected to remove the inherent defect proviso of Article 22 altogether,[103] granting the carrier the possibility of exoneration in all cases where it could prove that it and its servants had taken all necessary measures to avoid the damage, or that those measures were impossible to undertake.[104]

There is a twofold significance in this dalliance with the prospect of holding the carrier liable, in the absence of fault, for damage caused by the manufacture's presumptively wrongful conduct. First, it demonstrates that the delegates did not understand the passenger as generally having a cause of action against the manufacturer under then-existing national law. Secondly, the delegates contemplated, and even endorsed, the existence of recourse actions by carriers against manufacturers, albeit subject to limitations in practice.

iv. Concluding Remarks

What this legal history shows, is that during the period of the Warsaw Convention's gestation and its 1929 adoption, a third party to the passenger-carrier relationship (the aircraft manufacturer providing the quintessential example) was practically immune from direct liability against an injured passenger under the common law. Privity of contract was the greatest stumbling block for a plaintiff seeking to sue the manufacturer or another third party for damage negligently caused. Such liability could only be established in very limited circumstances. There was not yet the general principle of negligence, such as that established in England under *Donoghue v. Stevenson* in 1932. It is true that a New York court enunciated a principle of general products liability in 1916, and that this decision, i.e., *MacPherson*,[105] "found immediate acceptance."[106] However, this acceptance was limited to U.S.

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101. *Id.* at 48, 296.

102. *Id.* at 296. This point was reinforced by the French Delegate who had noted that the short lifetime attached to such warranties really meant that unless the accident occurred shortly after delivery of the aircraft the carrier would be strictly liable without being able seek recourse from the manufacturer. *Id.* at 48.

103. *Id.* at 54.

104. *See* Warsaw Convention, *supra* note 1, at art. 20(1).

105. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

106. WILLIAM L. PROSSER, LAW OF TORTS 643 (3d ed. 1964). *See also* Gillam, *supra* note 57, at 143.

jurisdictions pre-Warsaw. As noted earlier, the United States did not actively participate in drafting the Warsaw Convention, and the record does not indicate that the actual drafters were aware of emerging products liability in the United States.

The French civil law was also beneficial to the manufacturer and other third parties, although not so much so as the common law. Aside from the difficulty of establishing fault, delictual liability was not recognized against manufacturers under Articles 1382 and 1383 of the Civil Code. The strict liability of Article 1384(1) did not avail the aviation plaintiff against a third party because he was not regarded as the *gardien* of the thing. Likewise, contractual remedies were of no avail to the aviation plaintiff due to the French law's version of privity.

The manufacturer and other third parties were largely insulated from passenger claims on account of the lack of privity of contract and the absence of the modern doctrines of negligence and strict products liability. The drafters of the Warsaw Convention would not have needed to take into consideration the potential impact of the existence of alternative remedies against third parties. It was reasonable, at that time, to rely on the liability relationship involved in the international carriage of passengers by air as being two-party in nature. Since the passenger could not sue a manufacturer, there was no risk of that manufacturer seeking recourse against the carrier; that aspect of recourse did not arise.

On the other hand, the manufacturer had little to fear from the carrier in terms of recourse. The Convention's Minutes show that the delegates were aware of the possibility of recourse actions by carriers against third parties—they even endorsed them—but they acknowledged that they were unlikely to arise in practice.[107] They were right. The aircraft purchase agreements between manufacturers and carriers invariably contained express warranties against defects in material and workmanship, a remedy limitation section in the event of defect, and various liability disclaimers.[108] In addition, recourse actions taken against manufacturers resulting from the carrier's liability to the passenger under the Convention were generally blocked (at least in common law jurisdictions) by the rule against contribution amongst tortfeasors. Therefore, the other aspect of recourse actions, i.e., the

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107. WARSAW MINUTES, *supra* note 87, at 21.

108. As one legal counsel for a manufacturer later put it: "Any manufacturer having reasonably competent legal counsel can exempt itself from virtually all liability from manufacturer caused damages to aircraft that the manufacturer has sold to the air carrier." Hunter Hughes, *Aircraft Manufacturer Warranties—Protection for the Manufacturer or the Purchaser?*, 2 AIR & SPACE L. 71, 71 (1977).

carrier seeking recourse against third parties for its liability to the passenger, did not concern the delegates and further reinforced their two-party understanding of their aviation liability system.

The drafters were quite content to leave the manufacturer and other third parties out of the system. They had no desire to protect them as they were already amply protected by their own business practices and the law. The drafters did not foresee that the law would evolve to provide the plaintiff with a choice of defendants and a selection of remedies through which the scope for the involvement and influence of third parties in the carrier-passenger relationship would greatly expand. However, this is precisely what happened with the development of the general doctrine of negligence, strict products liability, and other new remedies.

D. The Montreal Convention 1999

Even from its early days, the Warsaw Convention was often the subject of much criticism. Its limits of liability were attacked as being low, and the maturation of the air transport industry undermined the original policy justifications for its perceived pro-carrier slant. This discontent only increased over time. The various efforts to amend and supplement the Warsaw Convention transformed it into WCS. However, the patchy ratification of these instruments resulted in a fragmented, disunified system that was the subject of conflicting jurisprudence. By the end of the twentieth century, the disunification reached a breaking point and the time for action came, resulting in MC99.

MC99 is a consolidation and modernization of WCS. This requires our appreciation of two key factors: (1) the continuing relevance of the Warsaw Convention and WCS; and (2) the contrasting purpose of MC99 to that of WCS. It is not within the scope of this Article to perform a thorough analysis of MC99's purpose,[109] yet some points are of particular relevance to the matter at hand and require attention here.

Firstly, the preamble to MC99 recognizes the need to *modernize* and *consolidate* the Warsaw Convention; this is the first clear indication of one of MC99's purposes.[110] Indeed, the courts have generally found a

109. *See* Cluxton, *supra* note 11, at 54 (discussing MC99's purpose).

110. For example, the Second Circuit described MC99 as having been passed to "'harmonize the hodgepodge of supplementary amendments and intercarrier agreements' of which the Warsaw Convention system consists." Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 401 (2d Cir. 2004) (*quoting* Carl E. Fumarola, *Stratospheric Recovery: Recent and Forthcoming Changes in International Air Disaster Law and its Effect on Air Terrorism Recovery*, 36 SUFFOLK U. L. REV. 821, 835 (2003)).

great commonality of purpose between the Warsaw Convention and MC99.[111] However, we ought not to directly equate the purpose of MC99 with that of the Warsaw Convention; instead, we must accommodate the effects and changes of the process of modernization and consolidation. The mere act of modernizing and consolidating WCS is itself a powerful reaffirmation by MC99's drafters of WCS' cardinal purpose as the unification of certain rules of private air law. This cardinal purpose remains the same with MC99 and is broadly acknowledged by the courts.[112]

As noted earlier, the Warsaw Convention's supplementary objective was to further the public interest in the development of air transport whilst achieving an equitable balance of interests. Under MC99, the development of air transport remains a fundamental objective, but the perspective regarding the balance of interests has substantially changed. In MC99, the notable change was the weight given to protecting the interests of consumers;[113] thus, its preamble specifically recognizes the

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111. The Supreme Court of the United Kingdom noted in *Stott*: "One of the original purposes of the Warsaw Convention was to bring some order to a fragmented international aviation system by partial harmonization of the applicable law and to provide benefit to both prospective passengers and to the airlines in reaching an equitable balance of interests; the same purpose applies to the Montreal Convention." Stott v. Thomas Cook Tour Operators [2014] AC 1347, 1359 (SC) (on appeal from Eng.) (Eng.). *See also* Matz v. Nw. Airlines, No. 07-CV-13447, 2008 U.S. Dist. LEXIS 38614, at *1 (E.D. Mich. May 13, 2008).

112. The Supreme Court of Canada observed that the "two of the main purposes of the *Warsaw Convention*, and hence of the *Montreal Convention*, are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability." Thibodeau v. Air Can., [2014] S.C.R. 67, ¶ 47 (Can.). *See also* Allianz Glob. Corp. & Specialty v. EMO Trans. Cal., Inc., No. 09-CV-4893, 2010 U.S. Dist. LEXIS 62425, at *11 (N.D. Cal. June 21, 2010) ("The goal of the Montreal Convention was to create an international unified system of rules and procedures to alleviate the uncertainty of operating under a diverse set of legal systems.").

113. This was clearly evidenced in the President Clinton's letter of transmittal to Congress. The President described MC99 as "a vast improvement over the liability regime established under the Warsaw Convention and its related instruments, relative to passenger rights in the event of an accident." Message from the President of the United States transmitting the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999, *in* S. TREATY DOC. NO. 106-45, at iii, iii (2000). In the Department of State letter of submittal, Strobe Talbott endorsed MC99 as "the culmination of a four decades-long effort by the United States and other countries to persuade the international aviation community to provide increased economic protection for the international air traveler and shipper with a regime of liability and modernized procedures that match the developments in today's aviation industry." Letter of Submittal from Strobe Talbott, Deputy Sec. of State (June 23, 2000), *in* S. TREATY DOC. NO. 106-45, at v, v (2000). *See also* Bin Cheng, *The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part II)*, 49 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 484, 497 (2000) ("In drawing up the new

importance of ensuring protection for consumers (something echoed by both courts[114] and commentators).[115] This is not to say that the interests of carriers and the general public were disregarded.[116] Instead, just as with the Warsaw Convention, it was a question of achieving an equitable balance between the interests of all parties. Without a doubt, there was a shift in that balance between Warsaw and MC99. The Warsaw Convention favored the interests of the air transport industry (comprising both the carrier and the traveling public) over those of the plaintiff passenger. A new deal was promised with MC99—it would better protect the interests of consumers and ensure equitable compensation for victims and their families.[117]

Convention [MC99], it was constantly being emphasized that the interests of the consumer are paramount.").

114. *See* Ehrlich, 360 F.3d at 371 n.4 ("The new treaty 'unifies and replaces the system of liability that derives from the Warsaw Convention,' ... explicitly recognizing '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.' ... This Convention seems to have reversed one of the premises of the original Warsaw Convention, which favored the airlines at the expense of consumers."). Nevertheless, the Montreal Convention did not alter the original Warsaw Convention goal of maintaining limited and predictable damage amounts for airlines. *See* Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776, 780-81 (7th Cir. 2008); Weiss v. El Al Isr. Airlines Ltd., 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006); Bassam v. Am. Airlines, Inc., 287 F. App'x 309, 312 (5th Cir. 2008).

115. *See* Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 AIR & SPACE L. 12, 14 (2000) (noting the shift in policy, away from the interests of the carriers to those of the consumer/passenger). *See also* GEORGE N. TOMPKINS JR., LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES: FROM WARSAW 1929 TO MONTREAL 1999 33-34 (2010); Bin Cheng, *A New Era in the Law of International Carriage by Air—From Warsaw (1929) to Montreal (1999)*, 53 INT'L & COMP. L.Q. 833, 844-45 (2004).

116. The interests of the carrier, in particular those of the small to medium airlines (especially from developing nations), were strongly advocated for at the Conference, with several States raising concerns about the negative impact of being too pro-consumer. For the comments made by the following States in the general observations on the draft Convention, *see* Minutes of 1 INTERNATIONAL CONFERENCE ON AIR LAW (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR) MONTREAL, 10-28 MAY 1999: MINUTES), 45-6 (Alg.); 47 (India, Can.); 48 (China, Madag.); 49 (Indon.); 50 (Mex.); 51 (Egypt), ICAO Doc. 9775-DC/2 (1999) [hereinafter MC99 MINUTES].

117. This is evidenced by two of the clauses to MC99's preamble: (1) "RECOGNIZING 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," and (2) "CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests." MC99, *supra* note 2, at preamble.

MC99 retains the two-fold purpose of its predecessor, consisting of a cardinal purpose and a supplementary purpose. The former remains unchanged, whereas the latter has undergone significant recalibration in light of the industry's changing circumstances and socioeconomic conditions. This is underlined by the forceful declarations made by the Contracting Parties in the preamble, and reflected in the substance of the provisions contained within the Convention itself. Thus, the object and purpose of MC99 can be defined as follows:

Avoidance of conflict of laws through unification of certain rules relating to travel documentation and air carrier liability.

Assurance of an equitable balance between the interests of consumers in international carriage by air, the need for equitable compensation based on the principle of restitution, and the orderly development of international air transport.

Regarding the liability regime for passenger death and bodily injury, MC99 consists of a two-tier system: strict liability of the carrier up to SDR 128,821,[118] and presumed fault liability for claims exceeding that amount. In respect to both tiers, the carrier can invoke contributory negligence as a defense.[119] For second tier liability, the carrier can exonerate itself by proving the absence of fault, rather than the previous *all necessary measures* defense.[120] An additional ground for exoneration was introduced that releases the carrier from liability under the second tier if it can prove the damage was solely due to the negligence, or a wrongful act or omission of a third party.[121]

The new regime is very beneficial for the plaintiff because unlimited recovery is available without a prima facie obligation to prove the fault of the carrier. Indeed, once a plaintiff has proved recoverable damages in excess of the first-tier limit, this limit will only come into play where the carrier elects to and successfully raises one of the available defenses. Given that most aviation disasters involve an element of carrier negligence, the likelihood of the carrier deciding to raise a defense, let alone prove it, is rare. As a result, liability is seldom litigated. Indeed, a chief complaint made by lawyers about MC99 is the loss of work it has

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118. The limit was originally 100,000 Special Drawing Rights (SDR), but this figure was raised in 2009 to SDR 113,000 and then again in 2019 to SDR 128,821, pursuant to Article 24 of MC99. MC99, *supra* note 2, at art. 24; *2019 Revised Limits of Liability Under the Montreal Convention of 1999*, INT'L CIV. AVIATION ORG. (n.d.), *available at* https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx (last visited Apr. 4, 2021).

119. MC99, *supra* note 2, at art. 20.

120. *Id.*

121. *Id.* at art. 21(2)(b).

meant for them, as compared to WCS. It has certainly reduced the volume of litigation and sped up the resolution of claims. Nevertheless, its success is conditional on offering the plaintiff their desired choice of forum, and rather than liability, the matter of jurisdiction has become the primary battlefield for litigation.

As described in Part I above, MC99's jurisdictional regime essentially amounts to that of the Warsaw Convention with the addition of the long-sought fifth jurisdiction.[122] The inclusion of the fifth jurisdiction demonstrates a shift in the balance of interests—it is largely viewed as pro-consumer and contrary to the interests of carriers. Other than this shift, the purpose of MC99's jurisdictional regime remains the same as that of the Warsaw Convention.[123]

III. THE BIGGER PICTURE

We began in this Article by looking at the question of choice of forum within the context of WCS, to which MC99 is the successor. We have seen that this system is predicated on the paradigm of the two-party liability relationship between carrier and passenger. It appears to be a simple and discrete system within which the passenger-carrier relationship is insulated from third-party interests and influences. We have seen that the drafters of the Warsaw Convention were vindicated in establishing their regime on the basis of this two-party paradigm given the then-current state of play under *le droit commun*. Since then, however, a number of substantial developments now render that two-party paradigm an anachronism. The thesis of this Article is that a bigger picture now exists, within which WCS and MC99 are merely parts. The modern reality is one in which the passenger-carrier relationship is very exposed to third-party interest and influence. The goal of Part III of this Article is to demonstrate the existence of this bigger picture and to elaborate upon its nature and dynamics—but first, an illustrative case.

A. An Illustrative Case

The Kegworth air disaster was the crash of British Midland Flight 92 on January 8, 1989, near East Midlands Airport in the United Kingdom. The accident took the lives of forty-seven people and seriously

122. For an account of how the fifth jurisdiction finally came to be accepted, *see* Cluxton, *supra* note 11, at Part III.B.

123. *See supra* Part II.B.

injured many of the seventy-nine survivors.[124] The aircraft (a Boeing 737-400) was climbing to cruising altitude when a fan blade detached from its left (number 1) engine (a CFM56 manufactured and sold by CFM International). The detached blade caused secondary damage to the engine and, as a result, the airframe began to vibrate severely. At the same time, fumes and smoke were ingested into the cabin of the aircraft through the air conditioning system. Believing—erroneously, as it would turn out—that the air conditioning system was fed from the right (number 2) engine, the crew identified it as defective and throttled it back and shut it down. In response, the shuddering lessened, and the smoke and fumes reduced. This induced the crew to believe that the problem was mitigated and the crew decided to divert to East Midlands Airport. On approach, thrust to the damaged left engine increased, which caused it to fail and catch fire. There was a resulting abrupt loss of power. Without sufficient time to restart the other engine, the aircraft crashed short of the runway, colliding with the embankment of the M1 motorway.

The United Kingdom's Air Accident Investigation Branch (A.A.I.B.) would ultimately identify the cause of the accident as the flight crew shutting down the wrong engine.[125] Whilst this was the theory from early on, it was challenged by some, including plaintiffs, who argued that the true cause was the cross-wiring of an engine warning system by the manufacturer.[126] The A.A.I.B. was not yet published when the *Nolan v. Boeing Co.* litigation began.[127] The plaintiffs in *Nolan* were the forty-five surviving relatives of the passengers killed in the disaster, seventy-six survivors, two bystanders, and various others claiming loss of consortium from injuries to survivors.[128] Since this crash occurred in the United Kingdom during a domestic flight between London and Belfast, operated by a British carrier, one might have expected that any resulting litigation would have taken place in the United Kingdom. Instead, the claims were brought before the U.S. courts. The defendants were Boeing Co., CFM International and General Electric Co. (G.E.). The engines were marketed by CFM, a joint enterprise created by G.E., and a French

124. The brief summary of the key facts provided above is taken from the Air Accidents Investigation Branch (A.A.I.B.) report. For a full account of the accident, the reader is directed to AIR ACCIDENTS INVESTIGATION BRANCH [AAIB], REPORT ON THE ACCIDENT TO BOEING 737, 400 G-OBME NEAR KEGWORTH, LEICESTERSHIRE ON 8 JANUARY 1989 3-7 (1990).

125. *Id.* at 2.

126. The A.A.I.B. report found no evidence to support this theory. *Id.* at 145.

127. Nolan v. Boeing Co., 762 F. Supp. 680, 681 (E.D. La. 1989), *aff'd*, 919 F.2d 1058 (5th Cir. 1990).

128. *Id.*

company, S.N.E.C.M.A.,[129] each of which designed and manufactured components of the engines.

Another likely reason the case was brought in the United States was to avoid the limitation of liability imposed by the application of WCS to any claim brought against the carrier.[130] Given the strong connections to the United Kingdom, keeping the litigation in the United States would require overcoming some serious obstacles, foremost amongst which was the prospect of FNC dismissal. The U.S. law firm's strategy was to avoid federal court by suing in Louisiana State Court, which, at that point in time, did not recognize the doctrine of FNC.

The next hurdle to vault was the issue of diversity jurisdiction.[131] For the purposes of diversity jurisdiction, a corporation is considered a citizen of both its state of incorporation and its principal place of business.[132] In *Nolan*, none of the victims were U.S. citizens, but the defendants were U.S. corporations.[133] It thus appeared that diversity jurisdiction existed, and the defendants would have been entitled to have the case removed to federal court. The plaintiffs knew that once in federal court FNC dismissal would be almost certain, so they attempted to

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129. S.N.E.C.M.A. (*Société Nationale d'Etudes et de Construction de Moteurs d'Aviation*) was a corporation organized under French law which, in 2004, merged with Sagem to form S.A.F.R.A.N. In 2016, S.N.E.C.M.A. was renamed Safran Aircraft Engines.

130. Although the flight in question was a domestic flight and therefore not directly subject to the Warsaw Convention, the Convention would have applied by virtue of an Order made pursuant to § 10(1) of the Carriage by Air Act 1961, 9 & 10 Eliz. 2 c. 27, § 10(1) (U.K.). Under § 4 of the earlier Carriage by Air Act 1932, 22 & 23 Geo. 5 c. 36, § 4 (U.K.), the Warsaw Convention was made applicable to non-international carriage by the Carriage by Air (Non-International Carriage) (U.K.) Order 1952 (S.I. 1952, No. 158).

131. Under the U.S. Constitution (U.S. Const. art. III, § 2, cl. 1) and as modified by the general diversity statute (codified under 28 U.S.C. § 1332), federal courts are granted subject matter jurisdiction in civil cases involving diversity of citizenship where the matter in controversy exceeds a certain amount (currently $75,000). Diversity of citizenship arises where the litigants are citizens of different states (*e.g.*, a Florida plaintiff suing a Colorado defendant) or where one is a citizen of a state, and the other is a citizen of a foreign State (*e.g.*, a Florida plaintiff suing a French defendant, or vice versa). The generally accepted explanation for why the First Congress chose to bestow such jurisdiction on the federal courts is that they wished to avoid the possibility of prejudice by state courts against out-of-state parties by ensuring a neutral forum. *See* CHARLES ALAN WRIGHT ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed. 2008).

132. 28 U.S.C. § 1332(c)(1).

133. In the case of Boeing, its place of incorporation was Delaware, and its principal place of business Washington. G.E. was incorporated and had its principal place of business in New York. CFM International was a Delaware corporation with its principal place of business in Ohio.

employ an untested theory to resist removal: narrowing in on the requirement that diversity of citizenship must be complete.[134]

Instead of filing actions under the names of the real plaintiffs in interest, the plaintiffs' lawyers filed actions under the names of the appointed legal representatives who shared national citizenship with the defendants.[135] The case was initially removed to federal court whereupon the plaintiffs sought remand. Although the defendants sought to impugn the strategy as fraudulent, the district court had no choice but to accept the citizenship of the appointed representatives and remand the case back to state court because of then-existing law.[136]

With removal successfully resisted, the case appeared to be stuck in state court. At that time, the court did not have the doctrine of FNC, so the plaintiff lawyers thought they were home free. Unbeknownst to them, Boeing and G.E. had an ace up their sleeve: joining S.N.E.C.M.A. as a third-party defendant. Although it was not alleged that S.N.E.C.M.A. owed any liability to the plaintiffs, it was under a contractual obligation to G.E. as part of their joint venture in CFM International, under which they shared profits and liabilities. This allowed G.E. to file cross claims for indemnification and contribution against S.N.E.C.M.A., thereby joining the company to the litigation. At that time, S.N.E.C.M.A. was owned by the French State, and was thus entitled to have the case removed to federal court under the Foreign Sovereign Immunities Act.[137]

Once back in federal court, Boeing (with the support of the other defendants) moved for FNC dismissal, arguing that England was an adequate alternative forum to resolve the dispute.[138] Plaintiffs challenged

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134. The requirement of complete diversity is defined by Black's Law Dictionary in the following terms: "In a multiparty case, diversity between both sides to the lawsuit so that all plaintiffs have different citizenship from all defendants." *Complete Diversity*, BLACK'S LAW DICTIONARY (9th ed. 2009). The rule of complete diversity was first laid down by Chief Justice Marshall in Strawbridge v. Curtiss, 7 U.S. 267 (1806) (the theory being that in such cases, there is no risk of prejudice where citizens of the same state are represented on both sides of the dispute).

135. The nominal plaintiffs were Kenneth P. Nolan and Vernon T. Judkins, both of whom were attorneys hired by administrators, curators, and/or tutors of the 225 persons (or family members of the persons) injured or killed in the accident. Nolan v. Boeing Co., 919 F.2d 1058, 1060 (5th Cir. 1990). Nolan was a New York citizen; Judkins, a Washington citizen. Far from being a mere coincidence, the plaintiff lawyers admitted "their sole reason for appointing domiciliaries of those states to act as administrators was to avoid diversity of citizenship and prevent the removal of their actions to federal court." *Id.* at 1061.

136. It should be noted that this strategy was subsequently closed off by statutory action that specifies that the domicile of the true party in interest should be used for diversity purposes. *See* 28 U.S.C. § 1332.

137. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1441(d).

138. *Nolan*, 919 F.2d at 681

dismissal on the grounds that the change in law would be so detrimental to their interests that it rendered England an inadequate forum.[139] The court noted that the likely damages awarded in England would be much lower because punitive damages would not be available, and it averred to the possible unavailability of strict products liability in that jurisdiction.[140] Nevertheless, the court concluded that "the plaintiffs' remedy in the United Kingdom is not so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law ought not to be given substantial weight."[141] The court also stressed the absence of any connection to the local forum, in contrast to the overwhelming links to the United Kingdom.[142] The private and public interest factors all pointed toward dismissal and, indeed, the district court granted a conditional dismissal subsequently affirmed by the Fifth Circuit. The ultimate fate of the plaintiffs' claims is not publicly known. It is likely that they settled for sums substantially lower than what they would have been awarded had the litigation continued to a successful pro-plaintiff conclusion in the United States.

Aside from demonstrating the lengths to which plaintiff and defendant lawyers will go in order to secure a jurisdictional advantage, *Nolan* also illustrates a number of salient points of immediate relevance to this Article.

First, it is a prime example of a group of plaintiffs electing to forego a WCS claim in a local forum in preference for an alternative remedy in a foreign forum. Whilst *Nolan* was litigated within the context of WCS, a system with obvious drawbacks (e.g., the low limit of liability), we continue to see the same practice of foregoing a remedy under MC99, a purportedly superior system to WCS. Why is that? The simple answer is choice of forum. The attractiveness of MC99 is ultimately conditional upon its jurisdictional scheme providing the particular plaintiff with a choice of their desired forum.

Second, *Nolan* exemplifies the reality that, because most aviation accidents can be attributed to several possible causes, a range of potential

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139. *Id.* at 682.

140. *Id.*

141. *Id.* (*citing* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 265 (1947); Ahmed v. Boeing Co., 720 F.2d 224, 226 (5th Cir. 1983).

142. *Nolan*, 919 F.2d at 683 ("Even if plaintiffs intend to base their case on the negligence of defendants in the planning, design, manufacture, assembly, testing, service and inspection of the aircraft and its engines, the evidence regarding the crash itself and the actions of BMA are central to the tragedy . . . Here, one finds even less of a connection to this forum since none of the airplane's components were designed or manufactured in Louisiana . . . In addition to evidence about the crash, substantially the evidence of the damage is also in the United Kingdom. Trial in the U.K. would greatly facilitate access to this evidence.").

defendants can be implicated. In other words, aviation litigation is usually multi-party in nature. This is more so at the preliminary stage when jurisdiction is being litigated, precisely because the pool of potential defendants will be larger because there have not yet been any findings on the substance of the various claims.

Third, the existence of multiple defendants (whether as co-defendants or third-party defendants) raises additional issues that influence choice of forum. Choice of forum considerations may influence the plaintiff's choice of defendant. In addition, the subsequent actions taken by the defendant(s) can be motivated by their own interests regarding choice of forum. Although British Midland was the prime suspect from the outset and thus the *proper* defendant for the plaintiffs' actions, the availability of U.S. defendants, combined with the plaintiffs' desire to secure a U.S. forum, resulted in the selection of Louisiana as the litigation forum, even though British Midland was not susceptible to the jurisdiction of that state's courts. From the perspective of a defendant, *Nolan* illustrates how they too will exploit the multi-party nature of aviation accident litigation to secure a jurisdictional advantage by excluding, impleading, or joining other parties.

The common denominator of these three points is choice of forum. Plaintiff lawyers will go to great lengths to secure the most advantageous forum, while defense lawyers will bend over backward to frustrate their securing that goal. At the top of the list of desirable forums is the United States. A good plaintiff lawyer will look at their jurisdictional options under MC99, if one of those is the United States, and FNC dismissal is avoidable, then they are home free and can expect the airline—in reality its insurer—to settle posthaste. Where MC99 does not offer a U.S. forum, then plaintiff lawyers will turn their attention to other potential defendants and theories of liability—anything that will get their foot in the door of a U.S. courtroom.[143]

B. Alternative Remedies

As *Nolan* amply illustrates, a highly eligible alternative defendant in aviation litigation is the manufacturer, especially since an enormous share of the airframe and aircraft component market is owned by U.S.

143. As one U.S. lawyer stated: "[I]f any part of the epicenter of the dispute touches the United States, the legal representatives would be negligent not to explore the possibility of action there." Alan Reed, *To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L COMP. L. 31, 31 (2000).

corporations. The manufacturer is even more attractive as a defendant where an action is based on strict products liability. This all begs a rather obvious question: if the aviation manufacturer is such a clear and attractive target for passenger claims, then why did the drafters of the Warsaw Convention not address it? Why did the drafters instead focus exclusively on the two-party relationship of the carrier-passenger rather than considering the reality of alternative remedies against third parties?

As shown above in Part II(C), at the time of the Warsaw Convention's drafting alternative remedies for passengers against third parties, e.g., a manufacturer, were few and far between. The drafters were justified at that time in adhering to the two-party paradigm as the basis for their system. What they could not appreciate at that time was that the subsequent emergence of alternative remedies would render that system anachronistic. The modern plaintiff has choices when it comes to which defendant to sue and what remedy to pursue. It is the core argument of this Article that MC99, as successor to WCS, is predicated on this anachronistic understanding, the repercussions of which undermine the effectiveness and fairness of MC99 as an aviation accident passenger compensation system.

This section explores the existence of alternative remedies. Mercifully, it can be a relatively short section as our interest is in establishing the factual existence of alternative remedies within the bigger picture of international aviation litigation, rather than analyzing their substantive content or assessing their overall efficacy. Furthermore, the greatest relevance of alternative remedies is the fact that they provide the source for third-party actions for contribution or indemnification, as will be further discussed in the next section.

The development of the common law to provide a general principle of liability for negligence opened an avenue for recovery in tort law for injured parties against parties with whom there was no privity of contract. Under these, it became possible for a plaintiff to bring a direct claim against a third party, such as a manufacturer, service provider (e.g., an airport), or even against a state's aviation authorities (provided sovereign immunity was not a barrier). Privity of contract no longer constrained the plaintiff to sue only the carrier with whom the contract of carriage had been formed. Now, the plaintiff had the possibility of an alternative tort-based remedy in negligence against third parties to the contract of carriage.

However, the alternative remedy provided under the general principle of negligence would not prove particularly useful to the plaintiff in the context of an aviation accident claim. Then, as now, a claim on the general theory of negligence was not usually an attractive option to a

plaintiff because of the need to prove fault. This is an especially onerous burden to overcome in the field of aviation, given the technical sophistication of the industry[144] and the likelihood that evidence has been destroyed and/or witnesses killed.[145] Even where it is possible to establish proof of negligence, the actual cost of doing so in an aviation accident may be prohibitively expensive. Where applicable,[146] the doctrine of res ipsa loquitur has provided some amelioration, yet the doctrine is of almost no value to a claim brought against a manufacturer or other third party because it requires that the defendant be in exclusive control of the instrument. In the case of an aircraft, it is the carrier who is generally in exclusive control, so—in the vast majority of aviation cases—the manufacturer or another third party will not be within the grasp of res ipsa loquitur, and the difficulties of proving negligence will remain.[147]

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144. As stated in *Shawcross & Beaumont*: "To succeed in a products liability case based on liability in negligence, a plaintiff must establish that the defendant was at fault in being negligent in respect of the design or manufacture of the product. In an aviation context, given the technical sophistication of the industry, this may be a difficult task." 4 SHAWCROSS & BEAUMONT: AIR LAW ¶ 406 (David McClean et al. eds., 169th ed. 2020).

145. *See, e.g.*, Cox v. Nw. Airlines, Inc., 379 F.2d 893 (7th Cir. 1967), wherein the plaintiff's husband had been a passenger of a flight operated by the defendant that had disappeared over the Pacific Ocean. Some wreckage was subsequently located, but the bodies of the passengers and crew were never found, nor was any evidence as to the cause of the accident. *Id.*

146. While seemingly custom-made for aviation accident cases, it was initially argued that the doctrine was inapplicable to aviation due to the inherent perils of the air, which meant that the defendant was never truly in exclusive control of the circumstances. This was addressed in *Fosbroke-Hobbes v. Airwork* [1937] 1 All ER 108 (KB) (Eng.), and in *Boulineaux v. Knoxville*, 99 S.W.2d 849 (Ark. 1935). Goedhuis wrote, circa 1937, "[t]he question whether or not the doctrine of *res ipsa loquitor* ought to be applied to air accidents has in the last years been much debated, especially in the United States." GOEDHUIS, *supra* note 23, at 34. Some support for not applying the doctrine was found in the early days of aviation. For example, in *Morrison v. Le Tourneau Co.*, 138 F.2d 339, 341 (5th Cir. 1943), the Fifth Circuit declared that "[t]he doctrine of *res ipsa loquitor* cannot apply in cases of this sort, because there is no showing that accidents of this very nature cannot happen to the most skillful [sic] pilots in planes of the finest type and condition." However, the technological advances and resulting improvements in safety and performance have eroded this basis for resisting the application of the doctrine. In 1977, the Fifth Circuit reconsidered its position. Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 429-30 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978). *Higginbotham* was cited approvingly by the Privy Council in *George v. Eagle Air Services Ltd.* [2009] 1 WLR 2133 (PC) (appeal taken from St. Lucia) (Eng.). By 1965, Prosser's *Law of Torts* stated that "all the later cases now agree that the safety record justifies the application of *res ipsa loquitor* to [an unexpected airplane] crash, or even to the complete disappearance of a plane." PROSSER, *supra* note 106, at 220-21.

147. For more on *res ipsa loquitor* in an aviation context, *see* ANDREAS F. LOWENFLED, AVIATION LAW: CASES AND MATERIALS 7, 106-10 (2d ed. 1981); Howard Osterhout, *The*

In the 1960s, a distinct body of law emerged in the United States known as strict products liability, built upon aspects of tort and contract law—specifically, the elements of negligence and warranty.[148] This body of law produced a distinct cause of action that has proven especially valuable in the case of aviation litigation, i.e., strict products liability in tort.[149] This new cause of action relieved the plaintiff of the heavy burden of proving fault while also providing a general basis upon which to establish the liability of third parties for their products. In 1965, the American Law Institute codified it as a rule in its Restatement (Second) of Torts,[150] which has been adopted (with some alteration) by the majority of U.S. states.[151]

Inspired by the U.S. experience, the European Union established a strict liability regime for damage caused by defective products in the 1980s.[152] As a form of strict liability, the plaintiff is not required to prove fault or negligence on the part of the producer, instead, they must prove the damage, defect, and causation.[153] The European experience is noted

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Doctrine of Res Ipsa Loquitor as Applied to Aviation, 2 AIR L. REV. 9 (1931); E.A. Harriman, *Carriage of Passengers by Air*, 1 J. AIR L. 33, 39-40 (1930).

148. LAURENCE E. GESELL, AVIATION AND THE LAW 650-51 (1998); *see also* James D. Ghiardi, *Products Liability—Where is the Borderline Now?*, 13 THE FORUM 206, 206-07 (1977); Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV 643, 643 (1978). A good summary of the history of products liability law in the United States is to be found in Rebecca Tustin Rutherford, *Changers in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts*, 63 J. AIR. L. & COM. 209, 212-18 (1997).

149. *See* William L. Prosser, *Products Liability in Perspective*, 5 GONZ. L. REV. 157, 162 (1970); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 804 (1966).

150. RESTATEMENT (THIRD) OF TORTS § 402A (AM. LAW INST. 1965).

151. It must be noted that the application of § 402A has been "anything but uniform." Rutherford, *supra* note 148, at 229. In 1997, the American Law Institute approved RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY, which seeks to supersede § 402A of the Second Restatement. However, the vast majority of states still adhere to the Second Restatement. The Restatement is extremely influential and has been adopted by many states as an authoritative statement of strict liability for products in tort. Rutherford, *supra* note 148, at 222.

152. The European Commission began to study strict liability for products in the 1970s and produced a draft Directive in 1976. In 1985, Council Directive 85/374 was adopted, i.e., Council Directive 85/374, 1985 O.J. (L 210/29) (EC) [hereinafter Directive 85/374], on the approximation of the laws, regulations, and administrative provision of the Member States concerning liability for defective products. This Directive was to be transposed by the E.U. Member States into national law by 1988. *Id.* For some history and discussion of the Directive, *see generally* Peter Shears, *The EU Product Liability Directive—Twenty Years On*, J. BUS. L. 884 (2007).

153. *See* Directive 85/374, *supra* note 152, at art. 4 ("The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.").

simply to demonstrate that the emergence of a new remedy, i.e., strict products liability, is not unique to the United States. Instead, it is safe to say that the expansion of remedies beyond those available in 1929 has taken place worldwide. From the plaintiff's point of view, WCS and MC99 are no longer the only shows in town.

The emergence of alternative remedies and defendants has meant that third parties (i.e., third parties to the contract of carriage) are now directly or indirectly implicated in the litigation of passenger claims. Whereas at the time of the Warsaw Convention, the drafters could rely on the law insulating third parties from passenger claims, the development of alternative remedies has expanded the plaintiff's options. The current reality is that MC99 is just one of several potential remedies available. Not only does this raise questions about its efficacy, but it also impacts the issue of choice of forum. The attractiveness of MC99 is ultimately conditional upon its jurisdictional scheme granting the plaintiff a choice of the most desirable forum. Where an alternative remedy exists that offers a preferable forum, then plaintiffs will forego an MC99 action, even if that alternative remedy is otherwise a less attractive option. Foregoing a convention remedy was not contemplated by the drafters of the Warsaw Convention, but it must now be taken into account when evaluating choice of forum under MC99.

C. Third-Party Actions

The emergence of alternative remedies led to another development that also contributes significantly to the bigger picture. This is the reality of third-party actions for contribution or indemnification, the impact of which is threefold. First, they provide the link by which alternative remedies become directly implicated in the carrier-passenger liability relationship. Second, they can undermine the goals and objectives of WCS and MC99 by circumventing some of the provisions of those regimes. Third, third-party actions can also have a direct bearing on choice of forum. Whether the defendant to the main action is the carrier (or some other party), the existence, or even just the prospect, of the defendant bringing a third-party action against another party alters the jurisdictional power play. As shown by the *Nolan* case, third-party actions are a strategic tool used by defendants in aviation litigation to win a jurisdictional advantage over the plaintiff. This raises new questions: Is this fair to the plaintiff? Is it consistent with the goals of MC99?

What is a third-party action? A third-party action is distinct from, but conditional upon, the main action between a plaintiff and a defendant.

A defendant may bring a third-party action to the main action against a third party who it alleges is liable to the defendant, either in part or in full, for its liability to the plaintiff in the main action. In practical terms, when a plaintiff brings an action for damages against a carrier, that carrier may allege that another party (e.g., the manufacturer of the aircraft) is also to blame, and this other party should reimburse the carrier for some (or all) of the damages that the carrier ends up owing to the plaintiff. Various other configurations can arise – instead of the carrier, the plaintiff might sue an agent of the carrier (e.g., in negligence) or a component manufacturer (e.g., in products liability), and that defendant may seek recourse against the carrier for some share (if not all) of the liability. The parties to the third-party action are called the third-party plaintiff and the third-party defendant.

The most common examples of a third-party action are claims for indemnification or contribution. In simple terms, the difference between indemnity and contribution is that in the former, the entirety of the liability is transferred from one party to the other; in the latter, liability is effectively shared between the tortfeasors according to the doctrine of apportionment.[154]

While indemnity might arise by way of contract and/or by operation of law, the right to contribution arises only by operation of law.[155] However, a distinction must be made between a third-party action for indemnification arising as a matter of law and one arising as a matter of contract. A right to indemnification arising under contract will be treated in the next section, which focuses on the influence of third parties via contractual indemnities and contracts of insurance. In this section, we are concerned with the influence exerted by third parties via their right to contribution or indemnification as it arises by operation of law. This

154. One commentator described it thus: "'Contribution' indicates that the liability for loss occasioned by a tort is shared by those responsible for it. 'Indemnity' indicates that the entire liability for loss is shifted from one person held legally responsible to another person. One who receives contribution is nevertheless out of pocket the amount of the judgment for which he does not receive contribution. One who is awarded indemnity is not out of pocket all because his indemnitor has to pay the entire judgment." E. Eugene Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 517 (1952). *See also* Gus M. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 150-51 (1947) ("'Contribution' is used to mean the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part ... 'Indemnity' is used to mean the payment of all of plaintiff's damage by one tortfeasor to another tortfeasor who had paid it to the plaintiff.").

155. Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 TUL. L. REV. 1165, 1167 (1981).

occurs in the case of joint or concurrent tortfeasors, which is common in aviation litigation.

Where a third-party plaintiff seeks contribution/indemnification against a third-party defendant based on common tort liability (as distinct from a contractual basis), then a condition of recovery is that both parties (to the third-party action) bear common liability to the plaintiff in the main action. If the plaintiff could not sue the manufacturer, the defendant carrier cannot seek contribution from the manufacturer. In the aviation example above, unless the manufacturer (i.e., the third-party defendant) would be liable to the plaintiff in a direct action, then the manufacturer cannot be liable to the carrier (*qua* third-party plaintiff) for contribution.

This commonality, upon which contribution/indemnification is founded, may be expressed either in the tortious act (and consequently in the damage) or solely in the damage. Where the commonality is in the tortious act *and* the damage, then the parties are defined as joint tortfeasors.[156] Where the commonality is *only* in the damage, then they are defined as concurrent tortfeasors.[157] What both species of tortfeasors

156. Joint tortfeasors combine to commit a single tortious act that necessarily causes the same damage. *See* W.T.S. STALLYBRASS, SALMOND'S LAW OF TORTS 74 (10th ed. 1945) ("In order to be joint tortfeasors they must, in fact, or in law, have committed the same wrongful act."). In the case of a joint tortfeasor, there is a single tort for which multiple parties bear shared responsibility. Joint tortfeasors thus share a mental concurrence in the commission of the wrongful act; that is, they act in concert or with a joint purpose. There are various doctrines for determining the existence of this mental concurrence, and these differ between jurisdictions. For instance, in English law, the concept of common design is employed by the courts. *See, e.g.*, Unilever Plc. v. Gillette (U.K.) Ltd. [1989] RPC 583, 609 (CA) (Eng.) (Mustill L.J. defining the test for liability as a joint tortfeasor as whether, "(a) there was a common design between [the parties] to do acts which ... amounted to infringements, and (b) [the party] has acted in furtherance of that design."). This area of law was addressed in 2015 by the Supreme Court of the United Kingdom, in *Fish & Fish Ltd. v. Sea Shepherd* [2015] 2 WLR 694 (SC on appeal from Eng.) (UK).

157. Whilst liability as joint tortfeasors arises where the parties combine to commit a single tort; there are situations in which two parties commit *separate* torts that combine to cause damage to the same injured party. This is frequently the case in aviation accidents since the torts, e.g., the independent negligent act of the carrier combined with a manufacturer's design defect, combine contemporaneously to cause personal injury or death. In this case, the tortfeasors do not act jointly, but their acts do run together to cause damage. Where their acts substantially and contemporaneously result in damage that is indivisible, then these several (i.e., not joint) tortfeasors may be regarded as *concurrent tortfeasors*. For example, in *Walton v. Avco Corp.*, 610 A.2d 454, 460, 530 Pa. 568, 580 (1992), an aviation product liability case involving concurrent tortfeasors' failure to warn, the court refused a claim for indemnification because each party's liability was independent from the other. ("The relationship of the parties in this case, however, establishes concurrent primary liabilities and therefore precludes any right to indemnification. Neither defendant's liability was dependent upon, or a precursor to, the other's. The jury found them both liable for their own acts, independent of one another.").

(generally referred to as solidary tortfeasors in the civilian law tradition)[158] share is that their torts must, as Glanville Williams put it, "run together" to produce the same damage.[159]

i. Contribution

Contribution allows one tortfeasor, who paid more than their share of the liability to the plaintiff, to seek a portion of that liability from another non-paying tortfeasor (or tortfeasors, if there is more than one). It is essentially a concession to fairness[160] and rests upon the recognition of the need for equity between those with a common obligation.[161] Each legal system has its own doctrine of contribution, or indeed may have a rule against it. However, the right of contribution at common law is generally denied an intentional tortfeasor; a similar exclusion applies in civil law.[1621]

Although contribution between tortfeasors is now commonplace, it was not always so. Under the rule in *Merryweather v. Nixan* (1799),[163] there was no contribution between joint tortfeasors at common law.[164] Therefore, where the plaintiff elected to recover solely from tortfeasor A, then tortfeasor B effectively got a free pass because A had no right of indemnity/contribution against B. The policy justification for this rule (as well as for the contributory fault exclusionary rule) was expressed in the legal maxims *in pari delicto* (*potior est conditio defendantis*) and *ex*

158. This is, of course, a generalization regarding civilian law systems. In fact, the various civilian systems do differ in how they define solidary tortfeasors, not all of which would identify concurrent tortfeasors as being *solidary*, although they would hold them liable *in solidum* for the damages. The difference emerges in the division of liability. In the case of joint tortfeasors, liability is distributed on a percentage basis corresponding to relative fault. For concurrent tortfeasors, the division tends to be on percentage causation. But there is also a tendency in some systems to see the liability of concurrent tortfeasors as a case of indivisibility, which has technical rules different from solidarity.

159. GLANVILLE L. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 1 (1951).

160. *See* Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 134 (1932).

161. *Id.* at 137.

162. HUIBERT DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 103-04 (1954).

163. Merryweather v. Nixan (1799) Eng. Rep. 186; 101 ER 1337 (Eng.).

164. For discussion of this case, *see generally* Theodore W. Reath, *Contribution Between Persons Jointly Charged with Negligence - Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898); Hodges, *supra* note 154; Ellis Berger, *Contribution Between Tortfeasors*, 9 IND. L.J. 229 (1934).

turpi causa non oritur actio.[165] In simple terms, the courts would not come to the aid of a wrongdoer.

This could be a harsh rule that imposed an injustice on parties who bore only a small proportion of the fault. In addition, it undermined the deterrent effect of tort liability. Nevertheless, the common law did not—and, strictly speaking, still does not—permit a right to contribution; however, an exception did arise in admiralty.[166] However, since then, English law,[167] various U.S. state laws,[168] and various other jurisdictions have enacted statutory schemes that provide a right to contribution.

When it comes to the civil law tradition, Szalma states that whilst Roman law recognized delictual, solidary obligations, permitting the injured party to recover all losses from one of several tortfeasors, the law did not permit contribution claims between tortfeasors.[169] Although Szalma claims that the majority of European civil law systems followed the Roman law, he describes provisions under Austrian, German, Swiss, and French Codes that allowed contribution between solidary tortfeasors.[170] Indeed, this appears to be the current general position of the European civilian law tradition.[171]

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165. *See* Leflar, *supra* note 160, at 130.

166. An exception did arise, but only in admiralty in England and the United States. A court of admiralty could order that the loss be divided equally between the parties, known as the rule of moiety (also referred to as the divided damages rule). The rule was first laid down in 1815 by Lord Stowell in *The Woodrop-Sims* (1815) 165 Eng. Rep. 1422, 1423 (UK). The U.S. Supreme Court adopted the rule in 1854 in *The Schooner Catharine v. Dickinson*, 58 U.S. 170 (1854).

167. Under English law, a statutory right was provided by the Law Reform (Married Women and Tortfeasors) Act 1935, 25 & 26 Geo. 5 c. 30, § 6 (UK). This Act was subsequently repealed and replaced by the Civil Liability (Contribution) Act 1978, c. 47 (UK), under which any party liable for damage suffered by another person may recover contribution from any other person liable for the same damage (whether jointly or otherwise). *Id.* at § 1.

168. Many states have adopted legislation based on the Uniform Law Commission's model legislation, the 1977 Uniform Comparative Fault Act. *See* UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT 4 (UNIF. LAW COMM'N 2003). The State of Idaho, for example, provides comparative negligence as the basis for apportionment. *See* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976).

169. Jozef Szalma, *Solidary and Divided Liability of Joint Tortfeasors—with Special Regards to the Provisions of the New Hungarian Civil Code*, 8 J. EURO. HIST. L. 66, 66-67 (2017).

170. *Id.* at 69.

171. The Principles of European Tort Law (PETL), published by the European Group on Tort Law (EGTL), provide some evidence of this. Although the PETL are not legally binding, they do intend to provide a harmonized codification of the law in Europe (including common-law States) in a similar vein to the American Law Association's Restatements. Under Article 9(102)(1) of the PETL: "A person subject to solidary liability may recover a contribution from any other person liable to the victim in respect of the same damage. This right is without

Therefore, unlike the common law, the civil law tradition has long provided for contribution between solidary tortfeasors. However, as demonstrated above in Part II(C)(ii), this was still problematic because it required establishing the liability of the parties in the first instance; this was very hard to do against third parties to the contract of carriage, so the availability of contribution was more theoretical than practicable. In other words, the need for contribution seldom arose in the context of carriage because the underlying requirement for liability of a third party to the plaintiff was extremely rare.

ii. Indemnification

In essence, indemnity means the duty to make good the liability incurred by another.[172] As noted above, the right of indemnity can arise either by contract or by operation of law. It is with the latter that we are currently concerned; the former is addressed in the next section. The origin of the non-contractual right to indemnity is found in equity, where it was founded upon the doctrines of restitution and unjust enrichment.[173] Simply put, indemnity results in the "shifting of the entire loss from one tortfeasor to another."[174]

The rule against contribution/indemnification could be harsh on a joint/concurrent tortfeasor, especially when the paying tortfeasor was morally faultless or where his or her share of the fault was minimal, e.g., when the paying tortfeasor's liability was based on strict liability or was vicarious.[175] In these cases, common law courts recognized an equitable right for a tortfeasor to recoup his or her loss from the other tortfeasor who was truly at fault.[176] As one commentator described it, "[i]ndemnity

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prejudice to any contract between them determining the allocation of the loss or to any statutory provision or to any right to recover by reason of subrogation [*cessio legis*] or on the basis of unjust enrichment." *See Principles of European Tort Law*, EUR. GROUP ON TORT L. (May 2005), *available at* http://www.egtl.org/docs/PETL.pdf (last visited Apr. 9, 2021).

172. The etymology of the word "indemnity" has been traced to the conjunction of the Latin words *in* (not), *damn* (loss), and *ficere* (to make), i.e., to not make loss. Gorman, *supra* note 155, at 1166 n.4.

173. Marie R. Yeates et al., *Contribution and Indemnity in Maritime Litigation*, 30 S. TEX. L. REV. 215, 223 (1990).

174. Ingham v. E. Air Lines Inc., 373 F.2d 227, 241 (2d Cir. 1967).

175. For example, a right of indemnity may arise in the case where liability arises vicariously based on a special relationship, e.g., *respondeat superior*. *See* Gorman, *supra* note 155, at 1172 ("[A] master, who is held vicariously liable under *respondeat superior* for the negligent acts of his servant, would be entitled to indemnity from the servant.").

176. For example, indemnity between tortfeasors was allowed by the Iowa Supreme Court in *Rozmajzl v. Northland Greyhound Lines*, 242 Iowa 1135, 49 N.W.2d 501 (1951)

is given to the person morally innocent but legally liable, as against the actual wrongdoer whose misconduct has brought the liability upon him."[177] There are, of course, various doctrines. Generally speaking, the right to equitable indemnification is usually only available in those circumstances where the paying tortfeasor is de jure liable but de facto "fault-less."[178] Where the paying tortfeasor bears more than a de minimis level of fault, then the right of indemnification is not available, and they must rely instead on the availability of a right to contribution.

The need to rely on equitable indemnification has been substantially reduced by the introduction of statutory regimes for contribution that generally permit contribution on a proportional basis all the way up to, and including, full indemnification.[179] In the context of aviation accident litigation, indemnification is much more likely to arise through an insurance agreement or contractual indemnities, to which we shall shortly turn.

iii. Relevance to Aviation Litigation

The availability of a right to non-contractual contribution or indemnification was not a feature of the common law at the time of the Warsaw Convention, and its availability within the civilian legal system was largely theoretical. On the international law plane, there was some precedent for recourse. The Collision Convention of 1910 provided for the apportionment of liability between joint tortfeasors according to their relative degree of fault.[180] The international regime governing the carriage of goods by railway contained provisions on recourse since the Berne Convention in 1890,[181] and continued to do so with both the CIM

(original common carrier was found liable); for some commentary on this case, *see* Davis, *supra* note 154, at 520.

177. Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 243 (1908).

178. It is not possible to discern a precise common doctrinal basis to the various doctrines. *See Ingham*, 373 F.2d at 240; Davis, *supra* note 154, at 536; Hodges, *supra* note 154, at 153-57. At most, it could be said, as Judge Learned Hand stated in *Slattery v. Marra Bros., Inc.*, 186 F.2d 134 (2d Cir. 1951), that indemnity ought to arise where "faults differ greatly in gravity."

179. *See, e.g.*, Civil Liability (Contribution) Act 1978, c. 47, § 2(2) (Eng.).

180. *See* International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, art. 4, Sept. 23, 1910, TD/B/C.4/296 [hereinafter Collision Convention].

181. *See* Berne Convention 1890, *supra* note 33, at art. 48.

1924[182] and the CIV 1924.[183] However, the recourse provisions in the railway conventions dealt only with recourse between carriers who were party to the contract of carriage, i.e., successive carriage. Neither the CIM 1924 nor the CIV 1924 made any provision in relation to recourse actions by, or against, third parties.

All of this suggests that recourse actions were not a common feature of the legal landscape at the time the Warsaw Convention was drafted, which is further reflected in the fact that the Convention does not address them. This is in stark contrast to the state of affairs that presently exists where third-party actions are a regular feature of civil litigation. This fact alone has fundamentally changed the legal landscape of international aviation litigation, exploding the myth of the two-party paradigm upon which WCS (and thus MC99) was established.

The development of doctrines of indemnification and contribution drove the expansion of procedural rules of joinder. Traditionally, the ability to join a defendant to proceedings was limited to cases of joint tortfeasors, so that when a plaintiff wished to recover against concurrent tortfeasors he or she was forced to pursue each in a separate action. Once contribution and indemnification became available, it made more sense to provide for separate proceedings to be joined together. This certainly countered many of the traditional regime's inequities and led to a greater incidence of multi-party litigation. This has, it is submitted, generated new inequities for the plaintiff because it empowers defendants to employ various strategies to challenge the jurisdictional choice of the plaintiff, which is precisely what occurred in *Nolan*.[184]

In *Nolan*, a factor militating in favor of FNC dismissal was the defendants' inability to join the carrier (British Midland) as a third-party defendant to the U.S. proceedings. It was argued that unfortunate consequences would arise if the FNC dismissal was not granted because the defendants, if found liable, would be forced to seek indemnification or contribution from British Midland through a separate action in England. Ironically, the defendants in *Nolan* had complained of their inability to join British Midland as a third-party defendant due to the court's lack of jurisdiction over the carrier. However, it is highly unlikely that Boeing did not have contractual indemnity in place with British Midland upon which it could have found jurisdiction. Indeed, jurisdiction over S.N.E.C.M.A. was established on a similar basis. To the cynical

182. *See* CIM 1924, *supra* note 33, at art. 27. Chapter III of the CIM 1924 contained a number of provisions relating to recourse actions between carriers, including jurisdiction.

183. *See* CIV 1924, *supra* note 33, at arts. 48-49.

184. *See supra* Part III.A.

observer, it might seem that the defendants (including potential third-party defendants) were coordinating their efforts to ensure a jurisdictional advantage that served their common interest. Strategically, it made sense for the defendants to keep British Midland out of the litigation altogether. This is what they had initially done with S.N.E.C.M.A., only bringing them into the litigation as a last resort to secure removal to federal court.

Cases such as *Nolan* bring to light the impact that third-party actions can have on the litigation of international aviation accident cases, particularly the issue of choice of forum. Through a third-party action, a defendant can bring about the joinder of another party to the litigation between it and the plaintiff to the main action. This invariably alters the dynamics and is frequently exploited by the defense to secure a jurisdictional advantage, most often by manufacturing an FNC dismissal.

Another consequence for aviation litigation of third-party actions for non-contractual contribution/indemnification is the risk they pose to circumventing the provisions and purpose of WCS and MC99. This is an area of intense debate, and for reasons of space cannot be explored here in the detail required.[185] Nevertheless, it is necessary to flag this issue and provide a very concise description.

If a plaintiff elects to forego a remedy against the carrier under WCS or MC99 and chooses instead to pursue a third party (e.g., an airframe manufacturer), the possibility can emerge that if that third party takes a third-party action against the carrier, that carrier would not be able to rely on the provisions of WCS or MC99 in that third-party action—although it could have, if the plaintiff had sued the carrier directly.

For example, in *In re Air Crash Over the Mid-Atlantic on June 1, 2009*,[186] most plaintiffs were non-U.S. domiciliaries for whom there was no U.S. jurisdiction over the carrier (Air France) under MC99. Instead, plaintiffs brought several tort actions against a number of U.S. component manufacturers in U.S. courts. These actions were consolidated before the District Court for the Central District of California. At this point, the defendant manufacturers brought third-party actions against Air France for indemnification or contribution. Air France argued that MC99 should apply to the third-party action and that the court should recognize that it did not have jurisdiction; to do otherwise, Air France argued, would circumvent and thereby undermine MC99 jurisdictional provisions.[187]

185. For a short summary of the issue, the reader is directed to 7 SHAWCROSS & BEAUMONT: AIR LAW ¶ 446 (David McClean et al. eds., 169th ed. 2020).

186. *See In re* Air Crash Over the Mid-Atlantic on June 1, 2009, 760 F. Supp. 2d 832 (N.D. Cal. 2010).

187. *See id.* at 846-47.

Although the court acknowledged the existence of a "potential tension," it avoided the issue by granting an FNC dismissal.[188] Indeed, it is likely that the manufacturer defendants brought the third-party actions to engineer an FNC dismissal, as it was in their collective interests to resolve the dispute in France rather than the United States.

Although still the subject of debate, the balance of opinion has come down on the side of holding that third-party actions are not governed by WCS or MC99; it is submitted that this is the correct view.[189] Unfortunately, this state of play could consequently open the possibility of WCS or MC99 being subject to circumvention, yet we must be careful when employing the term "circumvention" itself. Although it is often used in a pejorative sense, the circumvention involved here is not illegal or dishonest. The plaintiff is entitled to pursue a third party under an alternative cause of action rather than pursue the carrier via WCS or MC99. However, where that third party then brings a third-party action against the carrier, the result can be that the carrier indirectly answers a passenger claim in a forum that it would not have been subject to in an action brought by the passenger directly. This is inconsistent with the purpose of those conventions insofar as it generates legal uncertainty and undermines uniformity. Is it fair to a carrier that a plaintiff should be able to circumvent the jurisdictional (and perhaps other provisions of the conventions) by means of an alternative remedy, taken in the knowledge that the carrier will be added to the litigation via a third-party action? This is the reality of international aviation litigation, and policymakers and legislators are entitled—if not obligated—to take this into account when assessing the efficacy of MC99 within the bigger picture that this Article describes.

The two key takeaways from this section are that third-party actions provide an additional avenue for third-party influence in international aviation litigation (including WCS and MC99), and that third-party actions give rise to the risk of circumvention of WCS and MC99. These are two critical components of the bigger picture.

D. Risk Management Devices

Given its history, the extent of the potential liability involved, and the sophistication of parties, it should come as no surprise that a complex network of arrangements exists within the aviation industry for

188. *See id.* at 846.

189. *See* SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 446.

channeling and allocating the risks associated with carriage by air. These can be broadly split into two groups: (1) contractual indemnities; and (2) insurance.

Why should this Article take an interest in contractual indemnities and insurance? There are at least two reasons. First, and most obviously, they are part of the bigger picture, each playing a critical role as devices for the management of aviation risk. At least to the extent that both seek to control and allocate the risks related to liability for damages suffered by passengers and shippers during international carriage by air, they occupy the same space as MC99 and thus may promote or frustrate its objectives. More specifically, both mechanisms provide another avenue through which third parties exert influence over choice of forum. Collectively, this matrix of contractual indemnities and insurance agreements bind parties together in opposition to the interests of the plaintiff.

Secondly, insurance for passenger liability in international carriage by air is so ubiquitous nowadays as to be almost universal.[190] Whilst

190. Pursuant to Article 50 MC99, the European Union introduced Regulation 785/2004 that requires certain carriers operating within the European Union to have minimum levels of insurance in respect of their liability under MC99 for passengers, baggage, and cargo. *See* Regulation (EC) No. 785/2004 of the European Parliament and of the Council of Apr. 21, 2004, on insurance requirements for air carriers and aircraft operators [2004] O.J. (L 138/1) [hereinafter Regulation 785/2004]. The minimum level of insurance required by the Regulation in respect of liability for passengers is SDR 250,000 per passenger. *Id.* at art. 6(1). Regulation 785/2004 was subsequently amended in 2010 by Commission Regulation (EU) No. 285/2010 Apr. 6, 2010, amending Regulation (EC) No. 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators [2010] O.J. (L 87/19) [hereinafter Regulation 285/2010]. The amendment was necessary to make provision for the revision of the monetary limits of liability under MC99 that had been adjusted to account for inflation. However, since the level set for passenger liability in Regulation 785/2004 was in excess of that required by the Convention, the limit in respect of passenger liability was not adjusted in 2010. The Regulation applies to all air carriers "flying within, into, out of, or over the territory of a Member State to which the Treaty applies." Regulation 785/2004, *supra* note 184, at art. 2(1). Thus, insurance is mandatory for all carriers operating within the European Union regardless of whether they are Community air carriers or not. However, the minimum levels of insurance in respect of liability for passengers (as well as baggage and cargo) do not apply to flights of non-Community air carriers that merely overfly the territories of E.U. Member States. *See id.* at art. 7(4). It should be noted that prior to Regulation 785/2004, insurance was already mandated for Community air carriers pursuant to the licensing requirements of Council Regulation (EEC) No. 2407/92 of July 23, 1992, on licensing on air carriers (1992) O.J. (L 240/1) art. 7, now replaced by Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of Sept. 24, 2008 on common rules for the operation of air services in the Community (recast) (2008) 293 O.J. (L 3) art. 11. Beyond the European Union, compulsory insurance for air carriers has been a feature of national licensing regimes of commercial air carriers for many years. For details in respect of some national law regimes, *see* ROD D. MARGO, MARGO ON AVIATION INSURANCE ¶ 3.19

neither WCS nor MC99 make it compulsory for carriers to insure themselves, Article 50 of MC99 does provide that the Contracting States shall require their carriers to maintain "adequate" insurance covering their liability under the Convention.[191] The quasi-universality of insurance coverage is not limited to air carriers; all commercial aviation entities, whether by law or mere prudence, insure themselves against risk. This means that, in aviation litigation, it is the insurer, rather than the liable party, who is settling the bill with the victim of an accident. This fact invariably influences the litigation of claims.

The concluding part of this Article will require some evaluation of MC99 as a system of compensation, and this can only be done where the actual exposure of the carrier is known and, even more importantly, the full extent of the insurer's role is brought to light. The aviation insurer is not some benign presence whose only role is to sign the checks for its insured. Instead, it occupies—through subrogation—a staggeringly important place in the process of defending and settling claims. Yet, the insurer's role is seldom noted and even less often analyzed.

i. Contractual Indemnities

The labyrinthine complexity of contractual indemnities within the aviation industry is well illustrated by the facts of *In re Air Crash near Peggy's Cove, Nova Scotia on September 2, 1998*.[192] A Swissair-operated McDonnell Douglas MD-11 crashed into the Atlantic Ocean during a flight from New York to Geneva, resulting in the deaths of all 215 passengers on board. The crash resulted from an in-flight fire that started due to faulty wiring in the in-flight entertainment system, which ignited flammable insulating blankets. The plaintiffs sued not only

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et seq. (Katherine B. Posner et al. eds., 4th ed. 2014). In the United States, federal regulations require U.S. and foreign direct air carriers to maintain minimum levels of coverage, including $300,000 per passenger and $20 million per aircraft per occurrence. *See* 14 C.F.R. § 205.5. Thus, the vast majority of carriers are legally obligated to maintain insurance if they wish to operate within the European Union or the United States. Similar regulations are applied throughout the world. For instance, under US federal law, aircraft accident liability insurance is compulsory for U.S. direct air carriers and for foreign direct air carriers operating under the permission or authority of the Department of Transportation, whether it be domestic or international operations. *See* 14 C.F.R. § 205(3)(a) (providing: "A U.S. or foreign direct air carrier shall not engage in air unless it has in effect aircraft accident liability insurance coverage that meets the requirements of this part for its air carrier or foreign air carrier operations.").

191. MC99, *supra* note 2, at art. 50.

192. *In re* Air Crash Disaster Near Peggy's Cove, 210 F. Supp. 2d 570 (E.D. Pa. 2004).

Swissair, Boeing,[193] and Interactive Flight Technologies (the designers of the in-flight entertainment system), but also the manufacturers of the thermal blankets, the sub-contractor who installed the system, and two other sub-contractors who provided certification of the installation. The spaghetti-like crisscrossing of third-party actions between these seven defendants was mitigated by Swissair and Boeing settling with the plaintiffs and reaching recourse agreements with all but one of the other defendants. However, even still, Interactive Flight Technologies' refusal to settle with Boeing and Swissair led it to seek contractual indemnification from four of the six other defendants, including Swissair. Multi-party litigation such as this is common in the field of aviation litigation. Even if only one defendant appears on the docket, the truth is that the contractual indemnities between the various parties feed into the nexus and demand that we expand our attention beyond the illusory paradigm of a simple two-party dispute.

Contractual indemnities refer to indemnities arising from contract, as opposed to those which arise by law or equity[194] or in the case of insurance.[195] In the simplest of terms, we are concerned here with a particular type of clause frequently included in contracts between commercial aviation entities by which one party promises to indemnify the other.[196] For example, an aircraft lease or purchase agreement will nearly always contain a clause by which the aircraft operator agrees to indemnify the lessor or manufacturer against any losses arising from the operator's use of the aircraft. Therefore, if the manufacturer is sued by a passenger who is injured during carriage by air, the manufacturer will

193. Boeing Co. was a successor in interest, having acquired McDonnell Douglas.

194. Indemnification need not be contractual. As dealt with earlier, a right to indemnification can arise as a matter of law. This was recognized by the Privy Council in *E. Shipping Co. v. Quah Beng Kee* [1924] AC 177, 182-83 (PC) (appeal taken from Straits Settlements) (Eng.) (stating that "[a] right to indemnification generally arises from contract express or implied, but is not confined to cases of contract. A right to indemnification exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other . . . The right to indemnification need not arise by contract.").

195. Whilst a non-life insurance contract is a contract of indemnity, it is distinguishable from a non-insurance contract of indemnity. For instance, indemnities in insurance contracts are subject to legal doctrines that are not applicable in a non-insurance context, such as the duty of utmost good faith and the principle of fortuity. For some of the differences between insurance and non-insurance indemnities, *see* WAYNE COURTNEY, CONTRACTUAL INDEMNITIES 9 (2015).

196. In the context of contractual indemnities, Courtney defines a promise of indemnification as "a promise of exact protection against loss." *Id.* at 6.

turn to the operator in the expectation that it will hold the manufacturer harmless against such liability.[197]

Once a loss is within the scope of the indemnity, the indemnified is entitled to full indemnification; there is no rule providing for apportionment of liability between the indemnifier and indemnified based on any notion of comparative fault.[198] Subject to limitations imposed by statute or public policy, a party may undertake to indemnify another party against any conceivable loss. Of relevance to this work is indemnification relating to liability to passengers for personal injury or death sustained during international carriage by air. As has been noted on several occasions, the plaintiff has a range of possible defendants to sue in the event of an accident. Therefore, to the extent that these possible defendants have pre-existing contractual relations, they have an interest in securing contractual indemnities from each other. Of course, the buck has to stop with at least one of them, and the question of who shall carry the risk is generally a matter for commercial negotiation.

Contractual indemnity clauses in non-insurance agreements can vary significantly from one agreement to the next, but some common features are easily discerned. The following is an example of part of general indemnity clause taken from a lease agreement[199] between a leasing subsidiary of a major aircraft manufacturer and an international air carrier:

The [lessee] agrees to indemnify and hold harmless the [Indemnitee] against any and all Losses which the Indemnitee may at any time suffer or incur, whether directly or indirectly as a result of (i) ownership,

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197. The desired effect of an indemnity is to protect a party (the indemnified) from loss. The party undertaking to protect the indemnified is obliged to either prevent such loss arising in the first place or to compensate for loss already incurred. For this reason, the effect of contractual indemnities is described as being either "preventative" or "compensatory." *Id.* at 17-18. Courtney distinguishes the two in the following manner: "For [indemnities of prevention], the indemnifier is expected to act before the indemnified party suffers a loss. In contrast, it is implicit in the notion of compensation that the indemnifier is to perform after the indemnified party has already sustained loss." *Id.* at 18.

198. *See id.* at 80-81. Courtney quotes Chief Justice Stephen in *Osborne v. Eales* [No. 2], stating "it seems to be impossible to hold that a man indemnifies another against a loss by merely paying a portion of it. If the latter shares the loss, he is to that extent clearly not indemnified." Osborne v. Eales [No. 2] (1862) 15 Eng. Rep. 849, 137-38 (PC) (appeal taken from Austl.) (UK).

199. This operating sublease agreement between sublessor Airbus Leasing II, Inc. and sublessee Siberia Airlines was filed as part of the documents associated with the case of *Esheva v. Siberian Airlines*. Operating Sublease Agreement (Doc. 128-7), Esheva v. Siberian Airlines, 499 F. Supp. 2d 493 (S.D.N.Y. 2007) (No. 06-CV-11347). The author accessed the document through Public Access to Court Electronic Records (PACER), a service maintained by the Administrative Office of the U.S. Courts.

registration, import, export, storage, modification, leasing, . . . use, operation whether in the air or on the ground, delivery or re-delivery of the Aircraft or any part thereof, and which relate to the Aircraft, during the lease period, and (ii) any act or omission which invalidates or which renders voidable any of the Insurances.[200]

What is immediately notable is that the scope of the general indemnity is incredibly broad, covering every conceivable act involving the aircraft resulting in any and all loss to the indemnified. It applies whether the loss is direct or indirect, the latter covering claims by third parties (such as passengers). There is no requirement of fault on the part of the lessor; it is expected to assume the obligation to indemnify the lessee for any and all risks. Indeed, the next sub-clause specifies that the indemnities apply even where the loss is attributable to an act or omission of the lessor, or to a defect in the aircraft, or to strict liability.[201] Subsequent sub-clauses of the lease agreement do provide exceptions which do not require the lessee to indemnify the lessor, e.g., where the indemnified party's fraud, willful misconduct, or gross negligence, caused the loss.[202]

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200. *Id.* at 21. A general indemnity provision is also found in the agreement between lessor and carrier quoted by the English High Court in *Pindell Ltd. v. AirAsia Bhd.* [2012] 2 CLC 1, 35-36 (Com Ct) (Eng.) ("Lessee hereby agrees at all times to indemnify, protect, defend and hold harmless each Indemnitee from and against all and any liabilities, losses, claims, proceedings, damages, penalties, fines, fees, costs and expenses whatsoever (any of the foregoing being referred to as a 'Claim') that any of them at any time suffers or incurs . . ."). In another case, a helicopter lease agreement included the following indemnification clause: "Lessee hereby assumes liability for, and shall defend, indemnify and hold harmless the Lessor and each of its agents, servants and assigns from and against any and all costs, losses, liabilities, obligations, expenses, claims, damages, penalties, actions, suits, expenses and disbursements of any nature whatsoever, including legal expenses, imposed on, incurred by or asserted against Lessor in any way relating to or arising out of the manufacture, purchase, acceptance or rejection, ownership, delivery, lease, possession, use, condition, sale, return or other disposition hereunder of the Helicopter (including, without limitation, latent and other defects, whether or not discoverable by Lessee, any claim in tort for strict liability, and any claim for patent, trademark or copyright infringement." Helicopter Lease Agreement (Doc. 128-7) 1, 8, Escobar v. European Aeronautic Def. & Space Co., No. 13-CV-598 (D. Hawaii filed June 11, 2016). The author accessed the document through Public Access to Court Electronic Records (PACER), a service maintained by the Administrative Office of the U.S. Courts.

201. The clause (numbered 14.2) provides: "Except to the extent Clause 14.3 applies, the Sublessee will be liable in respect of its indemnities in paragraph 14.1 [i.e., the general indemnity clause] even though the Loss is suffered or incurred after the Expiry Date or is attributable to an act or omission of an Indemnitee, to some defect in the Aircraft or strict liability (provided it relates to an event or circumstance occurring during the Sublease Period)." Operating Sublease Agreement, *supra* note 198, at 21.

202. *See id.* at 22.

Generally speaking, aircraft manufacturers tend to have far-reaching indemnity clauses in their aircraft sales agreements that allocate the risk of liability to the carrier.[203] The scope of these indemnities can be surprisingly broad. This is well illustrated by the case *Pakistan International Airlines v. Boeing Co.*[204]

Although the facts of the case involved first-party damage to the carrier's aircraft, the indemnity clause at issue here extended to include third-party liability for injury to, or death of, any person(s). The carrier's aircraft was damaged in a hard landing at Ankara, Turkey. Boeing sent a survey team to inspect the damage and submitted a repair proposal to Pakistan International Airlines (PIA). After completing the repairs, Boeing agents were towing the aircraft when a component of the main landing gear broke, resulting in US$500,000 in damage to the aircraft. Naturally, PIA sought compensation from Boeing, arguing that the damage resulted from its own negligence in failing to detect the problem.[205] Unfortunately for PIA, its claim for compensation was frustrated by an indemnity clause in the aircraft sales agreement, which provided:

Buyer will indemnify and hold harmless Boeing and each employee of Boeing assigned pursuant to paragraphs (a), (d) and (e) above from and against all liabilities, costs and expenses incident thereto, which may be suffered by, accrue against, be charged to or recoverable from Boeing or any such employee, or both, by reason of injury to or death of any person or persons . . . or by reason of loss of or damage to property, including the Aircraft, arising out of or in any way connected with the performance by said employee of services in connection with any of the aircraft after delivery thereof to Buyer.[206]

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203. The lessor's indemnification is reinforced by a disclaimer and waiver clause in the agreement whereby, except as otherwise agreed, the lessor waives, releases, and renounces all claims against the lessee, however and whenever arising, and the lessor disclaims any obligation or liability toward the lessee or any other person. The agreement's disclaimer states: "None of the indemnitees will have any obligation or liability whatsoever to the [lessee] or any other person (whether arising in contract or in tort, and whether arising by reference to negligence or strict liability of the sublessor or otherwise) . . . " *Id.* at 38-39. The waiver clause doubles down on the disclaimer by stating: "The [lessee] hereby waives releases and renounces, as between itself and each indemnitee to the extent permitted by applicable law ... all claims against such indemnitee, however, and whenever arising . . . " *Id.* at 39. The waiver and exclusion apply in respect of, *inter alia*: "any liability, loss or damage caused or alleged to be caused directly or indirectly by the aircraft or by any inadequacy thereof or deficiency or defect therein or by any other circumstance in connection therewith; ... The use, operation or performance of the aircraft or any risks relating thereto." *Id.* at 39.

204. Pakistan Int'l Airlines Corp. v. Boeing Co., 575 F.2d 1268 (9th Cir. 1978).

205. *Id.* at 1270.

206. *Id.* at 1269.

This clause effectively immunized Boeing against any conceivable liability, not only arising from PIA's operation of the aircraft, but also arising in any way connected to the aircraft. Such indemnities are commonplace in aircraft purchase agreements with aircraft manufacturers.

An easily accessible example of a contractual indemnity that is almost universally employed by air carriers engaged in international carriage by air is found in the Standard Ground Handling Agreement (SGHA) of the International Air Transport Association (IATA). This SGHA is a model agreement of standard clauses that carriers (members and non-members of IATA alike) use as the basis for the contracts with ground handling agents. Ground handling agents provide the vast majority of ground operations for carriers at their outstations, e.g., baggage and cargo handling/loading, de-icing, aircraft marshaling, load control, fueling, surface transport, and so on. Article 8 of the 2018 edition of the IATA SGHA includes several clauses about liability and indemnity. Article 8(1) provides, inter alia, that the carrier indemnifies the ground handling agents against liability for claims for liability for passenger death or personal injury arising from the act or omission (including negligence) insofar as it falls short of willful misconduct.[207]

The contractual indemnities agreed to by carriers with third parties (e.g., manufacturers) allocate the risk of liability towards passengers—and much more besides—to the carrier. The carrier becomes the repository for the risk of third parties' liability to passengers. Where a passenger claim arises against an aircraft or component manufacturer, or whichever other aviation business entity one cares to mention, the reality is, with few exceptions, that the complex web of contractual indemnities

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207. *Standard Ground Handling Agreement*, SWISSPORT (2018), *available at* https://www.swissport.com/fileadmin/downloads/publications/190327_SP-18-C2177_GH_Agreement_Gesamt-PDF_sse_RZ.pdf (last visited Apr. 5, 2021) ("Except as stated in Sub-Articles 8.5 and 8.6, the Carrier shall not make any claim against the Handling Company and shall indemnify it (subject as hereinafter provided) against any legal liability for claims or suits, including costs and expenses incidental thereto, in respect of: (a) delay, injury or death of persons carried or to be carried by the Carrier; (b) injury or death of any employee of the Carrier; (c) damage to or delay or loss of baggage, cargo or mail carried or to be carried by the Carrier, and (d) damage to or loss of property owned or operated by, or on behalf of, the Carrier and any consequential loss or damage; arising from an act or omission of the Handling Company in the performance of this Agreement unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result ..."), ("The exceptions referred to in Article 8(1) pertain to damage to the carrier's aircraft (i.e., art. 8(4)) and for direct loss or damage to cargo (i.e., art. 8(5)). For these, the handling company accepts limited liability. A similar indemnity is provided by Article 8(2), which includes death or personal injury to third parties, i.e., non-passengers.").

will lead back to the carrier. The carrier will have little option but to fulfill its assumed contractual duties to indemnify other parties and pick up the bill.

Why do carriers assume this burden? It is certainly not for charitable or ethical motives; instead, the reasoning is commercially driven and predicated on the fact of insurance. The carrier prefers to accept the allocation of risk because it knows it will transfer that risk to the insurance market, and because it believes that the ultimate cost of doing so will be cheaper when it sources the insurance coverage itself. Were the carrier to refuse to accept the allocation of risk, then the third party would be required to purchase the extra coverage necessary, the cost of which would be factored into the price paid by the carrier. Take the example of an airframe manufacturer: the additional cost to the manufacturer of insurance, resulting from the absence of an indemnity from the carrier, would be added to the aircraft's purchase price. Put simply, carriers prefer to buy cheaper aircraft even though they must assume the risk and cost of insuring against liability as a quid pro quo.

Through contractual indemnities and similar risk allocation devices, the parties agree between themselves who will carry the risk of liability. It should interest us greatly that it is the carrier who voluntarily accepts this role as the repository of risk but, more realistically, it is a matter of deciding who will assume the primary obligation to insure against that risk. The carrier knows full well that it will shift that risk to the aviation insurance market. This brings us nicely to the topic of insurance.

ii. Insurance

This sub-section begins by providing some background on aviation insurance agreements, but the substantial part of it focuses on the doctrine of subrogation, the device by which the insurer can assume claims control and acquires the right to bring third-party actions. This is presented from an English law perspective, as justified by the size, importance, and influence of the United Kingdom aviation insurance market globally.[208]

Aviation insurance comprises policies issued to aircraft operators (e.g., airlines), aircraft manufacturers, component manufacturers, airports, aviation maintenance and repair providers, aviation service

208. As one commentator on aviation insurance notes, "[w]ith the London market being recognized as the international centre for aviation insurance . . . common law principles have a strong influence in the formulation and interpretation of aviation insurance policies." Wolf Müller-Rostin, *Insurance*, *in* COLOGNE COMPENDIUM ON AIR LAW IN EUROPE 1095 (Stephan Hobe et al. eds., 2013).

providers, and so on.[209] As is to be expected, there are substantial differences amongst aviation insurance policies. This is partly due to the numerous variables at play, from the individual insured's particular needs and the peculiarities of their operations, to the specific regulatory background and idiosyncrasies of the different insurance markets. Nevertheless, there is also a great deal of standardization to be found in the documentation employed by the aviation insurance market. This has, in large part, been thanks to the efforts of various groups within the market that have produced voluminous libraries of standard clauses, which are then combined and utilized by the market to tailor individual policies to specific requirements.[210]

Within the field of commercial aviation insurance,[211] coverage for several categories of risk is available for purchase. The insurance policy document will often contain a schedule of insurance consisting of separate sections; each addressed to a particular risk, such as loss or damage to the aircraft (i.e., hull insurance), liability to passengers, liability to third parties,[212] and war and allied perils.[213] In some respects,

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209. MARGO, *supra* note 190, ¶ 2.04 ("[B]roadly speaking, aviation insurance embraces the insurance of risks associated with (a) manufacture, ownership, operation and maintenance of aircraft, and (b) the operation of aviation facilities on the surface.").

210. *See id.* ¶ 10.03. In 1949, the Lloyd's Aviation Underwriting Association drafted a standard aircraft policy referred to as AVN 1. This standard has been amended over the years, most recently by the Aviation Insurance Clauses Group (AICG), which produced AVN 1D in 2014. Its predecessor (AVN 1C) is still commonly used regardless of where the risk is situated. *Id.* ¶ 10.03 n.3. However, for U.S.-based business, AVN 16 is employed for aircraft hull policies and AVN 20 for aircraft liability policies. *Id.* ¶ 10.03. According to MARGO, standard policies are common to the general aviation business but are not generally used in connection with the insurance of commercial airlines. *Id.* For commercial airlines, it is more common for the broker to prepare a policy specific to the airline but generally utilizing various standard clauses from AVN 1C and augmenting it with others produced by the AICG and other groups. Many of these standard clauses can be accessed at Aviation Insurance Clauses Group, AICG (Aug. 3, 2020), *available at* https://www.aicg.co.uk/AICG_Web/Product/AICG_Web/AICG_clauses.aspx (last visited Apr. 5, 2021).

211. The field of aviation insurance is divided between commercial aviation and general aviation. We are concerned with the former, which involves, "very large risks with high-limit first-party policies covering hull losses (for example, large aircraft or property damage) or high-stakes third-party liability coverages." Katherine Posner, *The Unique Role of Aviation Insurance Coverage Counsel*, *in* NEGOTIATING INSURANCE POLICY DISPUTES: LEADING LAWYERS ON INTERPRETING INSURANCE CONTRACTS, OBTAINING KEY DOCUMENTS, AND RESOLVING COVERAGE DISPUTES (INSIDE THE MINDS) 17 (2011).

212. Here, the term *third party* is used to refer to non-passengers, i.e., third parties to the contract of carriage, rather than third parties to the contract of insurance.

213. Other insurance agreements include aviation products liability (*see* AVN 66), loss or damage to aircrew baggage and personal effects (*see* AVN 75), and liability to/of pilots/crew (*see* AVN 73).

an aviation insurance policy is a collection of separate policies covering different risks amalgamated within a single document. Each of these sections will usually provide specifics as to coverage, exclusions, conditions, and (possibly) extensions of cover.[214] The precise limits, deductibles, and premiums are generally itemized for each type of insurance provided under the policy.[215]

We are concerned with the category of risk referred to as aviation legal liability. This is a type of "liability insurance" defined as covering "the monetary impact of legal claims against policyholders and, crucially, sometimes the cost of defending claims."[216] The aviation insurance market further sub-categorizes aviation legal liability,[217] and a fundamental distinction applies between liability to passengers and liability to third parties. From the carrier perspective, our attention is on passenger liability insurance, as this is the category into which WCS and MC99 claims fall. Third-party liability insurance policies for other commercial entities in the aviation industry are concluded on much the same terms, and thus the exposition provided herein will also serve for a broader perspective on aviation insurance generally.

Subject to applicable limitations and deductibles, aviation legal liability insurance for passengers grants the insured airline indemnity from the insurer against all sums that the insured shall become legally liable to pay as damages for any bodily injury to passengers, or for

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214. AVN 1C and AVN 1D do not include extensions of cover in the sections of the schedule of insurance. Brokers may elect to add clauses to the section wording within the policy itself or will attach the same as endorsements. Extensions of cover are treated below in the sub-section on endorsements.

215. For instance, for hull cover, the policy schedule may specify maximum agreed values for the aircraft types as well as a deductible for each (usually applied on a per claim basis). Depending on the policy, the deductible may not apply in the case of a total loss, a constructive total loss, or an arranged total loss. The level of deductible is usually specified by broad categories, such as narrow-bodied jets (including Airbus A320 and Boeing 737 variants) with a possible deductible of US$750,000 or wide-bodied jets (including Airbus A330 and Boeing 777) with a possible deductible of US$1,000,000. Deductibles can be reduced, and the insured may elect to take out deductible insurance.

216. Malcolm A. Clarke, *Insurance*, *in* ENGLISH PRIVATE LAW 785 (Andrew Burrows ed., 2013). It is to be distinguished from first-party liability insurance, whereby the insured insures their own life or property. In an aviation insurance context, an example of first-party liability insurance would be hull insurance, which forms part of the category known as *aircraft insurance* (as distinct from *liability insurance*).

217. In addition to passenger and third-party liability, aviation legal liability includes cargo liability, product liability, and premises liability. The latter two are usually taken out separately by an airline. For example, aviation products liability insurance can be taken out separately under the AVN 66 policy wording. In some cases, a policy may, in addition to passenger, third-party, and cargo liability, also provide cover under the same clause for some product and premises liability.

property damage to baggage or personal articles caused by an occurrence arising out of or in connection with the insured's operation of an aircraft.[218] This cover includes liability of the airline for losses caused by the negligence of its employees.[219] It will also usually cover the insured carrier's defense costs.[220] When it comes to liability for death or injury to passengers and third parties, aviation policies do not usually have deductibles, but an overall limitation is generally specified between US$1.5 and US$2 billion per occurrence.[221]

It goes without saying that insurance coverage is not absolute. In addition to monetary limitations, there are also coverage limitations. The description of cover contained in the schedule of insurance in a policy provides, in and of itself, a form of exclusion insofar as it defines the circumstances in which the duty to indemnify will arise.[222] Prima facie, if the loss suffered does not fall within the description of cover, then the insurer is not at risk, and no duty to indemnify arises.

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218. The coverage provided by an aviation insurance policy for legal liability to passengers is entirely dependent on the wording of the policy in question. The wording provided above is thus not intended as a universal definition of such coverage but rather as a description of the general features of such coverage. Other descriptions include: "Passenger liability insurance 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." MARGO, *supra* note 190, ¶ 12.01. *See also* 9 SHAWCROSS & BEAUMONT: AIR LAW ¶ 38 (David McClean et al. eds., 169th ed. 2020) (1997) ("The purpose of this cover is to indemnify the insured for all sums which he shall become legally liable to pay as damages or compensation for accidental bodily injury (fatal or otherwise) to passengers who are carried by the insured under a contract of carriage by air.").

219. However, cover does not include the personal liability of the employee to the injured party unless an extension for such cover is purchased.

220. In respect of the insured carrier's defense costs: firstly, as shall be discussed below, it is the insurer who controls the conduct of the proceedings, and it is, therefore, the party incurring the costs on the insured's behalf. It is thus only fair that the defense costs should be covered by the insurance policy, and this is indeed usually the case. *See* AVN 1C (July 26, 2016) Final, at § II(3); AICG, *supra* note 209. *See also* MARGO, *supra* note 190, ¶ 23.39.

221. MARGO, *supra* note 190, ¶ 12.05 n.1; P.J.C. VICCARS, AVIATION INSURANCE: A PLANEMAN'S GUIDE 20 (2d ed. 2012).

222. The coverage for legal liability to passengers as laid out in Section III(1) of AVN 1C provides: "The Insurers will indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay, and shall pay, as compensatory damages (including costs awarded against the Insured) in respect of: (a) accidental bodily injury (fatal or otherwise) to passengers whilst entering, onboard, or alighting from the Aircraft; and (b) loss of or damage to baggage and personal articles of passengers arising out of an Accident to the Aircraft." AVN 1C (July 26, 2016) Final, at § III(1); AICG, *supra* note 209.

Supplemental to the basic coverage are exclusions, usually laid down in an exclusions section.[223] Whether general or specific, the significance of an exclusion is that, where the loss suffered by the insured comes within the scope of the exclusion, the insurer is entitled to refuse to indemnify the insured against the loss.[224] An example of an exclusion clause is one to the effect that the policy will not apply where the aircraft is operated outside the geographical limits specified in the policy schedule.[225]

The general exclusions portion of the policy will usually include detailed exclusions attached from standard clauses produced by the aviation insurance market. The most relevant attached exclusion clause is the "War, Hi-Jacking and Other Perils Exclusion Clause" (AVN 48B).[226] This particular exclusion clause excludes claims arising from a range of perils. Aside from the obvious cases of war and hijacking, AVN 48B excludes claims arising from, inter alia, "strikes, riots, civil commotions or labour disturbances," and "[a]ny malicious act or act of sabotage."[227]

It is very common for these general exclusions to be written back into the policy through an *endorsement*. Broadly speaking, an

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223. Section III of AVN 1C provides specific exclusions to legal liability to passengers. For example, exclusions pertaining to documentary requirements and also excluding the insurer from liability for injury or loss suffered by employees or operational crew. In terms of general exclusions, these are specified in Section IV of AVN 1C and apply to all the attached insurance policies, e.g., hull, passenger, and third party. One general exclusion provides that the policy does not apply, "[w]hilst the total number of passengers being carried in the Aircraft exceeds the declared maximum number of passengers stated in Part 2(4) of the Schedule." *Id.* at § IV(A)(7).

224. *See* MARGO, *supra* note 190, ¶ 10.49 ("An exclusion, sometimes also called an exception, is a clause in a policy which limits the risks by excluding or excepting the insurers from liability for certain types of claims or for claims arising from certain types of risk that would otherwise fall within the basic coverage provisions of the policy.").

225. For some case law on this issue, *see* Vargas v. Ins. Co. of N. Am., 651 F.2d 838 (2d Cir. 1981); Monarch Ins. Co. v. Castellano, 176 Ill. App. 3d 849, 531 N.E.2d 908 (1988).

226. Other frequently attached exclusion clauses are: Nuclear Risks Exclusion Clause (AVN 38B); Noise and Pollution and Other Perils Exclusion Clause (AVN 46B); Asbestos Exclusion Clause (AVN 96); Contracts (Rights of Third Parties) Act 1999 Exclusion Clause (AVN 72); Crew Exclusion Clause (AVN 68). *See* AICG, *supra* note 209. For example, paragraph 1 of AVN 46B provides: "This Policy does not cover claims directly or indirectly occasioned by, happening through or in consequence of: (a) noise (whether audible to the human ear or not), vibration, sonic boom and any phenomena associated therewith; (b) pollution and contamination of any kind whatsoever; (c) electrical and electromagnetic interference; (d) interference with the use of property . . . " AVN 46B (July 26, 2016) Final, § III(1); AICG, *supra* note 209.

227. *See* War, Hi-Jacking & Other Perils Exclusion Clause (Aviation) (AVN 48B) (Jan. 10, 1996), *reprinted in* MARGO, *supra* note 190, at app. A43.

endorsement is a document attached to an insurance policy that modifies the policy in some way.[228] An endorsement may provide additional coverage to the basic policy, such as increasing the limits of liability or extending coverage to a type of risk not covered by the basic policy. In simple terms, endorsements are add-ons to the basic policy that allow the parties to customize the coverage.[229]

Another common usage for an endorsement is "writing back" something excluded in the basic policy. Since war and related perils are always excluded by the policy, coverage for this can be reinstated via an endorsement. AVN 52E is the standard clause currently used for this purpose. To illustrate this, let us take the tragic case of the Germanwings Flight 9525. Here, in an apparent act of suicide, the co-pilot crashed the aircraft into the French Alps, killing himself and all others on board. Such an event counts as a malicious act that an aviation insurer excludes under AVN 48B.[230] Therefore, but for that clause, the insurer would be liable to indemnify the insured.

However, in all likelihood, an insurer would be liable to indemnify a carrier in such circumstances but only because coverage for war risks (including malicious acts) would have been written-back into the policy by way of an endorsement, albeit under differing terms.[231] A standard endorsement exists within the aviation insurance market for this very purpose, i.e., AVN 52E. Alternatively, the carrier may separately arrange cover from a specialized war risks insurer. In either case, the norm is that carriers are amply covered.

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228. Endorsements may be standard or non-standard. The aviation insurance market makes widespread use of standard clauses in endorsements. Attached to the basic policy will be several documents that are generally identified as numbered endorsements, where utilizing a standard clause then a code will usually be inserted at the foot of the document including a reference to the publication date of the standard clause (*e.g.*, AVN 106 22.01.09). If the standard clause has been amended by the parties, and thus differs from the standard, then word *amended* may be included in parentheses beside the code. An example of a standard endorsement is AVN 62. This provides indemnification for reasonable expenses incurred for the purpose of search and rescue operations.

229. For example, where the airline operates leased aircraft (whether under a finance or operating lease), then a number of standard clause endorsements exist that the lessor or financier will insist of being included in any contract of insurance. *See, e.g.*, AVN 67B adds the lessor/financier as an additional insured to the policy.

230. The AICG produced two new versions of this clause in 2006, AVN48C and AVN48D. There is only a slight difference in wording between the two versions. The aviation insurance market has continued to use AVN48B in the case of passenger liability.

231. *See* VICCARS, *supra* note 220, at 59-62. Whilst the AVN 52E will provide a different limit of liability (*e.g.*, $150 million) to that provided under the main policy (a limit of $1.5 billion), the sub-limit would usually not be applied to the insured's liability for passengers.

This brief overview of aviation insurance contracts intends only to demonstrate the fact of aviation insurance, specifically of carriers, and the nature and extent of the coverage provided. As explained in the introduction to this Article, insurance coverage for carrier liability to passengers is mandated by law, so much so that it is all but universal. The sophisticated contracts of insurance used within the aviation industry provide the insureds with very comprehensive protection against loss, damage, or liability arising from accidents. Not only can the insured shift the risk of liability to the insurer under these policies, but it can also immunize itself against its own legal costs (and those awarded to the plaintiff) incurred in the process of defending claims brought against it. Naturally, to enjoy these benefits, the carrier must pay a premium, but the cost of these premiums is negligible in comparison to the potentially financially ruinous consequences of a major disaster. Indeed, one distinguished commentator has stated that "[w]hilst insurance is an indispensable prerequisite for an air carrier's operation, its actual cost is relatively small, usually averaging less than two percent of the total operating cost of the flight."[232]

The facts are that the carrier (as well as other commercial aviation parties) is comprehensively insured against passenger liability, in most cases not having to pay a cent itself to the victim of an aviation accident in compensation or as costs. Deductibles are not generally a feature of aviation insurance agreements for passenger liability, and the overall limits provided under policies are massive (ranging from US$1.5 to US$2 billion per occurrence).[233] The near-universal existence of such insurance almost guarantees that in the event of an aviation catastrophe, the resources are in place to provide the victims and their families with the compensation to which they are entitled under the terms of the applicable conventions, even where the carrier has long since been wound-up or become insolvent.

iii. Subrogation

Under the common law, a contract of indemnification might permit an insured party to recover more than his actual loss. This is because the insured's right to indemnification from the insurer is not affected by his having a right of action against a third party for the same loss.[234] In other

232. Müller-Rostin, *supra* note 207, at 1094.

233. MARGO, *supra* note 190, ¶ 12.05 n.1.

234. JONATHAN GILMAN ET AL., ARNOULD'S LAW OF MARINE INSURANCE AND AVERAGE 1485 (17th ed. 2008) [hereinafter GILMAN ET AL.] ("[A]n assured's right to claim against a

words, it is no defense to the insurer to argue that the insured has a claim against the wrongdoer. Likewise, where the insured sues the wrongdoing third party for the loss, the fact that he has insurance does not affect his claim against the third party.[235] Therefore, the injured party could theoretically recover twice for his loss, once by way of a claim against the wrongdoer and another by way of indemnification of his insurer. However, as stated in *Arnould's Law of Marine Insurance and Average*, "it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once."[236] For this reason, the common law recognizes that the indemnifying party has rights against the indemnified that are collectively referred to under the doctrine of subrogation.

Subrogation gives rise to two entitlements. First, the right of the insurer to step into the insured's shoes and exercise any causes of action vested in the insured against third parties.[237] Second, the right of the insurer to recover from the insured any sums received from third parties in respect of the insured loss.[238]

In its first aspect, the doctrine of subrogation grants the insurer the right to the benefits of any rights or remedies of the insured against third parties that may relieve or lessen the loss for which indemnification has been provided.[239] This aspect of subrogation was alluded to by Lord

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third party liable for the assured loss (or contractually liable to indemnify him against the same) does not affect his right to claim the same from his insurer."); JOHN BIRDS ET AL., MACGILLIVRAY ON INSURANCE LAW ¶ 24-002 (John Birds et al. eds., 13th ed. 2015) [hereinafter BIRDS ET AL.] ("If a person suffers a loss for which he can recover against a third party, and is also insured against such loss, his insurer cannot avoid liability on the ground that the insured has the right to claim against the third party.").

235. GILMAN ET AL., *supra* note 233, at 1485 ("[T]he assured's right to recover his loss from a third party liable for the same [or contractually liable to indemnify him against the same] is not affected by any recovery he may make [or be entitled to make] under a contract of insurance which covers him for the same loss"); BIRDS ET AL., *supra* note 233, ¶ 24-002 ("[T]he third party if sued by the insured, cannot avoid liability on the ground that the insured has been or will be fully indemnified for his loss.").

236. GILMAN ET AL., *supra* note 233, at 1487.

237. *See* BIRDS ET AL., *supra* note 233, ¶ 24.001 ("In insurance law 'subrogation' is the name given to the right of the insurer who has paid a loss to be put in the place of the insured so that he can take advantage of any means available to the insured to extinguish or diminish the loss for which the insurer has indemnified the insured.").

238. S.R. DERHAM, SUBROGATION IN INSURANCE LAW 1 (1985). *See also* BIRDS ET AL., *supra* note 233, ¶ 24.002; J. BIRDS, BIRDS' MODERN INSURANCE LAW 331 (10th ed. 2016).

239. In *Castellain v. Preston*, Lord Justice Brett summed up this first aspect of subrogation, referring to it as the fundamental rule of insurance: "[A]s between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of

Mansfield in *Mason v. Sainsbury*: "[e]very day the insurer is put in the place of the insured . . . . The insurer uses the name of the insured."[240] In practical terms, the insurer's right of subrogation gives it the right to control proceedings against third parties in the name of the insured. It is important to note that subrogation does not operate to vest the insured's cause of action in the insurer. The insurer, as subrogee, does not gain a personal cause of action against the third party; it is reliant on the insured's cause of action.[241] For this reason, the insurer cannot—except in some limited jurisdictions—take the subrogated action in his own name, but only in that of the subrogor insured. Therefore, the insurer may only exercise by subrogation the rights that the insured could themselves have exercised against the third party.[242] The insured must have a cause of action against the third party before the insurer can exercise its right of subrogation. Likewise, if the insured's right of action is somehow limited or extinguished, the insurer cannot be in any better position when making a subrogated claim.

The second aspect to which the term subrogation is applied typically entitles the insurer to receive from the insured any money received in damages from third-parties liable for the indemnified loss.[243]

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condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished." Castellain v. Preston [1883] 11 QBD 380, 388 (CA) (Eng.). Lord Cairns nicely summarized the rule in *Simpson v. Thomson*: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." Simpson & Co. v. Thomson [1877] 3 App. Cas. 279, 284 (HL) (on appeal from Scot.) (UK).

240. Mason v. Sainsbury [1782] 3 Douglas 61, 99 Eng. Rep. 538, 64 (1782) (KB) (Eng.).

241. *See* DERHAM, *supra* note 237, at 69 ("The doctrine of subrogation does not confer a new and independent right of action on the insurer, but merely gives it the benefit of any personal right that the insured himself has against the third party.").

242. *See* GILMAN ET AL., *supra* note 233, at 1494 ("Self-evidently, the insurer can only be subrogated to rights currently vested in the assured, and can acquire by subrogation no better right than the assured possesses.").

243. In *Burnand v. Rodoconachi Sons & Co.*, Lord Blackburn described this aspect of subrogation: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." Burnand v. Rodocanachi Sons & Co. [1882] 7 App. Cas. 333, 339 (HL) (on appeal from Eng.) (Eng.).

Colinvaux's Law of Insurance argues that the first is the only true instance of subrogation.[244] It is submitted that this view is to be preferred. While the term subrogation is used to refer to the second case, it is does not strictly amount to subrogation since it involves the exercise of a personal right of the insurer against the insured and not the subrogated exercise of the insured's cause of action against a third party.

It is the first aspect of subrogation that we are primarily concerned with because it gives the insurer the power of claims control. Although subrogation may arise by force of law, insurers will usually include a contractual clause to this effect in the policy, rather than rely on common law subrogation (also referred to as equitable subrogation).[245] The major consequence is that it is the insurer, not the insured, who is really calling all the shots in proceedings brought against the insured; the insurer is *dominus litis*. As Lord Justice Brett put it in *Wilson v. Rafflalovich*:

> The underwriters are, in the sense in which the phrase is always used, the real plaintiffs, that is, they are the persons instructing the solicitors, the persons paying for the action, the persons to benefit by the action, and the persons to lose by the action if it is lost; but in point of law they are not the plaintiffs, the plaintiffs on the record being the only persons who can be recognized as plaintiffs.[246]

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244. *See* ROB MERKIN, COLINVAUX'S LAW OF INSURANCE 622 (10th ed. 2014).

245. This is done, in part, because there are limitations to subrogation at common law. For example, whilst the right of subrogation arises upon conclusion of the contract of insurance, it is only exercisable once the insured has been fully indemnified. *See* MARGO, *supra* note 190, ¶ 23.63 ("The right of subrogation arises *ipso facto* upon the conclusion of the contract of insurance, although its exercise is postponed until the indemnification of the insured by the insurers."). *See also* Page v. Scottish Ins. Corp. [1929] 33 Lloyd's List LR 134, 137 (CA) (Eng.) (the court stating: "the underwriter had no right to subrogation until he had fully indemnified the assured under the policy"). In another case before the Court of Appeal, the judgment noted: "You only have a right to subrogation in a case like this when you have indemnified the assured." Scottish Union & National Ins. Co. v. Davis [1970] 1 Lloyd's Rep. 1, 5 (CA) (Eng.). Providing for a contractual right of subrogation also has the advantage of permitting the parties to alter the rules normally applicable to subrogation. DERHAM, *supra* note 237, at 144. Derham also cites the decision of Judge North in *Arthur Barnett Ltd. v. Nat'l Ins. Co. of N.Z.* [1965] NZLR 874 (CA) (N.Z.), as holding that an express provision in the policy at issue, "would entitle the insurer to be *dominus litis* of the action and to control proceedings even before the insured had received a full indemnity, and indeed that it may enable the insurer to exercise a right of subrogation before it has made payment under the policy." DERHAM, *supra* note 237, at 146. *See also* Morris v. Ford Motor Co. [1973] QB 792, 812 (CA) (Eng.) (Lord Justice James stating: "It is open to the parties to a contract of indemnity to contract on the terms of their choice, and by the terms, they choose they can exclude rights which would otherwise attach to the contract.").

246. Wilson v. Raffalovich [1881] 7 QBD 553, 558 (CA) (Eng.).

iv. Subrogation in Aviation Litigation

In conversation with aviation litigators, it becomes abundantly clear that it is the insurer who is, so to speak, "calling all the shots." This is a state of affairs that plaintiff lawyers enthusiastically point out; on the defense side, lawyers are eager to downplay the insurer's role, as they know not to bite the hand that feeds them. Depending on the parties involved, the air carrier may have some influence over how litigation is pursued, not by matter of law or contract but by blunt commercial clout. A large airline is a valuable customer to an aviation insurer, and the market is highly competitive, so the desire to keep the insured happy will influence the power dynamic. The insurer will generally stress this aspect of the arrangement and emphasize the importance of satisfying the insured and protecting its interests.

Clearly, each situation is unique, and the relative bargaining strength of the parties will influence the de facto control of proceedings. One such situation was described to me by a defense lawyer. A very large international air carrier was opposed to the course of action pursued by its insurer, which was to concede liability concerning a high-profile aviation disaster. The insurer's interest was in minimizing its exposure and settling with the manufacturer (a major airframe manufacturer), whereas the airline was primarily concerned with the negative impact that conceding liability would have for its business. In this case, the carrier was in a position to be able to exert sufficient influence over its insurer to alter the course of litigation; thus, one must be cautious before relying upon generalizations. One thing is clear, however: it is the insurer who controls the purse strings, and it is also the insurer who is in the driver's seat when it comes to making the final decision.[247]

AVN 1C contains a claims control clause that provides: "[t]he Insurers shall be entitled (if they so elect) at any time and for so long as they desire to take absolute control of all negotiations and proceedings and in the name of the Insured to settle, defend or pursue any claim."[248] AVN 1D contains provisions to a similar effect.[249] Even in a case where

247. *See* Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. & SOC. SCI. 433, 436 (2010) ("Whether a lawsuit involves securities fraud, medical malpractice, an auto accident, or a president accused on sexual harassment, a liability insurer most likely will be paying the defense lawyer and deciding whether to go to trial or settle the case. If there is a settlement or a trial verdict, it will be the insurance company, not the defendant, that pays. It is no exaggeration to say that liability insurers are the bankers for the tort system.").

248. *See* AVN 1C, *supra* note 209.

249. *See* AVN 1D, *supra* note 209, at 9.

the insured retains the right of claims control—a rarity in aviation insurance—the insured nonetheless owes a duty of good faith to the insurer with respect to claims against third parties; in most cases, this is codified as a contractual obligation within the policy.[250] As a result, even if the insurer cannot directly control the proceedings, its potential to seek damages against the insured for any prejudice caused by the insured's own handling of the claim against the third party gives the insurer indirect control.

There are two aspects to claims control. First, it grants the insurer control of proceedings brought against the insured, and second, it also gives the insurer the power to bring third-party actions in the name of the insured. However, a word of caution must be voiced here with respect to joint insurance in light of a majority decision of the Supreme Court of the United Kingdom in *Gard Marine & Energy Ltd. v. China National Chartering Company Ltd. (The Ocean Victory)*.[251] The majority determined that subrogation will not operate for the insurer in an action between the co-insureds. As joint insurance is not commonplace in the aviation insurance market, this is unlikely to prove problematic, and insurers can be expected to act to counter it.

In most jurisdictions, although the insurer is *dominus litis*, the litigation in question will proceed under the name of the insured, e.g., the carrier. The insurer's name will not appear anywhere on the court docket. Therefore, in the case of a claim by a passenger against a carrier, although the insurer may not be the de jure liable party, it is the real defendant in interest because the litigation is being primarily conducted in accordance with its instructions and in pursuance of its benefit. The reality is that a passenger bringing an action against a carrier under WCS or MC99 is not taking on the party with whom it concluded the contract of carriage, or the carrier who actually performed the flight in question. Instead, they are facing off against a party with whom they have neither contracted nor one that was ever within their contemplation. In some jurisdictions (e.g., New York), a direct action against an insurer is possible, and an insurer

250. For example, in AVN 1C, Section IV(3)(B)(d) provides that the insured shall "not act in any way to the detriment or prejudice of the interest of the Insurers." AVN 1C, *supra* note 203; *see generally* BIRDS ET AL., *supra* note 233, ¶ 24.049 ("Insurance policies frequently contain a clause expressly requiring the insured to take all necessary steps to protect the insurer's rights. If an insured under such a policy allowed a time-bar to elapse, thereby precluding the insurer from enjoying the exercise of remedies against a third party, the insurers could, it is submitted, recover damages for the breach of that stipulation in the amount which would have been recoverable from the third party.").

251. Gard Marine & Energy Ltd. v. China Nat'l Chartering Co. [2017] UKSC 35 (appeal taken from Eng.) (Eng.).

may be obligated to take any subrogated actions in its own name.[252] However, this is exceptional. In the vast majority of jurisdictions worldwide, the insurer can pull the strings from behind the curtain without fear of revealing itself; this is especially beneficial when a jury is involved.

Claims control by the insurer fundamentally alters the dynamics of aviation litigation. Not only is the imbalance in power between the plaintiff and defendant shifted even further in favor of the latter, but the insurer's interests may also differ significantly from those of the carrier. Whilst a carrier may be eager to settle, the insurer may wish to challenge the quantum to be paid out in damages. Claims control—indeed subrogation itself—undermines the theory of corrective justice. For many plaintiffs, especially in cases involving the death of passengers, a primary objective for litigation is the vindication of the rights of decedent passengers against the party actually responsible for their deaths. This is best served by ensuring that it is the carrier who must assume the duty of answering for their wrongdoing and compensate the passenger out of their own pocket. Claims control by the insurer removes the carrier one step further from the litigation, and defeats the element of corrective justice embodied by the carrier itself compensating the victim. Clearly, MC99 contemplated insurance and was not intended to embody principles of corrective justice solely. Still, the adequacy with which it has considered the role actually played by the insurer in the litigation of claims taken under it, and the extent to which the interests of the insurer drive the efficacy of MC99 as a compensatory system, is a question to which the concluding part of this Article shall attend.

The insurer's right to step into the shoes of its insured and take advantage of rights and benefits accruing to the insured in respect of the loss for which the insurer has indemnified it provides extraordinary potential for loss shifting. This aspect of subrogation is often put front-of-stage by supporters of the doctrine, who argue that it ensures that the cost of compensating the victim is ultimately borne by the responsible

252. Whilst insurance in the United States is primarily a matter for individual state law; many state jurisdictions have a similar rule, New York being a prime example. Thus, where goods shipped by IBM had been lost by the defendant carrier, proceedings were brought before the district court in New York in the name of the insurer and not IBM, who had already been indemnified. *See* Royal Ins. v. Amerford Air Cargo, 654 F. Supp. 679 (S.D.N.Y. 1987); *see also* B.R.I. Coverage Corp. v. Air Can., 725 F. Supp. 133 (E.D.N.Y. 1989). Insurers have not acquiesced to this kind of development. To avoid having to reveal itself as the true party in interest, they have employed a number of tricks, e.g., the loan receipt. *See generally* J. Thomas Ray, Jr., *The Loan Receipt and Insurers' Subrogation—How to Become the Real Party in Interest Without Really Lying*, 50 TUL. L. REV. 115 (1975).

party.[253] In this sense, it can promote corrective justice. In a similar vein, it is argued that subrogation lowers the costs of premiums since it reduces the final sum paid by the insurer as indemnification. However, some courts have expressed skepticism as to whether the insurer actually includes subrogation recoveries into the calculation of premiums, or instead treats them as a windfall.[254] In any case these arguments are, on other grounds, less persuasive in the context of the aviation insurance market for reasons detailed below.

Subrogation cuts both ways in aviation litigation. Where the carrier is sued by the passenger, the carrier's insurer is entitled to take subrogated third-party actions against other liable parties, such as the aircraft manufacturer. Likewise, where the manufacturer is held liable in a product liability action taken by the passenger against it, subrogated actions by the manufacturer's insurer against the carrier or other parties are a distinct possibility.

The value of a subrogated claim against a third party will depend on a number of factors. First, in many cases, the same insurer will be involved on both sides, serving as the insurance carrier of both the carrier and the manufacturer for at least part of the risk. Second, there will more than likely be a preexisting contractual relationship between the insured and the third party, so any contractual provisions that affect the insured's right of action against the third party will be binding on the insurer. For instance, if the insured carrier has given the third-party manufacturer contractual indemnities of the type discussed above, the right of subrogation will most likely be worthless. In addition, the parties may have agreed to a waiver of the subrogation clause, which the insured will be obliged to make provision for in its insurance policy.[255] In the case of leasing agreements, the lessor always requires that the lessee carrier take out and maintain insurance, and that the lessor shall be named as an

253. PETER CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW 377 (8th ed. 2013) ("The main argument in favor of subrogation rights is to ensure that the cost of compensation ultimately rests on the party legally responsible for the harm the compensation redresses.").

254. In her work on subrogation, Derham quotes the following dictum from a U.S. case. DERHAM, *supra* note 237, at 153; De Cespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227-28 (Fla. Dist. Ct. App. 1966) ("[Subrogation] has frequently become a source of windfall to insurers in that the anticipated recoveries under subrogation rights are generally not reflected in the computation of premium rates.").

255. MARGO, *supra* note 190, ¶ 23.71 ("The right of subrogation may be expressly waived under the policy, and may also be impliedly limited by the policy wording. The right of subrogation is frequently waived under airline policies where third parties such as suppliers or financiers require it."). Endorsements have been produced for the purpose of providing a waiver of subrogation for named parties, AVN 102, in the case of loss or damage to aircraft.

additional insured.[256] This prevents the carrier's insurer from bringing a subrogated claim against the lessor. As the grantor of contractual indemnities, waivers, etc., the carrier is thus placed in the position of having the risk contractually allocated to it – a risk it then shifts to the insurer, who will be unable to rely on subrogation to shift it elsewhere.

However, the insurer of the recipient of these contractual indemnities (and related mechanisms) will have the option of utilizing subrogation to shift the loss off of its shoulders and onto those of the carrier. But since the carrier is itself insured, the reality of subrogation in an aviation market where insurance is so ubiquitous is that the loss is merely shifted from one insurer to another, the net impact of which is not only that it necessitates the duplication of insurance, but also results in immense cost. Subrogation is a wasteful and extremely costly process that only adds to the overall cost of litigation.[257] In turn, this results in higher insurance premiums that are ultimately paid for by the consumer for international carriage by air. In this scenario, the justifications of subrogation (i.e., promoting corrective justice and keeping costs down) are of doubtful value because it is the insurer of the responsible party who pays, and they will figure the cost into the future premiums charged.

The fact that the insurer can do all this in the insured's name is of enormous value to an insurer who is desperate to keep its name out of the litigation. Its anonymity is chiefly motivated by the fear that "the knowledge of the existence of liability insurance is likely to affect the jury both in the allocation of responsibility and in the assessment of damages."[258] Naturally, where the dispute is to be decided by a judge, this motivation is less pressing as the judge will be well aware of who is who. As Sir Richard Aikens (Lord Justice of Appeal) noted in the foreword to Merkin and Steele's *Insurance and the Law of Obligations*, "[t]he fact that the claimant was actually a subrogated insurer and the defence was being maintained by the defendant's liability insurer have traditionally been treated as the unacknowledged elephants in the court room."[259] Even still, the insurer is keen to maintain a low profile, and

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256. *See* AVN 67 Airline Finance/Lease Contract Endorsement (Dec. 10, 1990), *reprinted in* MARGO, *supra* note 190, at app. A82 (reproduction of AVN 67 Airline Finance/Lease Contract Endorsement (Dec. 10, 1990)).

257. *See* CANE, *supra* note 252, at 378 ("Another objection to subrogation is that shifting losses around is costly. The initial allocation of liability is expensive and subrogation adds further to the cost by shifting it against.").

258. WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY 120 (abr. ed. 1964). *See also* Ray, *supra* note 252, at 119-20.

259. Richard Aikens, *Foreword* to ROB MERKIN & JENNY STEELE, INSURANCE AND THE LAW OF OBLIGATIONS (2013).

subrogation facilitates this by obfuscating its presence as the true party in interest. The reality is that the nominal plaintiff or defendant has long since been indemnified by its insurer and plays only a supporting role (if any) in the proceedings.

The prevalence of insurance coverage for international carriage of passengers by air is undoubtedly a great boon for the traveling public. It all but ensures that the resources necessary to satisfy claims will be available in the event of an accident. In addition, insurance also means that in most cases, the passenger's right to compensation will not be defeated by the dire financial straits of fly-by-night operators. However, there is a hidden cost to insurance for the plaintiff: by way of subrogation—regardless of what the docket says—it is the insurer who calls the shots in the vast majority of aviation litigation of passenger claims.

By holding claims control, the insurer's interest in choice of forum becomes paramount, which undoubtedly changes the dynamics involved. The question of the liability of the carrier is seldom of concern. Instead, the litigation is perpetuated by the matter of the quantum of damages that will have to be paid in settlement of the claim. Whether it settles a claim in the United States, or almost anywhere else, is the key factor driving the insurer to challenge the plaintiff's choice of forum. "Anywhere but here" is the mantra of the aviation insurer when it comes to being sued in a U.S. court. FNC is thus a godsend for the insurer that is zealously employed – not as a device for ensuring fairness and convenience in the selection of the forum for the resolution of a dispute, but as a means of mitigating the cost of the insurer's duty to indemnify the insured.

Subrogation further empowers the insurer in this battle over forum because the insurer exploits it to bring third-party actions to secure a jurisdictional advantage, as we saw with the *Nolan* case. Whilst plaintiffs can add alternative defendants to proceedings to do likewise, they are not, unlike the defendants, able to count on the cooperation of those parties. In some cases, the plaintiff might be able to play the defendants against each other, but in most cases it will be the defendants teaming up against the plaintiff.

There are, of course, cases where subrogation is employed toward a genuine goal of shifting the loss from the insurer (who has indemnified its insured) to the party at fault. This is especially important in the case of a regime such as MC99 that provides for no-fault liability of the carrier. Where this strategy succeeds, then it is arguable that it keeps the costs of premiums down and, by extension, the passenger pays a lower fare. But there remains a social cost, in that it makes the plaintiff's road to receiving compensation so much longer and more arduous. In addition,

the reality of aviation litigation is that the loss is not shifted to the party at fault, but to its insurer. Thus, instead of reducing the overall loss to be spread across the market, the loss is just shifted—at great expense—from one loss-spreading insurer to another, with the cost of doing so added on top. Who ultimately pays for this? The traveling public! Is it all worth it?

IV. THE WAY FORWARD IS BACK

Starting with the narrow issue of the availability of FNC within WCS and MC99 regimes, the analysis of the parties' conflicting interests over where to litigate revealed a bigger picture, within which those regimes for passenger compensation were shown to be just one part of a larger aviation accident passenger compensation system. The stakeholders to this multi-party system were identified and its organization and means of operation revealed. This permitted us to reach the vital conclusion that MC99 (as successor to WCS) is based on an anachronistic understanding of international aviation litigation as two-party in nature. Such an understanding was justifiable in 1929, but not in 1999, and even less so in 2021. With the emergence of alternative remedies, the realization of rights to contribution and indemnification, and the ubiquity of insurance and other risk management devices, the reality is that modern aviation litigation of passenger claims is predicated on a multi-party system of liability relations. The two-party paradigm of the plaintiff passenger versus defendant carrier has been demolished. In its place stands a far more complex multi-party system in which third-party interests play a dominant role.

The jurisdictional regime established by MC99 has not adapted to this bigger picture, and the inclusion of FNC therein means that the manner in which it regulates choice of forum is inadequate, inequitable, and outdated. It is fundamentally unfair to the plaintiff, and it frustrates rather than furthers the policy objectives of MC99. It goes without saying that the application of FNC prejudices the plaintiff. In light of the bigger picture, the idea that this prejudice was somehow balanced against defendant carriers' interests evaporated. This reveals that the interests on the defendant carrier's side receive generous and powerful support from its insurer and third-party defendants, who are more than willing to cooperate in securing a common jurisdictional advantage resulting in lower net liability.

When it comes to choice of forum, the balance of interests is tipped firmly against the plaintiff, which has prejudicial consequences for the extent and level of compensation they can hope to receive. Yet, is it not a stated goal of MC99 to provide a new deal that assures plaintiffs of

swifter and more equitable compensation in the event of an accident? In so doing, it professes to readdress the balance of interests and make concessions to the plaintiff WCS had hitherto underserved. However, by failing to appreciate the bigger picture, the balance of interests upon which MC99's jurisdictional regime is established is fundamentally incomplete. In consequence, this skews results derived therefrom. Furthermore, by leaving the plaintiff's choice of forum open to challenge, MC99 incentivizes and generates unnecessary litigation over jurisdiction that not only lengthens the process of securing compensation, but also adds to its cost – a cost then borne by the industry and, ultimately, the fare-paying public.

There is an important counterargument in support of FNC within MC99's jurisdictional regime that this Article must address. With the United States as the current center for international aviation litigation, FNC serves an important function in controlling forum shopping and keeping the cost of settlements and damages awards down. Indeed, this is arguably the strongest argument in favor of FNC. However, this argument rests on the supposition that there is a need to control forum shopping, specifically in the context of MC99; this supposition must be challenged. FNC makes sense within a common law system where the jurisdiction of courts is extremely broad. Civil law systems manage without an equivalent to FNC precisely because the jurisdiction of their courts is more constrained and narrowly prescribed.

The jurisdictional regime of MC99—based as it is on the Warsaw Convention—has a civilian sensibility. It provides a limited number of pre-determined forums in which a plaintiff can sue. These are forums that have been selected because the drafters deemed them prima facie appropriate. In the vast majority of cases, the reality is that an MC99 plaintiff will most likely only have a choice between two or three forums in which to pursue an action for damages against a carrier. It is wholly inappropriate and downright disingenuous to accuse a plaintiff of forum shopping when they have selected a forum from a very limited and specially selected range of options.

In light of all these considerations, FNC has no place within the jurisdictional regime of MC99. The plaintiff's choice of forum under MC99 should be absolute and inviolable. However, merely excluding FNC from MC99 will not be sufficient on its own.

The legal landscape in 1929 meant the Warsaw Convention ring-fenced passenger claims falling within its scope, and it could operate as a discrete passenger compensation system largely insulated from third-party influence. This is no longer true. Due to the evolution of the legal landscape since the Warsaw Convention's drafting, the plaintiff now has

several litigation options. The existence of alternative remedies, the reality of third-party actions, and contractual indemnities means that the exposure of the carrier, and the industry in general, to liability for passenger claims arising from international carriage by air is not kept contained within MC99. This undermines MC99 in a number of ways.

First, it generates litigation outside MC99, the knock-on effect of which is that, instead of providing the fast and equitable compensation envisaged, passenger claims arising from accidents are submitted to non-uniform, general regimes of liability under which the resulting costs will usually be far in excess of what would have been awarded under MC99's bespoke regime. In addition, the liability imposed on the third party will often be shifted to the carrier by way of third-party actions and/or contractual indemnities. Where this loss-shifting is contested by the carrier—in truth, its insurer—the resulting litigation is incredibly expensive. Although this will not trouble the plaintiff to the main action, it should concern the industry and the fare-paying public who ultimately pick up the cost.

Second is the risk of circumvention. Where MC99 does not offer the plaintiff their desired choice of forum, they will forego MC99 and pursue an alternative remedy that does offer them access to that forum. Albeit indirectly, the carrier is thereby exposed via a third-party action taken by this alternative defendant to litigation of the plaintiff's action in a forum not specified by MC99. In addition, there is still a risk that the theory and extent of liability that the carrier will ultimately face may be inconsistent with that envisaged by MC99.

Merely removing the possibility of FNC from MC99 litigation will not resolve these issues. The optimal solution is to amend MC99, not only to exclude the application of FNC, but also to explicitly state that it provides the exclusive remedy for passenger claims falling within its substantive scope—not just against the carrier, but against a list of specified third parties (e.g., the airframe manufacturer, component manufacturer, aircraft lessor, and airport authority). The plaintiff's MC99 action against the carrier would preempt claims against these specified third parties. In effect, all passenger claims should be channeled through MC99 and alternative remedies proscribed. A savings clause should be provided to ensure that the carrier's right of recourse against third parties is not prejudiced. The sharing or shifting of liability between the carrier and the specified third parties should be left—as it is at present—to the contractual mechanisms agreed inter se.

This proposed amendment to the regime would resolve the immediate problem of the availability of FNC, greatly reduce the volume of litigation of passenger claims, and assure plaintiffs of faster and more

equitable compensation in the event of an accident. The non-availability of alternative remedies would effectively eliminate the risk of circumvention. In addition to providing greater certainty and predictability to all stakeholders, these immediate consequences would reduce the cost of aviation litigation to the industry.

Several secondary benefits will flow from this proposal. One such benefit would be the avoidance of duplication of aviation insurance. At present, whilst the carrier is under the all-but-universal legal obligation to insure against passenger liability, the reality is that manufacturers and other parties involved in international air transport also insure themselves against potential liability to passengers. This duplication of insurance is a consequence of the different bases for liability that exist (MC99, products liability, negligence, etc.). Under the proposed regime of exclusive carrier liability, the carrier would be the single repository of specified risks and thus the party responsible for insuring against them. Indeed, such a scheme would merely replicate what these parties already establish between themselves through contractual indemnification. As other stakeholders would no longer require insurance coverage for the same risks, this would reduce the cost of insurance to the aviation market and ought to translate into lower fares.

Such a proposal is not new to international law. A similar proposal was put forward by Cheng[260] and considered by the International Law Association (ILA) at its Conference in 1980.[261] This led to a draft convention that was then debated at the 1982 ILA Conference but never came to fruition.[262] This proposal was for an integrated system of aviation liability under which liability for personal injury or death was based on the principle of absolute, unlimited, and secured liability.[263] Crucially, liability was channeled through the carrier. However, as noted by the authors of *Shawcross & Beaumont*, the "weakest link" in the argument was that it proposed to include liability for damage to third parties on the surface.[264] An additional weakness of the regime was that the proposed channeling was de facto rather than de jure.[265] It did not propose to legally exclude alternative remedies against third parties, but expected that assured and unlimited recovery against a carrier would be

260. *See* Bin Cheng, *Fifty Years of the Warsaw Convention: Where Do We Go from Here?*, 28 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 373, 379-80 (1979).

261. *Air Law*, 59 INT'L L. ASS'N REP. CONF. 471, 479-82 (1980).

262. *Id.* at 553-93.

263. *Id.* at 583.

264. SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 184.

265. *See Air Law*, *supra* note 260, at 583. An alternative draft had been proposed by Mankiewicz that would have made channeling obligatory, but it was not preferred. *Id.* at 583.

a sufficient incentive to achieve that in effect, if not in law. As observed in this Article, the availability of an alternative remedy, even where seemingly less attractive, will be exploited by plaintiffs where it offers the preferred choice of forum. The advantage of the channeling proposal made in this Article is that it does not extend to liability to third parties,[266] and it does provide for de jure exclusivity of the liability of the carrier.

Similar proposals were successfully implemented in international law. Indeed, Cheng's proposal was inspired by conventions on civil liability for nuclear damage agreed through the International Atomic Energy Agency.[267] In addition, the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969)[268] makes the ship-owner strictly liable for oil pollution damage. As amended by the 1992 Protocol,[269] it defines a range of persons against whom no remedy, either under the Convention or otherwise, can be sought. In addition to servants or agents of the ship-owner, the pilot, charterer, operator, any person taking preventative measures, etc., are now insulated from liability.[270] Thus, CLC 1992 provides a quasi-exclusive remedy against the ship-owner. In other words, it channels liability through the ship-owner. At present, 138 States have ratified CLC 1992 (accounting for 97.75% of world tonnage). It thus represents a compelling analogy that could be applied *mutatis mutandis* to international carriage by air.

Channeling claims through the carrier also makes sense in the context of the near-universal requirement for carrier insurance that now exists—insurance that is relatively inexpensive, offers very wide coverage, and has capacity well in excess of that required to satisfy claims in the vast majority of aviation accidents. The carrier's own financial capacity to meet the cost of settlement will not be at issue. Limiting plaintiffs to an MC99 action against the carrier (i.e., excluding alternative remedies) will not deprive them of their right to full damages since

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266. It is appropriate to exclude liability to third parties on the ground as this is the subject to a new regime consisting of two conventions agreed through ICAO in 2009: Convention on Compensation for Damage Caused by Aircraft to Third Parties May 2, 2009, DCCD Doc. No 42 (General Risks Convention); Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft May 2, 2009, ICAO Doc. 9920 (Unlawful Interference Convention).

267. *See* Cheng, *supra* note 259, at 379.

268. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1966, 973 U.N.T.S. 3 [hereinafter CLC 1969].

269. Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S. 255 [hereinafter CLC Protocol 1992].

270. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1966, 973 U.N.T.S. 3, *as amended by* Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S. 255 [hereinafter CLC 1992].

recovery is guaranteed by insurance. There would be no need to pursue alternative remedies where the MC99 remedy is capable of satisfying claims in full. There are, of course, exclusions and limits to insurance coverage; therefore, cases in which the carrier will bear the financial burden of meeting claims without the aid of insurance will remain. In such cases, the plaintiff's remedy is dependent on the solvency of the carrier. Where a carrier proves incapable of satisfying the full cost of compensating the plaintiff, then the absence of an alternative remedy would be prejudicial. This is an issue that would benefit from future research, the conclusions from which may require adjustments to the proposals put forward here.

A related issue would pertain to the existing grounds on which the carrier can be exonerated from tier-two (i.e., unlimited) liability under MC99. As it stands, the carrier is not liable when it can prove: "(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."[271] It is submitted that such grounds for exoneration should be removed. In their place, however, the carrier should be entitled to exonerate itself from tier-two unlimited liability where it can prove the damage arose solely due to the negligence or other wrongful act or omission of a third party other than the specified third parties.

A further issue for future examination is how this proposal would interact with the controversial matter of the exclusivity of MC99. In this context, the exclusivity in question pertains to the scope of MC99 and of the available remedies found therein. As decided by the Supreme Court of the United Kingdom (then the House of Lords) in *Sidhu v. British Airways Plc.*[272] and the U.S. Supreme Court in *Tseng v. El Al Israel Airlines Ltd.*,[273] where a plaintiff's action against the carrier falls within the substantive scope of the Warsaw Convention (or MC99)[274] but no liability is provided for under the provisions of the relevant convention, then no action lies against the carrier (either under the conventions or *le droit commun*). For example, a passenger injury that occurs during qualifying international carriage by air but is not the result of an "accident" and/or is not "bodily injury" would not be recoverable. This

271. MC99, *supra* note 2, at art. 22(2).

272. Sidhu v. British Airways Plc. [1997] AC 430 (HL) (joined cases on appeal from Eng. & Scot.) (UK).

273. El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155 (1999).

274. *Sidhu* and *Tseng* were decided in relation to the Warsaw Convention. However, they have been followed in MC99 cases. *See, e.g.*, Stott v. Thomas Cook Tour Operators Ltd. [2014] UKSC 15 (SC) (Eng.); Doe v. Etihad Airways P.J.S.C., 870 F.3d 406 (6th Cir. 2017).

proposition is largely accepted but is not without challenge.[275] As it stands, the consensus of jurisprudence would deny the plaintiff a remedy against the carrier, but they would be entitled to pursue a third party (e.g., a manufacturer) under *le droit commun*.

The question to be asked in the context of this research is whether the immunity granted to third parties by channeling claims through the carrier should be maintained in the case where there is no liability of the carrier. In other words: should the exclusivity enjoyed by carriers under the conventions be extended to the nominated third parties? Resolution of this issue depends on the solution to the exclusivity question, which is still contested. If the current consensus prevails, then the issue of third parties would arise, and a policy would need to be adopted with respect to third parties. However, if non-exclusivity were to win out, then the issue would not arise since both carriers and third parties could be sued under *le droit commun*. In either event, the proposal made in this Article would be applicable; the only distinguishing issue would the extent of its application. Establishing a policy to address this would be a valuable area for future research.

An advantage of the proposal put forward in this Article is that it would replicate the arrangements already established by the industry itself. Through contractual indemnities, the principal stakeholders to international carriage by air allocate risk to the carrier, which in turn shifts that risk onto the aviation insurance market. The cost to the insurer in assuming that risk is then spread across that market through the payment of premiums by carriers. This is the most efficient and appropriate mechanism, as it focuses the cost on the party best placed to spread it across the widest possible consumer base for international carriage by air, i.e., the passengers. This results in a regime where it is the two contracting parties to international carriage by air who are prima facie bearing the costs of a risk that has been rationally and responsibly insured against.

The way forward is back. Back to a regime where the plaintiff's choice of forum was absolute and inviolable. Back to the two-party

275. Several jurisdictions have followed the *Sidhu/Tseng* position on exclusivity, *see, e.g.*, Thibodeau v. Air Can., [2014] S.C.R. 67 (Can.); Hennessy v. Aer Lingus [2012] IEHC 124 (Ir.); Potgieter v. British Airways [2005] (3) SA 133 (C) (S. Afr.). Commentators are supportive of exclusivity. *See, e.g.*, SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 406; TOMPKINS, *supra* note 115, at 99-100. For non-exclusivity, the authors of *Shawcross & Beaumont* cite a French decision (i.e., Duffy v. Brit. Air (Le Havre, June 12, 1986), (1987) 40 R.F.D.A. 446, *aff'd*, Rouen CA (Apr. 26, 1988) (Fr.)) and a German decision (i.e., Oberlandesgericht Frankfurt (1 U 34/88) (Apr. 20, 1989), (1989) 38 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 381). SHAWCROSS & BEAUMONT, *supra* note 185, ¶ 411.

paradigm upon which the Warsaw Convention was established and under which the plaintiff was effectively limited to a remedy against the carrier. If this is done, then choice of forum will be regulated in a manner that takes account of the bigger picture, that is fair to all parties, and that also promotes the policy objectives of MC99 and those of the industry generally.