CONTRACTS OF CARRIAGE BY AIR

SECOND EDITION

MALCOLM A. CLARKE

Lloyd's List

CONTRACTS OF CARRIAGE BY AIR
SECOND EDITION

Port State Control
2nd edition
by Dr Z Oya-Özçayir
(2004)

War, Terror and Carriage by Sea
by Keith Michel
(2004)

Freight Forwarding and Multimodal Transport Contracts
by David A Glass
(2004)

Marine Insurance: Law and Practice
by F D Rose
(2004)

General Average: Law and Practice
2nd edition
by F D Rose
(2005)

Marine Insurance Clauses
4th edition
by N Geoffrey Hudson and Tim Madge
(2005)

Marine Insurance: The Law in Transition
Edited by D Rhidian Thomas
(2006)

Commencement of Laytime
by Donald Davies
(2006)

Liability Regimes in Contemporary Maritime Law
Edited by D Rhidian Thomas
(2007)

Bills of Lading and Bankers' Documentary Credits
4th edition
by Paul Todd
(2007)

Contracts of Carriage by Land and Air
2nd edition
by Malcolm Clarke and David Yates
(2008)

Legal Issues Relating to Time Charterparties
Edited by D Rhidian Thomas
(2008)

The Evolving Law and Practice of Voyage Charterparties
Edited by D Rhidian Thomas
(2009)

International Carriage of Goods by Road: CMR
5th edition
by Malcolm Clarke
(2009)

The Rotterdam Rules
by the Institute of Maritime Law, Southampton University
(2009)

Risk and Liability in Air Law
by George Leloudas
(2009)

The Modern Law of Marine Insurance Volume 3
Edited by D Rhidian Thomas
(2009)

The International Law of the Shipmaster
by John A C Cartner, Richard P Fiske and Tara L Leiter
(2009)

Places of Refuge International Law and the CMI Draft Convention
by Eric Van Hooydonk
(2010)

Maritime Fraud and Piracy
2nd edition
by Paul Todd
(2010)

The Carriage of Goods by Sea under the Rotterdam Rules
Edited by D Rhidian Thomas
(2010)

CONTRACTS OF CARRIAGE BY AIR

SECOND EDITION

BY

MALCOLM CLARKE
MA, LL B, Ph D (Cantab)
Fellow of St John's College, Cambridge
Professor of Commercial Contract Law at the University of Cambridge

Lloyd's List

LONDON
2010

Lloyd's List Law
Telephone House
69–77 Paul Street
London EC2A 4LQ
law.enquiries@informa.com

© Malcolm Clarke 2002, 2010

First edition 2002
Second edition 2010

British Library Cataloguing in Publication Data
A catalogue record for this book
is available from the
British Library

ISBN 978 1 84311 887 9

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of Lloyd's List Law.

Whilst every effort has been made to ensure that the information contained in this book is correct, neither the author nor Lloyd's List Law can accept any responsibility for any errors or omissions or for any consequences resulting therefrom.

Lloyd's is the registered trade mark of the Society incorporated by the Lloyd's Act 1871 by the name of Lloyd's.

Typeset in 10/12pt Times by Interactive Sciences Ltd, Gloucester
Printed in Great Britain by MPG Books, Bodmin, Cornwall
Printed on paper from sustainable sources

Preface

This edition of the book comes at a time of significant change—change in the practices and viability of the airline industry and in the law that governs carriage of both passengers and goods by air. The Warsaw Convention of 1929, as amended subsequently, has been replaced in many countries by the Montreal Convention 1999. The Montreal Convention came into force in the UK in June 2004—well after the publication of the first edition of this book in 2002. This edition of the book focuses principally on the Montreal Convention. However, as litigation governed by (versions of) the Warsaw Convention is still coming through, the book also deals with the last version of that Convention in force in the UK.[1] Moreover, Chapter 2 grapples with the impact of EC Directives.

The main changes to be undertaken were easier to identify than to execute. In central parts of that task I have been greatly assisted as regards content by George Leloudas of Gates & Partners and as regards production by the publisher's staff, notably Chris Betney. To them I am duly grateful.

Malcolm Clarke
St John's College, Cambridge
October 2010

1. Further, it is likely that certain provisions of the Montreal Convention (MC) will be influenced by opinion on the Warsaw Convention (WSC). Where MC provisions are substantially the same as those in WSC, courts in the US have "routinely relied" on previous decisions on WSC: Tompkins 34 Air & Space L 420, 422 (2009).

Page Intentionally Left Blank

Table of Contents

Preface v
Table of Abbreviations xvii
Table of Bibliographical References xix
Table of Cases xxi
Table of Conventions and Protocols xxxvii
Table of Rules xxxix
Table of United Kingdom Legislation xli
Table of International Legislation xliii

PART ONE: INTRODUCTION TO THE CONVENTIONS ON CARRIAGE BY AIR

CHAPTER ONE: THE SCHEME OF LIABILITY 3

1.1 The Montreal Convention (MC) 3
1.1.1 Personal injury and death 3
1.1.2 Baggage 4
1.1.3 Cargo 4
1.1.4 Delay 5
1.2 The Warsaw Convention (WSC) 5
1.2.1 Personal injury and death 5
1.2.2 Registered baggage 5
1.2.3 Unregistered baggage 6
1.2.4 Cargo 6
1.2.5 Delay 6

CHAPTER TWO: SCOPE AND APPLICATION OF THE CONVENTIONS 7

2.1 The Conventions and the Contract: the Conflict of Laws 7
2.2 Exclusivity 8
2.2.1 European regulation 10
(a) Scope 10
(i) The Conventions 11
(ii) The Regulations 11
(b) Enforcement 12
(c) Defence 12
2.3 Beyond the Contract of Carriage 13

2.3.1 Carriage 13
2.3.2 Carriers: persons regulated 14

CHAPTER THREE: HISTORY: FROM WARSAW TO MONTREAL 15

3.1 The Warsaw "System" 15
3.1.1 Different limits on liability 16
3.2 Reasons for Reform 16
3.2.1 Harmonisation 16
3.2.2 Reallocation of risk 17
3.2.3 The interests of carriers 18
3.3 The Montreal Regime 19
3.3.1 Limits 19
3.3.2 Streamlining 20

CHAPTER FOUR: RULES OF INTERPRETATION 21

4.1 Broad Principles of General Acceptance 21
4.2 Article 31 of the Vienna Convention 21
4.3 Ordinary Meaning: in English and in French—and in Isolation 22
4.4 Ordinary Meaning in Context 23
4.5 Good Faith 25
4.6 Object and Purpose 26
4.7 The Object and Purpose of the Conventions on Carriage by Air 27
4.8 Supplementary Means of Interpretation 27
4.8.1 Preparatory work: legislative history 28
4.8.2 Subsequent practice 29
4.8.3 Commentaries 29
4.8.4 Case law 29
4.8.5 Other conventions 31
4.9 Consideration of the French Text of WSC 32

PART TWO:THE CONVENTIONS AND COMMENTARY

MONTREAL COVENTION 1999
WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955 AND BY PROTOCOL NO. 4 OF MONTREAL, 1975

General Provisions

Article 1: Scope of Application 35
Comment 36
Notes to article 1.1 36
1. International carriage 36
2. The persons carried 37
3. Baggage 38
4. Cargo 38
5. Aircraft 38
6. Reward 39
7. Transport undertaking 39
8. The principle of restitution 40

Article 1.2 41
Comment 41
Notes to article 1.2 42
1. International 42
2. Carriage 42
3. The agreement of the parties 43
4. High contracting parties 43
5. Agreed stopping place 43

Article 1.3 44
Comment 44
Notes to article 1.3 44
1. Carriage to be performed by 44
2. Carrier 44
3. Undivided carriage 44
4. The parties 45
5. Carriage within the territory of the same State 45

Article 1.4 46
Comment 46

Article 2: Carriage Performed by State and Carriage of Postal Items 46
Comment 47
Notes to article 2 47
1. Relationship with State postal administration 47
2. The carriage of postal items 47

Documentation and Duties of the Parties relating to the Carriage of Passengers, Baggage and Cargo

Article 3: Passengers and Baggage 47
Comment 49
Notes to article 3 49
1. Ticket 49
2. Delivery of the ticket 51
3. The indications required 52
4. The places of destination and departure 52
5. Stopping places 52
6. The Hague Notice 52
7. Embarkation 53

Article 3 (continued) 53
Comment 54
Notes to article 3 (continued) 55
1. Checked (registered) baggage 55
2. Tags 56
3. Stopping places 57
4. The notice 57
5. *Prima facie* evidence 57
6. Absence, irregularity or loss of the check 58

Article 4: Cargo 58
Comment 58
Note to article 4 59
1. The AWB 59

Article 5: Contents of Air Waybill or Cargo Receipt 59
Comment 59
Notes to article 5 60
1. The AWB 60
2. The places of departure and destination 60
3. Agreement on stopping places 60

Article 6: Document Relating to the Nature of the Cargo 61
Comment 61

Article 7: Description of Air Waybill 61
Comment 62
Notes to article 7 62
1. Making out the AWB 62
2. Three original parts 62
3. Signature 62
4. After the cargo has been accepted 62
5. The consignor 63

Article 8: Documentation for Multiple Packages 63
Comment 63

Article 9: Non-compliance with Documentary Requirements 63
Comment 64

Article 10: Responsibility for Particulars of Documentation 64
Comment 65
Notes to article 10 65
1. Statements relating to the cargo 65
2. Damage 65
3. The carrier's liability to third parties 65
4. Causation 65

Article 11: Evidentiary Value of Documentation 65
Comment 66
Notes to article 11 67
1. *Prima facie* evidence 67
2. The conditions mentioned 67
3. Weight, dimensions and packing 68
4. Checking cargo 68
5. Statements relating to condition 68
6. Apparent condition 68

Article 12: Right of Disposition of the Cargo 69
Comment 70
Notes to article 12 72
1. Subject to obligations under the contract of carriage 72

2. A person other than the consignee 72
3. Prejudice to the others 72
4. Other consignors 72
5. Expenses occasioned 72
6. Impossibility 73

Article 13: Delivery of Cargo 73
Comment 74
Notes to article 13 74
1. Except when disposed of 74
2. The consignee entitled to delivery 74
3. Charges due 75
4. Conditions of carriage to be complied with 75
5. Arrival late 75
6. The rights which flow from the contract of carriage 75

Article 14: Enforcement of the Rights of the Consignor and Consignee 76
Comment 76

Article 15: Relations of the Consignor and the Consignee or Mutual Relations of Third Parties 76
Comment 77

Article 16: Formalities of Customs, Police or Other Public Authorities 77
Comment 78
Note to article 16 78
1. Fault 78

Liability of the Carrier and Extent of Compensation for Damage

Article 17.1: Death and Injury of Passengers—Damage to Baggage 78
Comment 79
Notes to article 17.1 80
1. The carrier 80
2. Liability 80
3. The damage sustained 80
4. Bodily injury 82
5. Accident 90
6. Causation 98
7. Embarking or disembarking 99

Article 17.2: Damage to Baggage 103
Article 18: Damage to Cargo 103
Comment 104
Notes to articles 17.2 and 18 106
1. The carrier is liable 106
2. Damage sustained 108
3. Destruction 109
4. Loss 109
5. Damage 110
6. Checked baggage 111
7. Cargo 111

8. The occurrence 112
9. Causation 112
10. Carriage by air 112
11. Inherent defect 113
12. Inherent vice 113
13. Defective packing 113
14. Act of war 113
15. In the charge of the carrier 113
16. Performance outside an airport 116
17. Transhipment 118

Article 19: Delay 118
Comment 118
Notes to article 19 118
1. Damage occasioned 118
2. Delay 120
3. Non-arrival at destination 123

Article 19: Delay (continued) 124
Comment 124
Notes to article 19 (continued) 124
1. Servants or agents 124
2. All necessary measures 125
3. Delay 130

Excursus 130
The concept of all necessary measures 130
1. Force majeure 130
2. Reasonable care 131
3. Utmost care 132

Article 20: Exoneration 132
Comment 133
Notes to article 20 133
1. Contributory negligence 133
2. Person suffering damage 134
3. Other wrongful act or omission 134

Article 21: Compensation in Case of Death or Injury of Passengers 135
Comment 135
Notes to article 21 136
1. The carrier 136
2. The monetary limit 136
3. Special contracts 137
4. The form of special contracts 137

Article 22: Limits of Liability in Relation to Delay, Baggage or Cargo 137
Comment 139
Notes to article 22 139
1. Checked baggage 139
2. The sum that can be awarded 139
3. Special declarations 139

4. Actual payment 140
5. Declared sums 140
6. The weight of baggage or cargo 140
7. The package or packages concerned 141
8. The weight of parts 141
9. Affecting the value of other packages 141

Article 22.5: [Damage Done Intentionally or Recklessly] 142
Comment 142
Notes to article 22.5 144
1. The liability affected 144
2. Intent to cause damage 145
3. Recklessness 145
4. Knowledge 146
5. Probable results 151
6. Result 151
7. Scope of employment 152

Article 22.6: [Expenses of Litigation] 153
Comment 153

Article 23: Conversion of Monetary Units 154
Comment 155

Article 24: Review of Limits 155

Article 25: Stipulation on Limits 156

Article 26: Invalidity of Contractual Provisions 156
Comment 156
Notes to article 26 157
1. Any provision tending to relieve the carrier of liability 157
2. The application of the exclusions 157
3. Inherent defect, quality or vice 157

Article 27: Freedom to Contract 158
Comment 159

Article 28: Advance Payments 159

Article 29: Basis of Claims 159
Comment 160
Notes to article 29 160
1. Actions for damages 160
2. Action founded outside 160

Article 30: Servants, Agents—Aggregation of Claims 162
Comment 163

Article 31: Timely Notice of Complaints 163
Comment 164
Notes to article 31 165

1. Baggage 165
2. Cargo 165
3. Complaints 165
4. *Prima facie* evidence 166
5. The damage complained of 166
6. The person entitled to take delivery 169
7. The carrier 169
8. Forthwith 170
9. The days from the date 170
10. Disposal 170
11. Notice in writing separate 170
12. Dispatch of notice 171
13. No action shall lie 171
14. Fraud 171

Article 32: Death of the Person Liable 172
Comment 172

Article 33: Jurisdiction 172
Article 34: Arbitration 173
Comment 173
Notes to articles 33 and 34 177
1. Domicile 177
2. The principal place of business 178
3. Where the contract has been made 179
4. Destination 180
5. The principal and permanent residence of the passenger 181
6. The territory from which the carrier operates services 181

Article 35: Limitation of Actions 181
Comment 182
Notes to article 35 182
1. Rights to damages 182
2. Extinguished 182
3. Actions affected 183
4. Brought 183
5. The date of arrival 183
6. The destination 184
7. Carriage ceases 184
8. The method of calculating 185

Article 36: Successive Carriage 185
Comment 186
Notes to article 36 187
1. Carriage to be performed 187
2. The performing carrier 188
3. The accident or delay occurs 188
4. The first carrier 188
5. Assumption of liability 189
6. The last carrier 189
7. The consignee or consignor 189

Article 37: Rights of Recourse against Third Parties 191
Comment 191

Combined Carriage

Article 38: Combined Carriage 192
Comment 192

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 39: Contracting Carrier—Actual Carrier 193
Comment 193

Article 40: Respective Liability of Contracting and Actual Carriers 193

Article 41: Mutual Liability 193

Article 42: Addressee of Complaints and Instructions 194

Article 43: Servants and Agents 194

Article 44: Aggregation of Damages 194

Article 45: Addressee of Claims 194

Article 46: Additional Jurisdiction 194

Article 47: Invalidity of Contractual Provisions 195

Article 48: Mutual Relations of Contracting and Actual Carriers 195

Other Provisions

Article 49: Mandatory Application 195
Comment 195

Article 50: Insurance 196

Article 51: Carriage Performed in Extraordinary Circumstances 196
Comment 196

Article 52: Definition of Days 196

APPENDICES

Appendix 1: The Montreal Convention, 1999 201
Appendix 2: Authentic French Text of the Warsaw Convention, 1929 217
Appendix 3: Guadalajara Supplementary Convention, 1961 227
Appendix 4: Warsaw Convention as amended at the Hague, 1955 and the Protocol No 4 of Montreal, 1975 231

Index 241

Page Intentionally Left Blank

Table of Abbreviations

AWB	air waybill
BGH	Bundesgerichtshof
CIM	Uniform Rules concerning the Contract for International Carriage and Passengers by Rail, Berne 1980; given effect in the United Kingdom by s.1(1) of the International Transport Conventions Act 1983
CMR	Convention for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956; enacted in the United Kingdom by the Carriage of Goods by Road Act 1965
HP	The Hague Protocol of 1955 which amended the Warsaw Convention of 1929
HR	Hague Rules, as enacted in the Carriage of Goods by Sea Act 1924
HVR	Hague-Visby Rules, as enacted in the Carriage of Goods by Sea Act 1972
MC	The Montreal Convention 1999
VCLT	Vienna Convention on the Law of Treaties 1969
WSC	The Warsaw Convention 1929, as amended by the Hague Protocol of 1955 and by the Montreal Protocol of 1975

Page Intentionally Left Blank

Table of Bibliographical References

Bennion	F. Bennion, *Statutory Interpretation* (3rd edn, London 1997)
Clarke CMR	M. Clarke, *International Carriage of Goods: CMR* (5th edn, London 2009)
Clarke and Yates	*Contracts of Carriage by Land and Air* (with D. Yates) (2nd edn, London 2008)
De Juglart	M. De Juglart, *Droit Aérien* (2nd edn, Paris 1989)
Fountain	Fountain Court Chambers, *Carriage by Air* (London 2001)
Giemulla	E. Giemulla, R. Schmid, P. Ehlers, and W. Müller-Rostin, *Warsaw Convention* (The Hague 1998)
Koller	I. Koller, *Transportrecht* (6th edn, Munich 2007) (Note that the 7th edn has just been published)
Kronke	H. Kronke, *Münchener Kommentar* (MüKo-HGB), Bd 7, (Munich 1997)
Miller	G. Miller, *Liability in International Air Transport* (Paris 1997)
Scrutton	T. E. Scrutton, *Scrutton on Charterparties and Bills of Lading* (20th edn, London 1996)
Sériaux	A. Sériaux, *La Faute du Transporteur* (Paris 1984)
Treitel	Peel (ed), *Treitel, The Law of Contract* (12th edn, London 2007)
Yates	D. Yates (ed.), *Contracts for the Carriage of Goods* (London 1993)

Page Intentionally Left Blank

Table of Cases

Abnett v. BA [1994] 1 ASLR 1 (Ct Sess) 181
Abnett v. BA 1996 SLT 529 (Ct Sess); 1997 SLT 492, HL 123, 174
Abrahamson v. JAL, 18 Avi 18,064 (3 Cir, 1984); cert denied 470 US 1059 (1985) 9, 90, 160
Abramson v. JAL. *See* Abrahamson v. JAL
Achilleas, The [2008] UKHL 48 ..... 109, 119
Ackerhielm v. De Mare [1959] AC 789, PC 148
ACE v. Holden (2008) 296 DLR (4th) 233 ..... 22, 49, 135
Adatio v. Air Canada, 21 May 1992, CA 100, 102, 103
Adler v. Austrian, Brussels 5.2.1986, (1987) 22 ETL 168 128
Adler v. Malev, 23 Avi 18,157 (SDNY, 1992) 9, 161
Adjoyi v. Federal, 137 F 2d 498 (SDNY, 2001) 37
Aéro-Club de l'Aisne v. Klopotowska, Cass Civ 20.1.1970, (1970) RFDA 195 37
Aetna v. Borain, 338 NYS 2d 786 (NY City Civ Ct, 1972) 169
A-G for Ceylon v. Scindia [1962] AC 60; [1961] 2 Lloyd's Rep 173, PC 68
A-G of Canada v. Flying Tiger Line (1987) 61 OR (2d) 673 ..... 157, 158
Ag Bad Homburg 30.10.1991, TranspR 1992.222 111
Ag Baden-Baden 5.2.1999, TranspR 1999.402 ..... 121, 123
Ag Düsseldorf 20.3.1998, TranspR 1998.474 141
Ag Frankfurt 28.6.1995, TranspR 1996.347 160
Ag Hanover 6.4.2000, TranspR 2000.313 111
Ag München 10.6.1999, TranspR 2000.265 116
AG World Exports v. Arrow Air, 22 Avi 18,221 (SD Fla, 1990) 134
Aikpitanbi v. Iberia, 533 F Supp 2d 872 (ED Mich, 2008) 10, 172
Air Afrique v. Scac Frigo, Cass. 3.6.1997, (1998) 205 RFDA 142 ..... 183, 185
Air Crash at Bali, In Re, 462 F Supp 1114 (CD Cal, 1978) 49
Air Crash at Lexington, Kentucky, 2008 US Dist LEXIS 11255 (ED Ky, 2008) 25, 162, 191
Air Crash at Little Rock, In Re, 118 F Supp 2d 916 (ED Ark, 2000) 89
Air Crash at Warsaw, In Re, 18 Avi 17,705 (EDNY, 1984) 42
Air Crash Disaster at Warsaw, Poland, In Re, Pimentel v. LOT, 748 F 2d 94 (2 Cir, 1984) 51, 53
Air Crash Disaster near New Orleans, In Re, Trivelloni-Lorenzi v. Pan Am, 821 F 2d 1147 (5 Cir, 1987) 174, 176
Air Crash near Cali, Colombia, In Re, 985 F Supp 1106 (SD Fla, 1997) 148, 149, 151, 152
Air Crash off Long Island, New York, In Re, 26 Avi 17,276 (SDNY, 1999) 176
Air Crash off Point Mugu, In Re, 145 F Supp 2d 1156 (ND Cal, 2001) 86
Air Disaster at Lockerbie, Re, 928 F 2d 1267 (2 Cir, 1991); 37 F 3d 804 (2 Cir, 1994) 9, 30, 81, 145, 161
Air Disaster near Cove Neck, New York, In Re, 774 F Supp 718 (EDNY, 1991) 178
Air France v. Air Cat, Cass. 28.5.1996, (1997) 32 ETL 129 115
Air France v. Arlab, Aix 29.11.1983, (1985) 39 RFDA 478 ..... 114, 120, 122
Air France v. ASTIR, Athens 19.6.1991, (1992) RFDA 78 167
Air France v. Atlantic Mutual, Paris 19.3.1975, (1975) 29 RFDA 199 190
Air France v. Fonds de Garantie, Colmar 7.11.1997, (1998) RFDA 150 182
Air France v. Helvétia, Paris 30.4.1997, BTL 1997.386 117
Air France v. Liberator, CA, Paris 8.12.1973, (1974) 28 RFDA 287, affmd Cass 16.4.1975, (1975) 29 RFDA 293 180
Air France v. Moinot, Cass. Civ. 16.4.1975, (1976) 30 RFDA 105 151
Air France v. Nicoli, Paris 2.4.1971, (1971) 25 RFDA 173 134
Air France v. Phillips, Paris 24.4.1990, (1990) 44 RFDA 355 185
Air France v. Primel, Cass Com 23.2.1988, BT 1988.423 115

Air France v. Saks, 470 US 372 (1985) 24, 29, 90, 93, 94, 96, 97, 99
Air France v. Sté. Laiterie de Curepipe, Paris 21.6.1985, (1985) 39 RFDA 343 76
Air France v. Teichner, (1985) 39 RFDA 242; Sup Ct 22.10.1984 ..... 86, 98
Air France v. Uni Europe, Paris 15.11.2000, BTL 2000.877 151
Air France v. Winterthur, Lyon 17.12.1999, (2000) BTL 29 150
Air Inter v. Bornier, Cass 5.5.1982, (1983) 37 RFDA 47 ..... 126, 129
Air Inter v. Quaranta, Aix-en-Provence 23.6.1988, (1988) 42 RFDA 384 ..... 94, 128
Air Inter v. Sage, Lyon 10.2.1976, (1976) 30 RFDA 266 102
Air Inter v. Simon, Paris 19.3.1968, (1968) 22 RFDA 198 129
Air Link v. Patterson [2009] NSWCA 251 90
Air Zaire v. Kimo, TC Bruxelles 9.1.1976, (1977) 31 RFDA 96 ..... 167, 169
Air-Liban v. Cie Parisienne de Réescompte, CA, Paris 31.5.1956, (1956) 10 RFDA 320 126
Akenhurst v. Thomson Holidays (unreported) (Gerona Air Crash Group Litigation (2004) 154 NLJ 62) 39, 92
Albacora v. Westcott & Laurance [1966] 2 Lloyd's Rep 53, HL 113, 158
Albazero, The. Owners of Cargo Laden on Board the Albacruz v. Owners of the Albazero (The Albacruz and The Albazero) [1977] AC 774; [1976] 2 Lloyd's Rep 467 76
Alfred McAlpine v. Panatown [2001] AC 518; [2000] BLR 331 76
Alitalia v. Serres, CA, Paris 7.7.1978, (1979) 33 RFDA 181 129
Alleged Food Poisoning Incident, Re, Al-Zamil v. British Airways, 770 F 2d 3 (2 Cir, 1985) 96, 180, 181
Alleyn v. Port Authority of NY, 58 F Supp 2d 15 (EDNY, 1999); 27 Avi 17,130 103
Alltransport v. Seaboard, 349 NYS 2d 277 (NY City Ct, 1973) 114, 185
Alpina v. TWA, Geneva 16.3.1962, (1964) 18 RFDA 234 140
Alvarez v. American, 27 Avi 17,214 (SDNY, 1999) 89
Amazon Coffee Co v. TWA, 18 Avi 17,264 (NY Sup Ct, 1983) 144, 169
American Banana Co v. VIASA, 411 NYS 2d 889 (AD, 1979); affmd 404 NE 2d 1330 (NY CA, 1980) 75, 76, 116
American Home v. Kuehne & Nagel, 544 F Supp 2d 261 (SDNY, 2008) 183, 193
American Home v. Maeder, 999 F Supp 543, 548 (SDNY, 1998) 65
Amsellen v. TWA, CA, Paris 14.2.1983, (1983) 37 RFDA 138 ..... 126, 128
Andrea Merzario v. Leitner [2001] 1 Lloyd's Rep 490, CA 31
Angers 4.12.1995, BTL 1996.337 173
Antares, The. Kenya Railways v. Antares Co Pte Ltd [1987] 1 Lloyd's Rep 424, CA 42
Antares (No 2), The. Kenya Railways v. Antares Co Pte Ltd [1986] 2 Lloyd's Rep 633 14
Applied Implants v. Lufthansa [2000] 2 Lloyd's Rep 46 141
Araluce v. Air France, CA, Paris 18.12.1987, (1987) 41 RFDA 465 134
Arctic Electronics v. McGregor [1985] 2 Lloyd's Rep 510 192
Aries v. Total [1977] 1 WLR 185; [1977] 1 Lloyd's Rep 334, HL 183
Arkwright v. Pan Am, 22 Avi 18,198 (D Mass, 1990) 170
Arkwright-Boston v. Intertrans, 777 F Supp 103 (D Mass, 1991) 66, 68, 69
Armour v. Jet Air, 1993 ETL 411 (SDNY, 1992) 68
Asher v. United, 70 F Supp 2d 614 (D Md, 1999) 86, 144,145
Ass. Rotterdam v. Sabena, TC Brussels 19.4.1969, (1969) 4 ETL 1174 145
Assureurs Divers v. Alitalia, TC Paris 4.11.1982, (1983) 37 RFDA 153 158
Attal v. Pan Am, TGI Paris 16.11.1989, (1990) 44 RFDA 22 45
Audran v. American, Paris 10.12.1993, D.1994.JR 225 123
Avianca v. Duque, Cass 15.8.1999, ULR 2000.362 181
Ayache v. Air France, TGI Paris 11.5.1984, (1984) 38 RFDA 450 ..... 126, 129, 131

Baah v. Virgin Atlantic Airways, 473 F Supp 2d 591 (SDNY, 2007) 180
Baartmanns v. Swiss Air, Trib. Fed.11.7.1972, (1974) 28 RFDA 75 146
Baker v. Lansdell, 590 F Supp 165 (SDNY, 1984) 56, 101, 111
Balani v. Malaysian Airline System, 24 Avi 18,078 (SDNY, 1994) 183
Banque Libanaise v. SAS, Paris 3.2.1977, (1977) 31 RFDA 282 114
Barclay v. British Airways plc [2008] EWCA Civ 1419; [2009] 3 WLR 369; [2009] 1 Lloyd's Rep 297 .....8, 24, 26, 30, 90
Barrett v. Ministry of Defence [1995] 1 WLR 1217, CA 97
Bart v. BWIA [1967] 1 Lloyd's Rep 239 120
Baum v. Austrian Airlines, TGI Brussels 18.3.1983, (1987) 22 ETL 161; Brussels 5.2.1986 103
Bayaav. United Airlines, 249 F Supp 2d 1198 (CD Cai, 2002) 10
BCCI SA v. Ali [2001] UKHL 8; [2002] 1 AC 251 24
Bejon v. Pakistan Int. Airlines, Toulouse 7.7.1998, (1998) 208 RFDA 307 150
Belgian Endive v. American, 673 NYS 2d 817 (NY, 1998) 184

Bellanger Jamet v. Air Inter, TC Seine 5.11.1962, (1963) 17 RFDA 106 134
Benjamin v. Air Guyane, Fort-de-France 13.9.1993, (1994) RFDA 348 99
Bennett v. Continental, 21 Avi 17,917 (D Mass, 1988) 114, 170
Berman v. TWA, 421 NYS 2d 291 (NY City Civ Ct, 1979) 115
Bernardi v. Apple Vacations, 236 F Supp 2d 465 (ED Pa, 2002) 143
Bernstein v. Pan Am, 421 NYS 2d 587 (NY, 1979) 190, 191
Bessis v. Air France, TGI Paris 2.6.1993 (1994) 94
Best v. BWIA, 581 F Supp 2d 359 (EDNY, 2008) 10, 186
BGH 9.10.1964, NJW 1964.2348 ..... 72, 131, 157
BGH 21.12.1966, NJW 1967.499 132
BGH 24.6.1969 (1970) 5 ETL 97; NJW 1969.2014 ..... 39, 41, 50, 51, 111
BGH 21.12.1973, TranspR 1974.852 43
BGH 2.4.1974 (1974) 9 ETL 777 ..... 39, 49
BGH 28.2.1975, NJW 1975.1597; 1975 ULR II.370 130
BGH 19.3.1976, ULR 1977.282; NJW 1976.1583 ..... 26, 63, 65, 71
BGH 23.3.1976, NJW 1976.1568; 1976 ULR II.324 180
BGH 28.9.1978, 1979 ULR II.265 ..... 93, 123
BGH 27.10.1978, NJW 1979.493 115
BGH 28.11.1978, NJW 1979.496 ..... 9, 55, 111, 116, 161
BGH 16.2.1979, (1980) 15 ETL 229; NJW 1979.2474 ..... 140, 146, 149
BGH 6.2.1981, NJW 1981.1902 173
BGH 5.6.1981, (1982) 17 ETL 301 132
BGH 6.10.1981, NJW 1982.49 174
BGH 12.1.1982, NJW 1982.1218 146
BGH 22.4.1982, NJW 1983.516 ..... 110, 157, 167, 169, 182
BGH 16.6.1982, RIW 1982.910 ..... 26, 28
BGH 16.6.1982, NJW 1983.518 179
BGH 27.1.1983, (1985) 20 ETL 349 73
BGH 5.7.1983, NJW 1984.2445 40
BGH 16.2.1984, VersR 1984.551 127
BGH 14.3.1985, TranspR 1986.22 169
BGH 1.10.1986, NJW 1987.590 ..... 67, 105
BGH 21.9.2000, TranspR 2001.29 ..... 31, 114, 144, 150
BGH 6.10.2005 (2006) 41 ETL 449 185
BGH 3.7.2008, (2009) 44 ETL 210 109
BGH 2.4.2009, (2009) 44 ETL 604 117
BGH 10.12.2009, XR 61/09 ..... 11, 183
Bland v. British Airways [1981] 1 Lloyd's Rep 289, CA 141
Blansett v. Continental Airlines, 379 F 3d 177 (5 Cir, 2004) 92
Block v. Air France, 386 F 2d 323 (5 Cir, 1967) 37, 38, 40
Blower v. GWR (1872) LR 7 CP 655 113
Bodnar v. United, 23 Avi 18,509 (ED Pa 1992) 51
Boehringer Mannheim v. Pan Am, 531 F Supp 344 (SD Tex, 1981); affmd on other grounds 737 F 2d 456 (5 Cir, 1984) 66, 68, 111, 131
Bogiatzki v. Deutscher Luftpool Case C–301/08 NYR, 22 October 2009 11
Bolitho v. City and Hackney HA [1998] AC 232; [1998] Lloyd's Rep Med 26 127
Booker v. BWIA, 32 Avi 16,436; 2007 WL 1351927 (EDNY, 2007) 9, 89, 144
Bousso v. Iberia, 26 Avi 15,528 (SDNY, 1998) 96
Bowe v. Worldwide Flight Services, 979 So 423 (Fla Dist Ct App, 2008) 101, 136
Boyar v. Korean Airlines, 664 F Supp 1481 (DC 1987) 179
Brännströms v. Ryanair, Svea Court of Appeal (26.5.2010), case T 3320–09 ..... 10, 12, 123
BRI v. Air Canada, 725 F Supp 133 (EDNY, 1989) 69, 107, 140, 157, 166, 170
Brinks Ltd v. SAA, 93 F 3d 1022 (2d Cir, 1996) 52, 60, 125, 147, 152
Briscoe v. Air France, 290 F Supp 863 (SDNY, 1968) 187
British Airways v. Safi (1998) 205 RFDA 166 (Quebec) 8, 43, 144, 160
British Airways v. UAP, Cass. 9.7.1991, (1992) 27 ETL 279 151
British Airways Board v. Taylor [1976] 1 WLR 13, HL 121
Brunwasser v. TWA, 541 F Supp 1338 (WD Penn, 1982) 120, 121, 123
Buchanan v. Babco [1977] QB 208; [1977] 1 Lloyd's Rep 234, CA affmd [1978] AC 141; [1978] 1 Lloyd's Rep 119, HL 7, 21–23, 26, 32
Buonocore v. TWA, 900 F 2d 8 (2 Cir, 1990) 99, 101, 103
Butler v. Aeromexico, 774 F 2d 429 (11 Cir, 1985) 143

Butler's Shoe Corp v. Pan Am, 514 F 2d 1283 (5 Cir, 1975) 167

Calberson v. ISA, Cass. 9.5.1995, (1996) 31 ETL 435 169
Caledonian Railway v. N British Railway (1881) 6 App Cas 114 22
Caman v. Continental Airlines, 455 F 3d 1087 (9 Cir, 2006) 92
Cap Palos, The [1921] P 458; (1921) 8 Ll L Rep 309 13
Captain Gregos, The [1990] LMCLQ 314 116
Carey v. United, 77 F Supp 2d 1165 (D Or 1999) 80, 86, 96
Carey v. United, 255 F 3d 1044 (9 Cir, 2001) 82, 86, 98
Carnisco v. Air China, 23 Avi 18,491 (SDNY, 1992) 116
Carroll v. United Airlines, 739 A 2d 442 (NJ Super AD, 1999) 125
Cass (Fr) 5.12.1967, JCP 1968.15350 144
Cass (Fr) 29.1.1985, BT 1985.345 150
Cass (Fr) 2.4.1996, (1997) 50 RFDA 448 162
Cass Civ 19.10.1999, BTL 1999.827 38
Cass Civ 22.6.2004, Unif L Rev 2005.606 122
Cass Civ 22.11.2005, Unif LR 2006.210 36
Cass Com 4.3.2003, Univ L Rev 2004.1006 62
Cass Com 18.1.2005, Unif L Rev 2005.608 106
Cenci v. Mall, 531 NYS 2d 743 (Albany, 1988) 129
Chan v. Korean Airlines, 490 US 104 (1989) 23, 29, 30, 49, 50, 180
Charpin v. Quaranta, Aix-en-Provence, 9.10.1986, (1986) 40 RFDA 538 94
Chaudhari v. British Airways [1997] EWCA Civ 1413; 1997 WL 1105796 ..... 90, 96, 98
CH Basel 12.12.1996, ULR 1998.884 112
Chendrimada v. Air India, 802 F Supp 1089 (SDNY, 1992) 93
Chisholm v. BEA [1963] 1 Lloyd's Rep 626 129–131
Chowdhury v. Singapore Airlines, 23 Avi 18,208 (EDNY, 1991) 140
Chubb v. Asiana, 214 F 3d 301, 309 (2 Cir, 2000) 22
Chubb v. Menlow, 32 Avi Cas 15,981 (CD Cal, 2008) 183
Cia Mexicana de Aviacion v. US District Court, 859 F 2d 1354 (9 Cir, 1988) 180
Cie Air France v. Liberator, Cass. Civ. 16.4.1975, (1975) 29 RFDA 293 173
Cie Jugoslovenski Aéro-transport v. Gati, CA, Paris 12.12.1961, (1962) 26 RFDA 93 126
Cie Le Languedoc v. Sté. Hernu-Peron, Paris 17.11.1975, (1976) 30 RFDA 109 127
Cie Saint-Paul Fire and Marine v. Cie Air France, Cass. Com. 22.7.1986, (1986) 40 RFDA 428 153
Circle Freight v. Medeast Gulf Exports [1988] 2 Lloyd's Rep 427, CA 67, 121
City of Baroda, The (1926) 25 Ll L Rep 437 126
Clarke v. Royal Aviation Group (1997) 34 Ord (3d) 481 36
Claudio v. Avianca, Trib. Fed. 29.6.1987, (1988) 23 ETL 498 ..... 28, 143, 146
Cohen v. Varig, 405 NYS 2d 44 (App Div, 1978) 112, 119, 157
Collins v. British Airways [1982] QB 734; [1982] 1 Lloyd's Rep 355, CA 43, 50, 55–57, 141
Compaq v. Circle 2001 SLT 368 (Ct Sess) 169
Condor Firmas v. Iberia, Hoge Raad 21.5.1999, Schip & Schade 1993.103 171
Confeccoes Textesis v. Space Tech, 22 Avi 17,494 (WD Wash 1989) 63, 65
Connaught Laboratories v. Air Canada (1979) 94 DLR 3d 586 (HC Ont) 165, 170, 182
Connaught Laboratories v. British Airways (CA Ont, 2005) ULR 2006.428, 77 OR (3d) 34 ..... 144, 150
Consorts Pénègre v. Swissair, Cass Civ 15.4.1986 (1986) 40 RFDA 241 ..... 99, 120, 145
Contreras Perez v. Pan Am, Trib. Supremo Espana 4.12.1990, ULR 1991.II.377 189
Corocraft v. Pan Am [1969] 1 QB 616; [1968] 2 Lloyd's Rep 459, CA 24, 32, 52, 140
Corte di Cassazione 12.11.2004, Univ L Rev 2005.614 106
Corte di Cass 26.5.2005,Unif L Rev 2006.436 173
Cortes v. American Airlines, 177 F 3d 1272 (11 Cir, 1999) 28, 80, 143, 145, 149
Cortez v. Air New Zealand, 31 Avi 18,134 (9 Cir, 2006) 92
Cosar v. LPS 1999 SLT 259 (Ct Sess) 119
Cowden v. British Airways plc [2009] 2 Lloyd's Rep 653 ..... 25, 31, 84, 119
Coyle v. Garuda 27.6.2001, 180 F Supp 2d 1160 (D Or, 2001 43
CPAM du Var v. Sarrat, Cass Civ 19.10.1999, BLT 1999.827 36
Croucher v. Worldwide Flight, 27 Avi 18,062 (D NJ, 2000); 111 F Supp 2d 50 ..... 95, 125
Cruz v. American Airlines, 193 F 3d 526 (DC Cir, 1999) 162
Cunliffe-Fraser v. Pan Am, 21 Avi 18,145 (SDNY, 1985) 165, 168
Curran v. Aer Lingus, 17 Avi 17,560 (SDNY, 1982) 100
Curran v. NIC [1987] AC 718 97
Cush v. BWI, 175 F Supp 2d 483 (EDNY, 2001) 99

D'Alessandro v. American Airlines, 139 F Supp 2d 305 (EDNY, 2001) 143, 151
Da Rosa v. TAP, 796 F Supp 1508 (SD Fla, 1992) 187
Dalton v. Delta, 570 F 2d 1244 (5 Cir, 1978) 109, 110, 167
Damon v. Air Pacific, 31 Avi 18,135 (9 Cir, 2006) 92
Daniel v. Virgin Atlantic, 59 F Supp 2d 986 (ND Cal, 1998) 119, 121
Data Electronics v. UPS [2007] UKHL 23; [2007] 2 Lloyd's Rep 114 29
Day v. TWA, 528 F 2d 31 (2 Cir, 1975); cert denied 429 US 890 (1976) 99, 101, 102
DC Sendai (Japan) 25.2.2003, 2005 Unif L Rev 616 122
De La Cruz v. Dominicana Aviacion, 22 Avi 16,639 (SDNY, 1989) 100, 103
Deauville v. Aeroflot [1977] 2 Lloyd's Rep 67 175
Deep Vein Thrombosis and Air Travel Group Litigation (the DVT case) [2002] EWHC 2825; affmd [2003] EWCA Civ 1005; [2004] QB 234; [2004] 1 Lloyd's Rep 316, CA; affmd [2005] UKHL 72; [2006] 1 AC 495; [2006] 1 Lloyd's Rep 231, HL 24, 26, 30, 91, 92
Deere v. Lufthansa, 621 F Supp 721 (ND Ill, 1985); affmd on other grounds 855 F 2d 385 (7 Cir, 1988) 141
Delta v. Gibson, 550 SW 2d 310 (Tex Civ App, 1977) 90
Denby v. Seaboard World, 575 F Supp 1134 (EDNY, 1983); revsd on other grounds 737 F 2d (2 Cir, 1984) 26, 27, 164–168, 171
Derry v. Peek (1889) 14 App Cas 337 171
DHL v. Amagansett, Cass. Com. 7.7.1998, BTL 1998.843; (1999) ETL 850 151
DHL v. Civil Aeronautics Bd, 584 F 2d 914 (9 Cir, 1978) 40
Director General of Fair Trading v. First National Bank [2001] UKHL 52; [2001] 3 WLR 1297; [2002] 1 Lloyd's Rep 489 25
Disley v. Levine [2002] 1 WLR 785; [2001] EWCA Civ 1087; [2001] CLC 1694 37–40
Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), ICJ (13 July 2009) 29
Djedraoui v. Tamisier, Trib. Paix Paris 31.3.1952, (1952) 7 RFDA 494 112
Domangue v. Eastern, 531 F Supp 334 (ED La 1981); affmd 722 F 2d 256 (5 Cir, 1984) 53, 139
Donkor v. British Airways, 62 F Supp 2d 963 (EDNY, 1999) 162
Duaygues v. UTA, Paris 25.2.1986, BT 1986.480 ..... 121, 134
Dubai Aluminium v. Salaam [2002] UKHL 48; [2002] 1 AC 215 153
Duff v. TWA, 527 NE 2d 498 (Ill App, 1988) 45, 112
Duff v. Varig, 542 NE 2d 69 (Ill App, 1989) 180
Dumenil v. Air France, TC Seine 18.4.1956, JCP 1956.2.9348 122

Eastern, In Re, 19 Avi 18,136 (SD Fla 1983) 91
Eastern Airlines v. Floyd, 499 US 530 (1991); revsd on other grounds 975 F 2d 35 (2 Cir, 1992), cert denied 123 L Ed 2d 650 (1993) 17, 27, 28, 81–83, 86–88, 131
Eastern Kayam Carpets v. Eastern United Freight, 6 December 1983, QBD 31
Eck v. United Arab Airlines, 360 F 2d 804 (2 Cir, 1966); [1966] 2 Lloyd's Rep 485 (2 Cir, 1965) 26, 174, 178
Egan v. Kollsman, 234 NE 2d 199 Fuld CJ (NY CA, 1967) 43, 46, 52, 186
Eggink v. TWA, 22 Avi 17,731 (SDNY, 1990) 116, 183
Eichler v. Lufthansa, 794 F Supp 127 (SDNY, 1992) 133
Ehrlich v. American Airlines, 360 F 3d 366 (2 Cir, 2004) 89
El Al v. Maydeck, Paris 27.3.1962, (1962) 15 RFDA 179 187
El Al v. Tseng, 122 F 3d 99 (2 Cir, 1997); revsd 525 US 155, 142 L Ed 2d 576 (1999) 9, 16, 17, 27, 28, 160, 161
Eli Lilly v. Aerolineas Argentinas, 508 NYS 2d 865 (NY City Civ Ct, 1986) 139
Emery v. Nerine Nurseries [1997] 3 NZLR 723, CA 162
Emirates v. Schenkel Case C–173/07, [2009] 1 Lloyd's Rep 1 ..... 11, 45
Empresa Consolidada Cubana de Aviacion, Cass It 15.6.1993, (1994) 47 RFDA 368 173
Ericsson v. KLM [2006] 1 HKLR 584, (2006) 41 ETL 699 151
Essery v. General (1937) 58 Ll L Rep 307 121
Evangelinos v. TWA, 550 F 2d 152 (3 Cir, 1977) 99, 101, 102

Farley v. Skinner [2001] UKHL 49; [2001] 3 WLR 899 119
Farmer v. Brennan, 511 US 825 (1994) 149
Federal v. Yusen, 232 F 3d 312 (2 Cir, 2000) 60
Feeney v. America West, 26 Avi 15,208 (D Colo, 1997) 187
Feibelmann v. Air France, 334 NYS 2d 492 (NY Civ Ct, 1992) 133
Fellowes v. Clyde Helicopters [1997] 1 All ER 775, HL 8, 9, 16, 27, 30, 39, 160
Finnair v. Winterthur, Unif L R 2003.776 (Swiss Fed Ct) 151
Fireman's Fund v. Alpina, 27 Avi 18,402 (ND Ill, 2001) 185
Fishman v. Delta, 132 F 2d 138 (2 Cir, 1998) 28, 93, 96, 98, 185

Flight Explosion on TWA Aircraft Approaching Athens Greece on April 2, 1986, In Re, 778 F Supp 625 (EDNY, 1991) 30, 82, 89
Floyd, 499 US 530 (1991); revsd on other grounds 975 F 2d 35 (2 Cir, 1992), cert denied 123 L Ed 2d 650 (1993) 17, 27, 28, 81–83, 86,–88
Fosbroke-Hobbes v. Airwork [1937] 1 All ER 108 ..... 50, 53, 67
Fothergill v. Monarch [1978] QB 108; [1977] 2 Lloyd's Rep 184, QBD; [1981] AC 251; [1980] 2 Lloyd's Rep 295, HL 21–24, 26, 28–30, 32, 79, 81, 108, 110, 119, 164, 166–168
Foulon v. Air Malta, T Rennes 11.10.1999, (2000) 54 RFDA 45 ..... 121, 123
Fournier v. Lufthansa, 191 F Supp 2d 996 (ND Ill, 2002) 10
Fratini-Bassaler v. Air France, CA, Aix-en-Provence 14.11.1967, (1968) 22 RFDA 201 126
Friesen v. Air Canada, 1982 ULR II 146 (Alta, 1981); (1981) 30 AR 527 (QB, Alberta) 45, 119, 120, 122, 126, 134, 186
Froman v. Pan Am, 349 US 947 (1955) 51
Fujitsu v. Federal Express, 247 F 3d 423 (2 Cir, 2001) 62, 110
Fujitsu Computer Products v. Bax Global [2005] EWHC 2289; [2006] 1 Lloyd's Rep 367 ..... 22, 52, 60
Fulop v. Malev, 175 F Supp 2d 651 (SDNY, 2001) 96

Gabra v. Egyptair, 27 Avi 18,119 (SDNY, 2000) 99
Galérie Carpentier v. Nordstern, Paris 26.11.1999, BTL 2000.138 117
Galu v. Swissair, 20 Avi 18,550 (SDNY, 1987) 38
Gan v. Venezolana, Cass. Com. 28.11.1997, BTL 1998.63; (1998) 33 ETL 574 158
Gasca v. Empresa de Transporte Aero de Peru, 992 F Supp 1377 (SD Fla, 1998) 180, 181
Gatewhite v. Iberia [1990] 1 QB 326; [1989] 1 Lloyd's Rep 160 ..... 70, 107, 190
Gatoil v. Arkwright-Boston [1985] AC 255; [1985] 1 Lloyd's Rep 181 28
Gefco v. Mason (No 1) [1998] 2 Lloyd's Rep 585 ..... 16, 27, 31
Geier v. Kujawa [1970] 1 Lloyd's Rep 364 50
Général Air Fret v. TWA, TC Seine 23.2.1956, (1956) RFDA 324 122
General Electric v. Harper Robinson, 24 Avi 17,541 (EDNY, 1993) 116, 169
Generali France v. Air France, TC Bobigny 6.4.2001, 218 RFDA 238 (2001) 164
Generali Transports v. Air France, TC Bobigny 16.3.2000, BTL 2000.394 150
Gensplit v. Pan Am, 581 F Supp 1241 (ED Wis, 1984) 167
George Straith v. Air Canada (1991) 59 BCLR 2d 241 107
Georgeopoulos v. American (CA NSW 1999) 89
Gerard v. American Airlines, 2007 WL 2205364 (Conn Super Ct 2007) 42
Gerhardstein v. Amex, 27 Avi 17,326 (10 Cir, 1999) 96
Gezzi v. British Airways, 991 F 2d 603 (9 Cir, 1993) 93, 97, 99
GKN Westland v. Korean Air [2003] EWHC 1120 (Comm); [2003] 2 Lloyd's Rep 629 153
Glen v. Korean Airlines Co Ltd [2003] EWHC 643 (QB); [2003] QB 1386 8
Globus v. Sabena, TC Bruxelles 15.5.1981, (1983) 37 RFDA 371 76
Goldman v. Thai Airways (1981) 125 Sol Jo 413; revsd [1983] 3 All ER 693; [1983] 1 WLR 1186, CA 93, 129, 130, 133, 146, 151
Gosse Millerd v. Canadian Government Merchant Marine (The Canadian Highlander) [1929] AC 223; (1928) 32 Ll L Rep 91 23
Gotz v. Delta, 12 F Supp 2d 199 (D Mass 1998) 93, 94
Grein v. Imperial Airways [1937] 1 KB 50; (1936) 55 Ll L Rep 318 ..... 39, 43, 45, 130, 131, 180
Grey v. American, 227 F 2d 282 (2 Cir, 1955); cert denied 350 US 989 (1956) 145
Grimes v. Northwest, 27 Avi 17,101 (ED Pa, 1999); 255 F 3d 1044 (9 Cir, 2001) 82, 86, 96, 98
Gurtner v. Beaton (unreported); on appeal [1993] 2 Lloyd's Rep 369, CA 39, 146

Haddad v. Air France, Cass. 16.2.1982, (1982) 36 RFDA 342 ..... 126, 129
Hadley v. Baxendale (1854) 9 Ex 341 ..... 86, 109, 119
Haldimann v. Delta, 168 F 3d 1324 (DC Cir, 1999) 45
Hall v. Heart of England Ballooons Ltd [2010] 1 Lloyd's Rep 374 183
Hardy v. British Airways 1983 SLT 45 182
Harpalini v. Air Canada, 622 F Supp 69 (D Ill, 1985) 120
Harvest Tones v. PIA, 19 Avi 18,415 (SDNY, 1985) 67
Hatz Libanaise v. SAS, Paris 3.2.1977, (1977) RFDA 282 114
Hatzlachh v. Tradewinds, 738 F Supp 714 (SDNY, 1990) 110, 116
Heckman v. Midwest, 555 F 3d 806 (9 Cir, 2009) 10
Helvétia v. Air France, Paris 3.2.2000; BTL 2000.410 151
Helvétia v. Air France, TC Toulouse 14.2.1980, (1981) 35 RFDA 236 167
Helvétia v. Alitalia, TC Lyon 6.3.1978, (1979) 33 RFDA 89 167

Helvétia v. Finnair, Paris 22.3.2000; BTL 2000.411 151
Herd v. Clyde Helicopters [1997] AC 534 161
Hernandez v. Aeronaves de Mexico, 18 Avi 18,227 (ND Cal, 1984) 45
Hernandez v. Air France, 543 F 2d 279 (1 Cir, 1976) 101
Heron II, The. Koufos v. Czarnikow [1969] 1 AC 350; [1967] 2 Lloyd's Rep 457 .....82, 109, 119, 151
Hewlett v. Flying Tiger, 669 SW 2d 412 (Tex App, 1984) 75
Hexter v. Air France, 563 F Supp 932 (SDNY, 1982) 55, 111
Highlands v. BWIA, 739 F 2d 536 (11 Cir, 1984) 144
HIH v. Virgin Atlantic, 105 F Supp 2d 1083 (ND Cal, 2000) 60
Hobbs v. L&SW Ry (1875) LR 10 QB 111 109
Hollandia, The. Owners of Cargo on Board the Morviken v. Owners of the Hollandia [1983] 1 AC 565; [1983] 1 Lloyd's Rep 1 ..... 16, 27
Holmes v. Bangladesh Biman [1989] AC 1112 39
Horabin v. BOAC [1952] 2 All ER 1016; [1952] 2 Lloyd's Rep 450 .....143, 146, 147
Hornsby v. Lufthansa, 2009 WL 116962 (CD Ca, 2009) 177
Hoyanger, The. Westcoast Food Brokers Ltd v Hoyanger, The [1979] 2 Lloyd's Rep 79, Fed Ct (Can) 67
HR 19.4.2002, (2005) 40 ETL 139 76
Hughes-Gibb v. Flying Tiger Line, 504 F Supp 1239 (ND Ill, 1981) 109, 167
Husain v. Olympic, 116 F Supp 1121 (ND Ca,l 2000); affmd 316 F 3d 829 (9 Cir, 2002) 91, 96, 149, 151

Igwe v. Northwest Airlines, 2007 WL 43811 (SD Tex, 2007) 124
INA v. Federal Express, 189 F 3d 914 (9 Cir, 1999) 61
INA v. Yusen, 18 Avi 18,271 (SDNY, 1984) 170
Institut de Sélection Animale v. Calberson, TC Paris 3.7.1991, (1991) 44 RFDA 391 171
Int Container v. CFE, Cass 23.5.1989, (1990) 25 ETL 89 119
Intercargo v. China Airlines, 208 F 3d 64 (2 Cir, 2000) 60, 61
Interfoto v. Stiletto [1989] QB 433, CA 51, 67, 122
International Mining v. Aero Nac De Colombia, 380 NYS 2d 405 (NY Sup Ct App Div, 1977) 149
Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 WLR 896, HL 24, 26

Jack v. TWA, 854 F Supp 654 (ND Cal 1994) 82, 88, 89
Jahanger v. Purolator, 615 F Supp 29 (ED Pa, 1985) 118
Jallah v. TWA, 19 Avi 17,804 (D Col, 1985) 170
Jarvis v. Swan Tours [1973] QB 233, CA 86
Jaycees Patou v. Pier Air, 714 F Supp 81 (SDNY, 1989) 116
Jean-Baptiste v. Air Inter, TGI Evry 5.3.1990, (1990) 44 RFDA 219 ..... 118, 130
Jebson v. Ministry of Defence [2000] 1 WLR 2055, CA 97
Johnson v. Allied Eastern, 19 Avi 17,847 (DC Cir, 1985) 125, 183
Johnson v. American, 834 F 2d 721 (9 Cir, 1987) 26, 38, 76, 107, 112, 144
Johnson v. Gore Woods & Co [2002] 2 AC 1 109
Johnson Estate v. Pischke [1989] 3 WWR 207 (Sask) 38, 131, 146
Jones v. Bencher [1986] 1 Lloyd's Rep 54 146
Julius Young v. Delta, 414 NYS 2d 528 (1979) 125

Kalantar v. Lufthansa, 276 F Supp 2d 5 (DDC, 2003) 102
Kalok v. Circle Freight, 24 Avi 17,768 (ND Cal, 1993) 141
Kamara v. Air France, Cass Civ 24.6.1968, D 1968 J 745 183
Kapar v. Kuwait Airways, 663 F Supp 1065 (DDC, 1987), 845 F 2d 1100 (1988) 179
Karfunkel v. Air France, 427 F Supp 971 (SDNY, 1977) 42, 196
Karuba v. Delta, 23 Avi 17,470 (SDNY, 1991) 129
Kawasaki v. Bantham (No 2) [1939] 2 KB 544; (1939) 63 Ll L Rep 155, CA 113
Kelachian v. Air France, Aix 21.5.1982, (1982) 36 RFDA 349 187
Kenner v. Flying Tiger Line, 20 Avi 18,282 (ND Ill, 1987) 45
Kenya Airways v. Airbus, Cass Civ 11.7.2006 [2006] RFDA 175
Kenya Railways v. Antares Co Pte Ltd (The Antares) (No 2) [1986] 2 Lloyd's Rep 633 14
Keyser Ullmann v. Skandia [1990] 1 QB 665; [1988] 2 Lloyd's Rep 513, CA 47
King v. American, 146 F Supp 2d 159 (NDNY, 2001) 124
King v. American Airlines, 284 F 3d 352 (2 Cir, 2002) 10, 124
King v. Bristow Helicopters [2001] 1 Lloyd's Rep 95, Ct Sess; revsd [2002] UKHL 7, HL 15, 22, 30, 79, 81–89
Kleiner v. Qantas, 22 Avi 18,179 (SDNY 1990); affmd 970 F 2d 895 (2 Cir, 1991) 91
KLM v. Hamman, Witwatersrand 5.2.2002, Unif L Rev 2002.924 ..... 139, 146

KLM v. Tannerie des Cuirs, Paris 6.6.2001, BTL 2001.664 134
Klos v. Polskie Linie, 133 F 2d 164 (2 Cir, 1997) 23, 180
Knoll v. TWA, 610 F Supp 844 (D Colo, 1985) 100
Knowlton v. American Airlines, 2007 WL 273794 (D Md, 2007) 9
Koirala v. Thai Airways, 126 F 3d 1205 (9 Cir, 1997); ULR 1998.890 143–145
Kologel v. Down in the Village, 17 Avi 17,104 (SDNY, 1982) 75, 110
Korba v. TWA, 508 NE 2d 48 (Ind App, 1987) 184
Korean Air Lines Disaster, Re, 932 F 2d 1475 (DC Cir, 1991) 149
Korean Airline Disaster of September 1, 1983, In Re, 664 F Supp 1478 (DDC, 1986), affmd *sub nom* Chan v. Korean Airlines, 490 US 122 (1989) 180
Korean Airlines v. Entiope, Cass Civ 15.12.1981, (1982) 36 RFDA 215; (1982) 17 ETL 181 91
Korper v. Aéro-Club Sarre, CA, Colmar 22.5.1992, (1992) 45 RFDA 323 36
Kotsambasis v. Singapore Airlines (1997) 140 FLR 318; (1997) 42 NSWLR 110 (CA, NSW) 21, 83, 86, 89, 101
Koufos v. Czarnikow (The Heron II) [1969] 1 AC 350; [1967] 2 Lloyd's Rep 457 ..... 82, 109, 119, 151
Kraus v. KLM, 92 NYS 2d 315 (1949) 43, 52
Kruger v. United Air Lines, 31 Avi 18,565 (ND Cal, 2007) 79, 95
Krys v. Lufthansa, 119 F 3d 1515 (11 Cir, 1997) 96

Lacey's Footwear v. Bowler [1997] 2 Lloyd's Rep 369 119
Lagarde v. Beaudinant, Chambery 17.10.1989, (1989) 43 RFDA 551 182
Lahey v. Singapore Airlines, 27 Avi 18,124 (SDNY, 2000) 97
Lam v. Aeroflot, 999 F Supp 728, (SDNY, 1998) 179, 180
Langadinos v. American, 199 F 3d 68 (1 Cir, 2000) 97
Laroche v. Spirit of Adventure (UK) Ltd [2008] EWHC 788; [2009] EWCA Civ 12; [2009] QB 778; [2009] 1 Lloyd's Rep 316, CA 23, 36, 37, 39, 183
Lathigra v. BA, 41 F 3d 535 (9 Cir, 1994) 124
Le Languedoc v. Hernu Peron, Paris 17.11.1975, (1976) 30 RFDA 109 151
Le Nord v. Pery, Paris 9.5.1980, (1980) 34 RFDA 300 190
Lear v. New York Helicopter, 597 NYS 2d 411 (1993) 125
Leather's Best v. Aerolineas Argentinas, 520 NYS 2d 490 (1987) 169
Lee v. American Airlines, 2002 WL 1461920 119
Lee v. China Airlines, 21 Avi 17,129 (CD Cal, 1987) 43
Leesh River Tea v. BISN [1967] 2 QB 250; [1966] 2 Lloyd's Rep 193, CA 126
Lefebvre v. Aéro-Club 'Les Ailes Dieppoisses', Rouen 20.11.1973, (1974) 28 RFDA 202 37
Legal-Kerjean v. Pichon, Cass. Civ. 4.6.1973, (1973) 27 RFDA 316 99
Lemly v. TWA, 20 Avi 17,520 (2 Cir, 1986) 42
Levy v. American, 24 Avi 17,581 (SDNY, 1993) 91
Lg Bonn 14.1.1998, TranspR 1999.109 121
Lg Darmstadt 20.6.2000, TranspR 2001.34 185
Lg Darmstadt 24.9.2002, TranspR 2003.114 151
Lg Duisburg 18.3.1975, (1975) 10 ETL 527 196
Lg Frankfurt 6.1.1987, RIW 1987.392 67
Lg Frankfurt 8.12.1989, TranspR 1991.143 111
Lg Frankfurt 21.8.1990, TranspR 1991.32 141
Lg Frankfurt 5.11.1990, TranspR 1991.143 109
Lg Frankfurt 14.11.1990, TranspR 1991.146 121
Lg Frankfurt 12.3.1991, TranspR 1991.241 141
Lg Frankfurt 27.3.1992, TranspR 1992.414 75
Lg Frankfurt 8.3.2000, TranspR 2001.35 185
Lg Hamburg 3.12.1992, TranspR 1995.76 ..... 134, 150
Lg München 25.2.1992, TranspR 1995.31 182
Lg München 17.2.1999, TranspR 2000.183 166
Lg Stuttgart 21.2.1992, TranspR 1993.141 ..... 114, 115, 169
Lg Stuttgart 19.8.1997, TranspR 1998.196; ULR 1998.884 183
Ligeti v. British Airways, 2001 WL 1356238 84
Lisi v. Alitalia [1967] 1 Lloyd's Rep 140 (2 Cir, 1996); affmd 390 US 455 (1968); [1968] 1 Lloyd's Rep 505 ..... 52, 53
Lister v Hesley Hall Ltd [2001] UKHL 22; [2002] 1 AC 215 153
LNWR v. Hudson [1920] AC 324 ..... 106, 158
Longo v. Air France, 1996 WL 866124 (SDNY, 1996) 89
Look Voyages v. Generali France, Paris 29.4.1998, (1998) 208 RFDA 230 51

Lucas v. Avro [1994] CLY 1444 109
Ludecke v. Canadian Pacific Airlines (1979) 98 DLR (3d) 52 (SC Can); [1979] 2 Lloyd's Rep 260 ..... 49, 57
Lufthansa v. American, 797 F Supp 446 (D Vic 1992) 107
Lufthansa v. CNRS, Paris 26.3.1971, 1971 ULR 122 68
Lugo v. American, 686 F Supp 373 (D Puerto Rico, 1988) 96
Lukács v. United Airlines, 2009 MBCA 111 119
Luna v. Cia Panamena de Aviacion, 851 F Supp 826 (SD Tex, 1994) 176
Lundberg v. State of New York, 306 NYS 2d 947 (1969) 152
Lyons v. American Trans Air, 647 NYS 2d 845 (1986); ULR 1998.886 99

M, In Re [2002] UKHL 7 84
M J Jones Inc v. Kingsway General Insurance Company [2004] OJ No 3286, CA 173
Mbaba v. Air France, 457 F 3d 497 (5 Cir, 2006) 9
McCarthy v. American Airlines, 2008 US Dist LEXIS 49389 (SD Fla, 2008) 25, 93, 193
McCarthy v. Northwest, 56 F 3d 313 (1 Cir, 1995) 28, 100
McCauley v. Federal, 31 Avi 18,173 (ED Mo, 2006) 90
McCutcheon v. David Macbrayne [1964] 1 WLR 125; [1964] 1 Lloyd's Rep 16, HL 53
MacDonald v. Air Canada, 430 F 2d 1403 (1 Cir, 1971) 99–101
McDowell v. Continental, 54 F Supp 2d 1313 (SD Fla, 1999) 90, 96, 97
McMurray v. Capital, 424 NYS 2d 88 (NY Cty Civ Ct, 1980) 118, 129
McNaughton v. Polar, 702 NYS 2d 759 (Sup, 1999) 116, 128
McPherson v. Qantas, 23 Avi 17,577 (D NJ, 1991) 141
Mache v. Air France, Rouen 12.4.1967, (1967) 21 RFDA 343 ..... 102, 103
Magan v. Lufthansa, 181 F Supp 2d 396 (SDNY, 2002), 339 F 3d 158 (2 Cir, 2003) 93
Magnus Electronics v. Royal Bk of Canada, 611 F Supp 436 (ND Ill, 1985) 106, 184, 185
Mahey v. Singapore Airlines, 115 F Supp 2d 464 (SDNY, 2000) 93
Mahmoud v. Alitalia, 17 Avi 17,598 (SDNY, 1982) 50
Mahomed v. British Airways, 15.7.1999 Court of Cassation 9
Malaysian Airlines v. Krum [2005] VSCA 232 90
Malek v. Air France, 31 Avi 18,096 (NYC Civ Ct, 2006) 120
Malik v. Butta, 24 Avi 17,737 (SDNY, 1993) 124
Manion v. American, 17 F Supp 2d 1 (DDC, 1997) 180
Manion v. Pan Am, 449 NYS 2d 693, 695 (CA NY, 1982) 51
Mansoor v. Air France KLM, 2008 US Dist LEXIS 12606 (SDNY, 2008) 99
Manufacturers Hanover Trust v. Alitalia (MHT Case), 429 F Supp 964 (SDNY, 1977); affmd 573 F 2d 1292 (2 Cir, 1977); cert denied 435 US 971 (1978) 130
Marc Rich & Co AG v. Bishop Rock Marine Co Ltd (The Nicholas H) [1996] 1 AC 211; [1995] 2 Lloyd's Rep 299 ..... 14, 47
Margrave v. British Airways, 643 F Supp 510 (SDNY, 1986) 90, 99
Marino v. Air France, CA, Milan 31.12.1969, ULR 1970.276 52
Marshall I Case 152/84 [1986] ECR 723 12
Martignier-Gorecki v. Air Inter, TGI Marseilles 3.9.1997, (1998) 205 RFDA 146 90
Martin v. Pan Am, 563 F Supp 135 (DDC, 1983); 17 Avi 18,352 (DC Col, 1983) 149
Martino v. Air France, Strasbourg 31.3.1995, (1995) 48 RFDA 265 56
Maschinenfabrik Kern v. Northwest, 17 Avi 18,340 (ND Ill, 1993) 149, 170
Maxwell v. Aer Lingus, 122 F Supp 2d 210 (D Mass 2000) 94, 95
Mayers v. KLM, 108 NYS 2d 251 (1951) 67, 140
Mbaba v. Air France, 457 F 3d 497 (5 Cir, 2006) 9
Mertens v. Flying Tiger Line, 341 F 2d 851 (2 Cir, 1965); 382 US 816 ..... 51, 52, 174
Messeaud v. Air Inter, T Longjumeau 9.6.1994, (1995) 48 RFDA 95 129
Mexico City Aircrash of 31 October 1979, Re, 798 F 2d 400 (9 Cir, 1983) 36, 38
Mezri v. Air France, TC Bobigny 20.10.2000, (2001) 217 RFDA 138 151
Miceli v. MGM Grand Air, 59 Cal Rptr 2d 311 (Cal App 2 Dist 1996) 49
Michael Galley Footwear v. Iaboni [1982] 2 All ER 200 ..... 129, 135
Milor v. British Airways [1996] QB 702 ..... 176, 177
Mitsui v. China Airlines, 101 F Supp 2d 216 (SDNY, 2000) 61
Mohammed v. Air France, 816 NYS 2d 697, 2006 WL 777076 139
Montazami v. Kuwait Airways, 20 Avi 17,194 (EDNY, 1987) 157
Montreal Trust v. Canadian Pacific [1977] 2 Lloyd's Rep 80; [1977] 2 SCR 793 52
Morris v. KLM [2001] 3 All ER 126; [2002] QB 100, CA; *sub nom* In Re M [2002] UKHL 7; [2002] 2 WLR 578, HL 30, 81, 84, 85, 89, 94
Morton-Norwich v. Intercen [1978] RPC 501 70

Motorola v. Kuehne & Nagel, 171 F Supp 799 (ND Ill, 2001) 162
Moukatoff v. BOAC [1967] 1 Lloyd's Rep 396 47
Muncaster Castle, The. Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd [1961] AC 807; [1961] 1 Lloyd's Rep 57 131
Mutuelle Générale v. Sabena, Paris 18.10.1978, (1978) 32 RFDA 456 114
Mystique Creations v. North Star, 22 Avi 18,418 (NYC Civ Ct, 1990) 165, 166

Nahm v. SCAC Transport, 21 Avi 17,478 (Ill App, 1988) 45
Najjar v. Swissair, TGI Bobigny 27.10.1987, (1987) 41 RFDA 323 ..... 127, 129
Nebco v. Iberia, 22 Avi 18,341 (SDNY, 1990) 179
Newell v. Canadian Pacific (1976) 74 DLR (3d) 574 (Ont) 38, 86, 146
Nicholas H, The. Marc Rich & Co AG v. Bishop Rock Marine Co Ltd [1996] 1 AC 211; [1995] 2 Lloyd's Rep 299 14
Nielson v. Waite (1885) 16 QBD 67 170
Nigeria Charter Flights Litigation case, 520 F Supp 2d 447 (EDNY, 2007); DeMay, 73 JALC 131 (2008) 123
Nipponkoa Ins Co v. Globeground Services, 2007 WL 2410292 (ND Ill, 2007) 75, 147
Nissan v. Fritz, 210 F 3d 1099 (9 Cir, 2000) 157
Nissan v. KLM, 27 Avi 18,170 (ND Cal, 2000) 61
Norton McNaughton v. Polar, 702 NYS 2d 759 (Supp, 1999) 115, 127
Noten v. Harding [1990] 2 Lloyd's Rep 283, CA 113
Nowell v. Qantas, 22 Avi 18,071 (WD Wash, 1990) 78, 105, 120
Nugent v. Goss [2000] 2 Lloyd's Rep 222, CA 143, 147, 150
Nuyttens v. Air France, Paris 3.12.1992, (1993) 47 RFDA 107 160

O'Brien v. MGN [2001] EWCA Civ 1279 ..... 51, 67, 122
Offshore Aviation v. Transcom, 831 F 2d 1013 (11 Cir, 1987) 66
OFT v. Abbey National [2009] UKSC 6; [2010] 1 Lloyd's Rep 281 25
OGH 16.3.1977, SZ 50 No 40, TranspR 1979.46, 1978 ULR I 370 130
OGH 29.6.1983, (1984) 19 ETL 526, 1986 ULR II 602 132
OGH 29.11.2001, TranspR 2004.36 144
O'Grady v. British Airways, 134 F Supp 2d 407 (ED Pa, 2001) 97
OLG Düsseldorf 29.3.1990, TranspR 1991.106 123
OLG Düsseldorf 13.12.1990, TranspR 1991.106 ..... 122, 165, 167
OLG Düsseldorf 21.1.1993, TranspR 1993.246 ..... 42, 113, 117, 144
OLG Düsseldorf 18.3.1993, TranspR 1993.287 112
OLG Düsseldorf 29.4.1993, TranspR 1994.285 171
OLG Düsseldorf 11.11.1993, TranspR 1995.30 ..... 68, 108
OLG Düsseldorf 11.11.1993, VerS 1994.1498 76
OLG Düsseldorf 13.6.1996, TranspR 1997.150 121
OLG Frankfurt 21.5.1975, NJW 1975.1604 ..... 113, 114
OLG Frankfurt 12.7.1977, NJW 1978.502 183
OLG Frankfurt 14.7.1977, RIW 1978.197 110
OLG Frankfurt 10.1.1978, RIW 1978.197 114
OLG Frankfurt 15.11.1983, RIW 1984.69 ..... 66, 67, 105
OLG Frankfurt 20.4.1989, VerS 1990.1031 157
OLG Frankfurt 14.6.1989, 1990 ULR I 390; TranspR 1990.21 ..... 130, 188
OLG Frankfurt 15.10.1991, TranspR 1993.61 ..... 146, 150
OLG Frankfurt 25.11.1992, TranspR 1993.350 ..... 109, 119
OLG Frankfurt 23.12.1992, TranspR 1993.103 ..... 110, 122, 123, 131
OLG Frankfurt 12.7.1993, RIW 1994.68 ..... 164, 170
OLG Frankfurt 16.4.1996, TranspR 1998.123, ULR 1998.878 113
OLG Frankfurt 8.10.1996, TranspR 1997.287 ..... 167, 169
OLG Frankfurt 13.2.1997, TranspR 1998.362 91
OLG Frankfurt 20.2.1997, TranspR 1997.373 123
OLG Frankfurt 21.4.1998, TranspR 1999.24 ..... 36, 114
OLG Frankfurt 30.6.1999, TranspR 1999.399 144
OLG Frankfurt 15.9.1999, TranspR 2000.183 ..... 144, 182
OLG Frankfurt 28.5.2002, TranspR 2003.169 144
OLG Frankfurt am Main 30.8.2004, TranspR 2004.471 68
OLG Hamburg 2.9.1982, RIW 1983.874 ..... 188, 189
OLG Hamburg 11.1.1996, TranspR 1997.267 ..... 116, 118
OLG Hamm 24.10.2002, TranspR 2003.201 ..... 43, 180

OLG Köln 16.2.1990, TranspR 1990.199 ..... 139, 162
OLG Köln 27.6.1995, TranspR 1996.26 144
OLG Köln 11.8.1998, TranspR 1999.107 130
OLG Köln 26.3.2002, TranspR 2003.111 144
OLG München 10.1.1977, TranspR 1997.277, 279 132
OLG München 20.9.1982, RIW 1983.127 123
OLG München 3.5.1989, TranspR 1991.61 7
OLG München 10.8.1994, TranspR 1995.118 ..... 165, 167, 169
OLG München 30.12.1994, TranspR 1995.300 ..... 144, 167
OLG München 31.3.1998, TranspR 1998.353 127
OLG München 13.12.2001, TranspR 2004.35 144
OLG Nürnberg 9.4.1992, TranspR 1992.276 ..... 114, 165, 169
OLG Nürnberg 18.4.2001, TranspR 2001.262 116
OLG Stuttgart 24.2.1993, TranspR 1995.74 ..... 146, 153
Oliver v. SAS, 17 Avi 18,283 (D My, 1983) 97
Olympic v. Mangal/Manzal Qalimi (Sup Ct Israel 1982), ULR 1984 II 397 ..... 143, 146
Onwuteaka v. Northwest Airlines, 32 Avi 15,159 (SD Tex, 2007) 122
Onyeanusi v. Pan Am, 23 Avi 18,122 (3 Cir, 1992); 952 F 2d 788 (3 Cir, 1992) 38, 112, 144
OOCL Bravery, The [2000] 1 Lloyd's Rep 394 (SDNY) 105
Oparaji v. Virgin Atlantic Airways (EDNY, 2006) 122
Orlove v. Philippine Airlines, 257 F 2d 384 (2 Cir); 358 US 909 (1958) 140
O'Rourke v. Eastern, 730 F 2d 842 (2 Cir, 1984) 139
Osbourne v. British Airways, 198 F Supp 2d 901 (SD Tex, 2002) 178
Ospina v. TWA, 24 Avi 17,109 (2 Cir, 1992) 127, 149
Overland Shoes v. Schenkers [1998] 1 Lloyd's Rep 498, CA 67
Owners of Cargo on Board the Morviken v. Owners of the Hollandia (The Hollandia) [1983] 1 AC 565; [1983] 1 Lloyd's Rep 1 ..... 16, 27
Owners of Cargo Laden on Board the Albacruz v. Owners of the Albazero (The Albacruz and The Albazero) [1977] AC 774; [1976] 2 Lloyd's Rep 467 76
Owners of Cargo Lately Laden on Board the Rewia v. Caribbean Liners (Caribtainer) Ltd (The Rewia) [1991] 2 Lloyd's Rep 324 178

Pacific Employers v. KLM, Cass. Belg. 30.9.1988, (1989) 24 ETL 97 68
Padilla v. Olympic, 765 F Supp 835 (SDNY, 1991) 97
Pakistan Airlines v. Bejon (1998) 205 RFDA 153 ..... 174, 175
Pakistan Arts v. PIA, 660 F Supp 2d 741 (1997), ULR 1998.885 37
Pan-Am v. Aetna [1975] 1 Lloyd's Rep 77 (2 Cir, 1994) 113
Pan Am v. CF Airfreight, 23 Avi 17,189 (SDNY, 1990) 169
Pan Am v. SA Fire [1965] 3 SALR 150 189
Panalpina v. Densil Underwear [1981] 1 Lloyd's Rep 187 ..... 119, 122, 126
Panzer v. Aerolineas Argentinas, 19 Avi 18,228 (1986) 167
Papet v. Air France, Paris 7.12.1994, BTL 1996.23 ..... 122, 123
Paradis v. Ghana Airways, 348 F Supp 2d 106 (SDNY, 2004) 122, 124
Paris 25.2.1954, (1954) 8 RFDA 45 150
Paris 31.3.1995, BTL 1995.377 ..... 157, 158
Paris 20.9.2000, BTL 2000.838 150
Paris 1.2.2002, BTL 2002.306 ..... 55, 129
Paris 28.6.2002; [2004] RFDA 3 120
Paris 6.12.2002, BTL 2003.139 43
Paris 19.6.2003, Univ L Rev 2004.1008 140
Parker v. Pan Am, 447 SW 2d 731 (Tex Civ App, 1969) 52
Parker v. SE Ry (1877) 2 CPD 416 67
Pasinato v. American, 24 Avi 18,081 (ND Ill, 1994) 127, 128
Penegre v. Swissair, Cass. Civ. 15.4.1986, (1986) 40 RFDA 241 ..... 98, 121, 159
People, The v. Giliberto, 383 NE 2d 977 (Ill, 1978) 178
Perera v. Varig, 775 F 2d 21 (2 Cir, 1985) 140
Perrett v. Collins [1998] 2 Lloyd's Rep 255, CA 14, 162
Petrire v. Spantex, 756 F 2d 263 (2 Cir, 1985); 474 US 846 181
Pflug v. Egyptair, 961 F 2d 26 (2 Cir, 1992) 178
Philippson v. Imperial Airways [1939] AC 332 41
Philips v. Air New Zealand [2002] 2 Lloyd's Rep 408 100
Piamba Cortes v. American, 177 F 3d 1272 (11 Cir, 1999) 28, 80, 143, 145, 149

Piano Remittance v. Varig, 18 Avi 18,381 (SDNY, 1984) 140
Pierre-Louis v. Newvac (USCA 11, 2009) 173
Pimental v. Lot, 748 F 2d 94 (2 Cir, 1984) 37
Piper v. Reyno, 454 US 235 (1981) 176
Pironneau v. Air Inter, Pau 3.7.1986, (1986) 40 RFDA 440 ..... 96, 134
Polanski v. KLM, 378 F Supp 2d 1222 (SD Cal, 2005) 180
Polskie v. Hooker, 1980 AMC 1748 (SDNY) 67
Polzeath, The [1916] P 241, CA 178
Potter v. Delta, 98 F 3d 881 (5 Cir, 1996) 95, 99
Povey v. Qantas Airways [2005] HCA 33 ..... 25, 92
Prescod v. AMR, 2004 US App LEXIS 17432 (9 Cir, 2004) 92
Preston v. Hunting Air Transport Ltd [1956] 1 QB 454; [1956] 1 Lloyd's Rep 45 50
Preyval v. Air France, TC Nice 7.5.1973, (1973) 27 RFDA 345 126
Price v. KLM, 107 F Supp 2d 1365 (ND Ga 2000) 95
Proctor v. Jetway [1982] 2 NSWLR 264 183
Promet Engineering v. Sturge [1997] CLC 966 110
PT Airfast Services v. Superior Court, 17 Avi 18,087 (Cal App, 1983) 45
Puaux v. Air Inter, TGI Evry 11.10.1966, (1997) 51 RFDA 56 57

Quantime v. Donovan, 21 Avi 17,367 (D Mass, 1988) 116
Quantum v. Plane Trucking [2001] All ER (Comm) 916; revsd [2002] EWCA Civ 350, CA 42, 106
Quinn v. Canadian Airlines (1994) 18 OR (2d) 326 93
Qureschi v. KLM (1979) 102 DLR (3d) 205 (NS SC) 180

R v. Caldwell [1982] AC 341 146
R v. Lawrence [1982] AC 510 146
R v. Moloney [1985] 1 All ER 1025 145
R v. Reid [1992] 3 All ER 673, HL 150
R v. Secretary of State, ex parte IATA [2000] 1 Lloyd's Rep 242; [1999] 2 CMLR 1385 ..... 16, 137
Rabinowitz v. SAS, 741 F Supp 441 (SDNY, 1990) 103
Rafailov v. El Al, 32 Avi 16,372, 2008 US Dist LEXIS 38724 (SDNY, 2008) 90
Ragi v. Air France, TGI Paris 19.2.1986, (1986) 40 RFDA 254 115
Railroad Salvage v. JFC, 556 F Supp 124 (EDNY, 1983); affmd 779 F 2d 38 (2 Cir, 1985) 116
Rajcooar v. Air India, 89 F Supp 2d 324 (EDNY, 2000) 90
Ranicar v. Frigmobile [1983] Tas R 113 111
Rank v. Jardine, 20 Avi 18,325 (ND Ill, 1987) 107, 190
Read-Rite v. Burlington, 186 F 3d 1190 (9 Cir, 1999) 106
Recumar v. KLM, 608 F Supp 795 (DC NY, 1985) 178
Reed v. Wiser, 555 F 2d 1079 (2 Cir, 1977); cert denied 434 US 922 (1977) 136
Rehder v. Air Baltic Case C–204/08; [2009] ILPr 44 10
Reid v. Ski Independence 1999 SLT (Sh Ct) 62 ..... 109, 141
Reiner v. Alitalia, 9 Avi Cas 18,228 (SC NY, 1966) 150
Republic National Bk v. Delta, 27 Avi 18,174 (SDNY, 2000) 120
Republic National Bk v. Eastern, 815 F 2d 232 (2 Cir, 1987); 639 F Supp 1410 (SD NY 1986) 50
Réunion Européenne v. Alitalia, TC Bobigny 3.9.1998, BTL 1998.18 171
Rewia, The. Owners of Cargo Lately Laden on Board the Rewia v. Caribbean Liners (Caribtainer) Ltd [1991] 2 Lloyd's Rep 324 178
Rhymes v. Arrow Am, 636 F Supp 737 (SD Fla, 1986) 162
Ricotta v. Iberia, 482 F Supp 497 (ED NY, 1979); affmd 633 F 2d 206 (2 Cir, 1980) 99
Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle) [1961] AC 807; [1961] 1 Lloyd's Rep 57 131
Rivière-Giret v. Air-Inter, TGI Toulouse 16.11.1977, (1978) 32 RFDA 214 ..... 128, 132
Roberts v. Brett (1865) 11 HLC 337 170
Robertson v. American Airlines, 277 F Supp 2d 91 (DDC, 2003) 9, 45
Rodriquez v. Ansett Australia, 383 F 3d 914 (9 Cir, 2008) 92
Rogers v. American Airlines, 192 F Supp 2d 661 (ND Tex, 2001) 10
Rolls Royce v. HVD [2000] 1 Lloyd's Rep 653 ..... 115, 117, 151
Rolnick v. El Al, 551 F Supp 261 (EDNY, 1982) 100
Romanowski v. L'Europe, TGI Carpentras 5.5.1987, (1988) 42 RFDA 72 183
Ronai v. Delta, 27 Avi 18,344 (ED NY 2000) 96
Rophe v. Ministère Public, Paris 20.12.1968, (1970) 24 RFDA 95 ..... 133, 134
Rosman v. TWA, 34 NY 2d 385 (CA NY, 1974) 86, 87, 89

Ross v. Pan American, 85 NE 2d 880 (NY CA, 1949) 26, 37, 51
Rothmans v. Saudi Arabian Airlines [1981] QB 368 ..... 174, 175, 177–179
Rothschild v. Tower Air, 1995 WL 71053 (ED Pa, 1995) 89, 95
Rotterdamsche Bank NV v. BOAC [1953] 1 WLR 493; [1953] 1 Lloyd's Rep 154 ..... 42, 51, 174, 187
Royal v. Aerolineas Argentinas, 20 Avi 18,404 (NY Civ Cty Ct, 1987) 169
Royal v. Amerford Air Cargo, 654 F Supp 679 (SDNY, 1987), 21 Avi 482 ..... 40, 116
Rullman v. Pan Am, 471 NYS 2d 478 (NY, 1983) 93
Rush v. US Air, 19 Avi 18,129 (Ohio App, 1984) 184
Rustenburg Platinum Mines v. SAA [1977] 1 Lloyd's Rep 564; affmd [1979] 1 Lloyd's Rep 19, CA 147, 152
Ruxley v. Forsyth [1996] 1 AC 344; (1995) 73 BLR 1 109
Rymanowski v. Pan Am, 416 NYS 2d 1018 (NY, 1979) 152

Saba v. Air France, 78 F 3d 664 (DC Cir, 1996) 148, 149
Safeco v. City of Watertown, 529 F Supp 1220 (NDS Dakota, 1981) 128
Saiyed v. Transmediterranean, 509 F Supp 1167 (WD Mich, 1981) 119, 189
Sakaria v. TWA, 8 F 2d 164 (4 Cir, 1993) 98
Saks v. Air France, 724 F 2d 1383 (9 Cir, 1984) 79, 90, 93, 94
Salazar v. Mexicana, 20 Avi 17,114 (WD Tex, 1986) 91
Salce v. Aer Lingus, 19 Avi 17,377 (SDNY, 1985) 91
Samuel Montagu v. Swiss Air Transport [1966] 2 QB 306; [1966] 1 Lloyd's Rep 323, CA 26, 30
San Diego v. Garmon, 359 US 236 (1959) 9, 161
Sassouni v. Olympic, 769 F Supp 537 (SDNY, 1991) 124
SCAC v. Sté. Generali, Versailles 18.10.01, BTL 2001.782 129
Scala v. American Airlines, 249 F Supp 2d 176 (ED Conn, 2003) 96
Schedlmayer v. Trans International, 416 NYS 2d 461 (NY Civ Ct, 1979) 55
Scherer v. Pan Am, 387 NYS 2d 580 (NY, 1977) 90
Schmoldt v. Pan Am, 767 P 2d 411 (Okl, 1989) 165
Schneider v. Swiss Air, 21 Avi 17,396 (D Me, 1988); 686 F Supp 15 ..... 90, 95
Schopenhauer v. Air France, 255 F Supp 2d 81 (EDNY, 2003) 57
Schuler v. Wickman [1974] AC 235; [1973] 2 Lloyd's Rep 53 28
Schwimmer v. Air France, 384 NYS 2d 658 (1976) 167
Seda Kücükdeveci v. Swedex Case C–555/07 (ECJ 19 Jan 2010) 12
Sedlmayer v. Trans International, 416 NYS 2d 461 (NY City Civ Ct, 1979) 111
Seth v. BOAC, 329 F 2d 302 (4 Cir, 1964) 51, 52
Sethy v. Malev, 27 Avi 18,050 (SD NY 2000) 95
Shah v. Pan Am World Services, Inc, 148 F 3d 84 (2 Cir, 1998) 9, 23, 28, 149, 151, 161
Shah v. Western, 17 Avi 17,101 (WD Wa, 1982) 169
Sheldon v. Pan Am, 74 NYS 2d 267 (NY Sup Ct, 1947); affmd 74 NYS 2d 578 157
Shen v. Japan Airlines, 24 Avi Cas 18,084 (SDNY, 1994) 179
Shifrin v. Air France, 27 Avi 18,514 (ND III 2001) 13, 14
Shinn v. El Al, 21 Avi 18,331 (D Colo, 1989) 103
Sidhu v. British Airways [1997] AC 430; [1997] 2 Lloyd's Rep 76 ..... 8, 9, 16, 24, 26–28, 30, 107, 108, 144, 156, 160, 162, 190
Siemens v. KLM, 19 Avi 18,502 (NY Civ Ct, 1986) 169
Siemens v. Schenker [2001] NSWSC 658; (2001) 162 FLR 469; [2004] HCA 11; (2004) 216 CLR 418 ..... 7, 106, 117, 118
Silber v. Islander Trucking [1985] 2 Lloyd's Rep 243 ..... 29, 126, 127, 130, 132
Silver v. Ocean [1930] 1 KB 416; (1929) 35 Ll L Rep 49, CA 113
Singh v. Tarom, 88 F Supp 2d 62 (EDNY, 2000) 178, 179
Sinochem Int Co v. Malaysia Int Shipping Corp, 127 S Ct 1184 (2007) 176
Smith v. Brown (1871) 40 LJQB 214 110
Smith v. Bush [1991] 1 AC 831 157
Smith v. Canadian Pacific, 452 F 2d 798 (2 Cir, 1971) 173, 174
Smith v. Littlewoods [1987] 1 AC 241 97
Société Aérospatiale v. Lee Kui Jak [1987] 1 AC 871 175
Socimer v. Standard Bank London [2008] EWCA Civ 116; [2008] 1 Lloyd's Rep 558 25
Solanky v. Kuwait Airways, 20 Avi 18,150 (SDNY, 1987) 180
Sompo Japan v. Nippon Cargo Airlines, 522 F 3d 776 (7 Cir, 2008) 10, 82
Sopcak v. Northern Mountain Helicopter Service, 52 F 3d 817 (9 Cir, 1995) 180
Sotheby's v. Federal Express, 97 F Supp 2d 491 (SDNY, 2000) 60, 61
Soundwave Electronics v. Iberia, 18 Avi 17,488 (NY, 1983) 171
South Pacific Air v. Magnus (1998) 157 ALR 443 (FCA) 90

Southern Electronic Distributors v. Air Express, 994 F Supp 1472 (ND Ga, 1998) 43, 52, 60
Soya v. White [1982] 1 Lloyd's Rep 136, CA; affmd [1983] 1 Lloyd's Rep 122, HL 113
Spanner v. United, 177 F 3d 1173 (9 Cir, 1999) 23, 58
Sphere Drake v. Swissair, Rb Antwerp 12.10.1990, (1990) 25 ETL 687 68
Sprinks v. Air France, Paris 27.6.1969, (1969) 23 RFDA 405 114
Srivastava v. Alia, 473 NE 2d 564 (Ill App, 1985) 184
SS Pharmaceuticals v. Qantas [1989] 1 Lloyd's Rep 319, Sup Ct (NSW); affmd [1991] 1 Lloyd's Rep 288, CA (NSW) 28, 29, 146, 148, 150
St Pauls v. VIASA, 807 F 2d 1543 (11 Cir, 1987) 167
Stag Line Ltd v. Foscolo Mango & Co Ltd [1932] AC 328; (1931) 41 Ll L Rep 165 ..... 14, 21
Stagi v. Delta, 24 Avi 18,475 (2 Cir, 1995) 99
Sté. Air Inter v. Quaranta, Aix 23.6.1988, (1988) 42 RFDA 384 ..... 94, 128
Sté. Camat v. Dubosq, Cass. 6.12.1988, (1988) 42 RFDA 381 96
Sté. Mutuelle v. Gauvain, Cass Civ 4.8.1967, (1967) 21 RFDA 436 37
Sté. Pool Esli v. Danzas, TC Paris 24.2.1994, (1994) 47 RFDA 470 130
Stiegler-Duque v. Avianca, Paris 5.3.1999, (1999) 53 RFDA 225 99
Stolk v. Air France, 299 NYS 2d 58 (NY 1969); affmd 316 NYS 2d 455 (1970) 57
Stone v. Continental, 905 F Supp 823 (D Haw, 1995) 97, 98
Stratis v. Eastern, 682 F 2d 406 (2 Cir, 1982) 37, 42, 43, 45, 51
Stratton v. Trans-Canada (1962) 32 DLR (2d) 736 (BC CA) 45, 46
Stud v. Trans International, 727 F 2d 880 (9 Cir, 1984) 105, 112, 169
Sturgeon v. Condor Flugdienst ECJ Joined Cases C–402/07 & C–432/07 [2010] 2 CMLR 12; [2010] 1 Lloyd's Rep 522 10
Sulewski v. Federal Express, 933 F 2d 180 (2 Cir, 1991) 38
Surmount v. Valcke, Douai 4.1.1969, (1969) 23 RFDA 191 180
Surprenant v. Air Canada [1973] CA 107 (CA Quebec) 42, 81
Swaminathan v. Swissair, 962 F 2d 387 (5 Cir, 1992) 178, 180, 181
Swansea v. Harpur [1912] 3 KB 493 ..... 108, 110
Sweis v. TWA, 681 F Supp 501 (ND Ill, 1988) 99–103
Swiss Bank v. Air Canada (1982) 129 DLR (3d) 85 (Fed Ct); affmd (1987) 44 DLR (4th) 680 (FCA) 151, 153
Swiss Bank Corp v. Brinks-MAT Ltd [1986] 2 Lloyd's Rep 79 132

Tai Hing v. Liu Chong Hing [1986] AC 80; [1985] 2 Lloyd's Rep 313, PC 47
Tai Ping v. Northwest, 94 F 3d 29 (2 Cir, 1996) 23, 60
Tandon v. United, 926 F Supp 366 (SDNY, 1996) 96
Tarar v. PIA, 17 Avi 18,618 (SD Tex, 1982) 151
Tasman Pulp v. Brambles [1981] 2 NZLR 225 ..... 190, 191
Tello v. Eastern, 1990 II ULR 390 (SC Puerto Rico, 1987) 129
Terrafranca v. Virgin Atlantic, 151 F 3d 108 (3 Cir, 1998) 86
Tetroc v. Cross-Con [1981] 1 Lloyd's Rep 192 113
Thai Airways v. Eeckhout, Brussels 11.1.1995, (1995) 30 ETL 346 49
Thomas Cook v. Air Malta [1997] 2 Lloyd's Rep 399 ..... 108, 128, 144
Thompson v. British Airways, 21 Avi 18,290 (DC Col, 1989) 80, 81
Thompson v. LMS [1930] 1 KB 41, CA 50, 60, 121
Thornton v. Shoe Lane Parking [1971] 2 QB 163; [1971] 1 Lloyd's Rep 289, CA 67
Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd [2004] EWCA Civ 1598 174
Timeny v. British Airways (1991) 102 ALR 565 (Sup Ct SA) 182
Tondriau v. Air India, Brussels 17.9.75, (1975) 11 ETL 907, Cass 27.1.1977, (1977) 31 RFDA 193 144–146
Transports Mondiaux v. Air France, Paris 14.3.1960, (1960) 14 RFDA 317 112
Transvalue v. KLM, 539 F Supp 2d 1366 (SD Fla, 2008) 179
Transworld (TWA) v. Franklin Mint, 466 US 243 (1984); 80 L Ed 273 (1984); [1984] 2 Lloyd's Rep 432 ..... 17, 27
Trivelloni-Lorenzi v. Pan Am, 821 F 2d 1147 (5 Cir, 1987) 174, 176
Tseng v. El Al, 122 F 3d 99 (2 Cir, 1977) 97
Tsevas v. Delta (ND Ill, 1997), LEXIS 19539 ..... 94, 97
Turbomeca v. Air France, Cass Civ 11.10.2007, [2008] RFDA 450 107
Turturro v. Continental, 128 F Supp 2d 170 (SDNY, 2000), 27 Avi 18,414 (SDNY, 2001) 10, 84, 89
Twardowski v. American Airlines, 535 F 3d 952 (9 Cir, 2008) 92

UAP v. Air Algerie, TC Paris 18.4.1983, (1984) 38 RFDA 171 114

Ugaz v. American Airlines, 576 F Supp 2d 1354 (SD Fla, 2008) 9, 90, 99, 101
Ulster-Swift v. Taunton Meat Haulage [1977] 1 Lloyd's Rep 346, CA 26, 113
Unat v. Air France, Cass 16.5.1999, (2000) 35 ETL 141 150
United v. Conesa, Versailles 4.2.2000, BTL 2000.424 171
United Int Stables v. Pacific Western Airlines (1969) 5 DLR (3d) 67 (BC CA) 37, 45, 62, 112, 114
Upton v. Iran Air, 450 F Supp 176 (SDNY, 1978) 99
UTA v. Blain, Paris 6.1.1977, (1977) 31 RFDA 181 ..... 126, 171
UTA v. Groupe Concorde CA, Paris 24.5.1991, BTL 1991.474 141
UTA v. Sté. Electro-Entreprise, Paris 6.5.1976, (1977) 31 RFDA 79, Cass Com 31.1.1978, (1979) 34 RFDA 310 117
UTA v. Sté. Équipement d'Avions, Paris 11.7.1975, (1976) RFDA 127 116

Valade v. Aéro-Club de Brive, Riom 21.11.1974, (1975) 29 RFDA 202 37
Vandelay v. Roberts, TGI Paris 8.2.1978, 33 RFDA 97 50
Vassallo v. Trans Canada (1963) 38 DLR (2d) 383 (Ont) 75
Velasquez v. Avianca, 23 Avi 17,153 (SD Fla, 1990) 9, 161
Vergara v. Aeroflot, 390 F Supp 1266 (D Neb, 1975) 179–181
Versailles 4.9.2003, BTL 2003.798 189
Vesta v. Butcher [1989] 1 All ER 402; [1989] 1 Lloyd's Rep 331 28
Victoria Fur v. Roadline [1981] 1 Lloyd's Rep 570 121
Victoria Sales v. Emery, 917 F 2d 705 (2 Cir, 1990) 106, 117
Vildex v. United, 25 Avi 17,886 (EDNY, 1996) 140

Walker v. Eastern, 775 F Supp 111 (SDNY 1991), 785 F Supp 1168 (SDNY, 1992) 90, 96
Wallace v. Korean Air, 214 F 3d 293 (2 Cir, 2000); pet denied, 531 US 1144, 121 S Ct 1079, 148 L Ed 2d 955 ..... 94, 95, 97
Walz v Clickair Case C–63/09 ..... 11, 31, 110, 137
Warner Lambert Co v. LEP, 517 F 3d 679 (3 Cir, 2008) 43
Waters v. Port Authority of New York, 158 Supp (2d) 415 (D NJ, 2001) 91
Watt v. Morrow [1991] 1 WLR 1421; (1991) 54 BLR 86 109
Watts v. American Airlines, 32 Avi 15,667 (SD Ind, 2007) 90
Waxman v. CIS Mexicana de Aviacion, SA, 13 F Supp 2d 508 (SDNY, 1998) 9, 95, 136, 161
Wea Farms v. American Airlines, 2007 WL 1173077 (SD Fla, 2007) 75
Webert Ricoeur v. Air France, TC Paris 9.11.1988, (1988) 42 RFDA 391 134
Weintraub v. Capital, 16 Avi 18,058 (NY, 1981) 91
Weiss v. El Al, 433 F Supp 2d 361, 2006 WL 1409736 (SDNY, 2006) 10
Westcoast Food Brokers Ltd v Hoyanger, The [1979] 2 Lloyd's Rep 79, Fed Ct (Can) 67
Western Digital v. British Airways [1999] 2 Lloyd's Rep 380; reversed in part [2000] EWCA Civ 153: [2000] 2 Lloyd's Rep 142, CA 108, 165, 166, 189
Westminster Bank v. Imperial Airways (1936) 55 Ll L Rep 242; [1936] 2 All ER 890 ..... 115, 137
Westway Metals v. Lan-Chile Airlines, 18 Avi 18,556 (SDNY, 1984) 145
Wexler v. Eastern, 18 Avi 17,155 (DC Super Ct, 1982) 165, 166
Winchester Fruit v. American Airlines [2002] 2 Lloyd's Rep 265 (LCC (BL)) 112, 122
Wing Hang v. JAL, 357 F Supp 94 (SDNY, 1973) 116
Winterthur v. Jules Roy, TC Lyon 16.3.2001, 218 RFDA 226 (2001) 150
Wipranik v. Air Canada, 2007 WL 2441066 (CD Cal, 2007) 96
Wolgel v. Mexicana, 821 F 2d 442 (7 Cir, 1987) 13, 112, 123, 124, 182
Wong v. United, 27 Avi 18,397 (ED La, 2001) 176
Wyman v. Pan Am, 1943 US Av R 1 (Sup Ct) 42

Yeoman Credit Ltd v. Apps [1962] 2 QB 508 13
Yuen Kun Yeu v. A-G for Hong Kong [1988] AC 175 97

Zaoui v. Aéroport de Paris, Cass. Civ. 18.5.1976, (1976) 30 RFDA 353 103
Zenbou v. Air France, TGI Lyon 13.1.1994, (1994) 47 RFDA 46 96
Zicherman v. Korean Air Lines, 516 US 217 (1996), 133 L Ed 2d 596 ..... 28, 80, 81, 83

Page Intentionally Left Blank

Table of Conventions and Protocols

Brussels Convention 1968 31
Art 57 174
CIM (Uniform Rules concerning the Contract for International Carriage and Passengers by Rail) 1980/1999 ..... 70, 108
CMR (Convention for the International Carriage of Goods by Road 1956) 7, 13, 22, 31, 32, 70, 114, 115, 127, 130, 132, 144, 146, 150, 165, 173, 190, 192, 195
Art 1 7
Art 1.4 22
Art 12.1 71
Art 12.5(b) 73
(c) 72
Art 17 132
Art 17.2 134
Art 17.4(b) 113, 158
Art 41 ..... 106, 195
Guadalajara Convention (GSC) 1961 ..... 15, 35, 44, 186, 193, Appendix 3
Art III 137
Arts V, VI 163
Montreal Convention (MC) 1999 ..... 1, 8, 9–11, 14, 15–20, 22–25, 27, 31, 32, 35 *et seq*, Appendix 1
Preamble 15, 18
Art 1 ..... 7, 36, 37, 40
Art 1.1 ..... 35, 39, 41, 42
Art 1.2 ..... 36, 44
Art 1.3 ..... 42, 44, 181, 186
Art 1.4 46
Art 2 ..... 46, 47
Art 2.2 111
Art 3 ..... 38, 49, 50, 52, 53, 57, 60
Art 3.1 ..... 11, 47, 52, 59
Art 3.2 ..... 43, 48, 49, 171
Art 3.3 *ff* 49
Art 3.3 ..... 53, 56
Art 3.4 ..... 48, 49, 53
Art 3.5 ..... 48–50, 53
Art 4 38
Art 4.2 43
Art 5 ..... 52, 59–61, 66
Art 6 ..... 59, 61
Art 6.2 71
Art 7 ..... 61, 62
Art 7.2 62
Art 7.4 63
CMR (Convention for the International Carriage of Goods by Road 1956)—*cont.*
Art 8 63
Art 8a 58
Art 9 ..... 58, 63, 64
Art 10 ..... 64, 65
Art 10.1 65
Art 11 ..... 65, 66, 105, 111
Art 11.1 ..... 59, 67
Art 11.2 67
Arts 12–14 77
Art 12 ..... 69–74, 76
Art 12.1 ..... 71–74, 76
Art 12.2 ..... 71, 73
Art 12.3 ..... 70, 72
Art 12.4 ..... 70, 71, 74
Art 13 73–76
Art 13.1 ..... 74, 75
Art 13.2 75
Art 13.3 75
Art 14 ..... 70, 75, 76
Art 15 76
Art 15.1 77
Art 15.2 ..... 71, 77, 107
Art 16 77
Art 17 *ff* 71, 107, 145
Arts 17–19 134
Art 17 ..... 11, 13, 24, 25, 29, 31, 79, 81, 83–102, 108, 109, 118, 119, 139, 147, 181
Art 17.1 ..... 3, 8, 26, 79, 82, 90, 92, 98, 101, 104, 105, 109, 135
Art 17.2 ..... 4, 82, 103–105, 111, 112
Art 18 ..... 42, 43, 70–72, 76, 103–104, 108, 109, 115, 116, 123, 158, 165, 185
Art 18.1 ..... 4, 104, 106
Art 18.2 4
(a) 114, 157
(b) 106, 158
Art 18.3 ..... 105, 106, 112
Art 18.4 ..... 105, 106, 111, 112, 117, 192, 193
Art 18.5 ..... 111, 118
Art 19 ..... 5, 10, 11, 72, 108–110, 118–125, 130, 131, 136, 182
Art 20 ..... 3–5, 94, 95, 128–130, 132–134
Art 21 ..... 3, 16, 80, 96, 134–136
Art 21.1 ..... 106, 139
Art 21.2 ..... 106, 136
Art 21.5 5

CMR (Convention for the International Carriage of Goods by Road 1956)—*cont*.
Art 22 ..... 9, 11, 44, 51, 78, 101, 110, 137–141, 143–145, 147
Art 22.1 ..... 5, 144
Art 22.2 ..... 4, 67, 108, 110, 137, 139, 144
Art 22.3 ..... 4, 139, 187
Art 22.5 ... 4, 42, 125, 133, 135, 140, 142, 144, 145, 148, 150, 152
Art 22.6 153
Art 23 ..... 113, 154, 155
Art 24 ..... 19, 80, 135–138, 155–156
Art 25 ..... 128, 129, 135, 144, 145, 150, 151, 156
Art 26 ..... 105, 120, 135, 156, 174, 182, 195
Art 27 54
Art 28 159
Art 29 ..... 159, 160, 162, 183
Art 30 162–163
Art 30.1 152
Art 31 ..... 31, 163–164, 165, 167, 171
Art 31.1 164–166
Art 31.2 ..... 164, 166
Art 31.4 165
Art 31.6 144
Art 32 172
Art 32.2 ..... 177, 181
Art 33 ..... 4, 5, 43, 172–175, 177, 178, 180
Art 33.1 184
Art 33.2 4
Art 33.4 ..... 162, 173
Art 34 ..... 173, 177
Art 34.2 174
Art 35 ..... 4, 5, 144, 157, 167, 176, 181, 183, 184, 193
Art 35.1 183
Art 35.2 ..... 162, 185
Art 36 185–187
Art 36.1 189
Art 36.2 188
Art 36.3 ..... 106, 170, 186, 188
Art 37 ..... 189, 191
Art 38 ..... 116, 192, 193
Art 38.1 ..... 112, 186
Arts 39 *ff* 44, 46, 123, 187
Arts 39–48 193
Art 39 193
Art 40 193
Art 41 193–194
Art 41.2 137
Art 42 194
Arts 43, 44 ..... 163, 194
Art 45 194
Art 46 194–195
Art 47, 48 195
Art 49 ..... 195, 196
Art 50 ..... 185, 196
Art 51 ..... 51, 196
Art 52 ..... 170, 196
Arts 53–57 197
Art 53.2 42
Art 57 47
UN Convention on Multimodal Transport 1980
Art 38 12
Uniform Rules Concerning the Contract of International Carriage of Passengers by Rail (CIV) 83
Vienna Convention on the Law of Treaties (VCLT) 1969 21
Art 17 29
Art 25 28
Art 30.4 12
Arts 31–33 22
Art 31 ..... 21, 22, 24, 27, 28, 31, 32, 110, 137
Art 31.1 22–24
Art 31.3(a) 27
(b) 19, 27, 29
Art 32 ..... 24, 27, 28, 32
Art 33.3 23
Art 33.4 32
Warsaw Convention (WSC) 1929 ..... 3, 5, 9, 10, 14, 15–18, 21–29, 31, 32, Appendix 4
French text ..... Appendix 2
Preamble 33
Chapter III 9, 106
Art 1 ..... 7, 36, 37, 40, 112
Art 1.1 ..... 9, 36, 39, 42, 161
Art 1.2 ..... 36, 41, 44
Art 1.3 ..... 42, 44, 189
Art 2 ..... 44, 45
Art 2.1 10
Art 2.2 ..... 47, 111
Art 3 ..... 48–50, 52, 53, 140
Art 3.1 52
(c) 49
Art 3.2 49
Art 4 ..... 49, 54, 56, 57
Art 4.1 ..... 56, 57
Art 4.2 ..... 43, 164
Art 4.3(f) 57
Art 4.4 ..... 55, 57
Art 5 58
Art 6 ..... 62, 70
Art 6.2 71
Art 7 63
Art 8 ..... 52, 53, 59, 61
Art 8(b) 61
Art 8(c) 59
Art 9 64
Art 10 ..... 64, 65
Art 10.1 65
Art 11 ..... 65–66, 105, 11
Art 11.1 ..... 66, 67
Art 11.2 67
Arts 12 *ff* 107
Arts 12–14 77
Art 12 ..... 63, 69–72, 76, 77
Art 12.1 ..... 71, 72, 74, 76
Art 12.2 71
Art 12.3 ..... 63, 70, 72
Art 12.4 ..... 70, 71
Art 13 ..... 70, 73–76
Art 13.1 ..... 74, 75
Art 13.3 74

Warsaw Convention (WSC) 1929—*cont.*
Art 14 ..... 70, 75, 76
Art 15 77
Art 15.1 77
Art 15.2 ..... 71, 77
Art 16 77–78
Art 16.2 78
Arts 17 *ff* 72, 107, 162
Arts 17–19 ..... 134, 160
Art 17 ..... 5, 8, 13, 21, 25, 31, 78–79, 81, 83–102, 109, 118, 119, 147, 160, 161
Art 17.1 ..... 79, 92, 98, 104, 105, 109, 135
Art 17.2 ..... 104, 111
Art 18 ..... 42, 43, 70–72, 76, 104, 109, 110, 115, 123
Art 18.1 ..... 5, 104, 120
Art 18.2 6
Art 18.3 ..... 6, 192
Art 18.4 ..... 105, 117
Art 18.5 ..... 117, 118
Art 19 ..... 6, 10, 72, 108–110, 117, 120–124
Art 20 ..... 3–6, 16, 20, 118, 124
Art 21 ..... 13, 133
Art 21.1 ..... 3–5, 13, 133, 134, 139
Art 22 ..... 6, 31, 49, 51, 78, 135, 140, 161
Art 22.1 ..... 5, 10, 135
Art 22.2 ..... 31, 67, 139
(a) 5, 138, 141
(b) 6, 138, 141, 142
(c) 138
Art 22.3 ..... 138, 139
Art 22.4 153
Art 22.5 ..... 4, 154, 155
Warsaw Convention (WSC) 1929—*cont.*
Art 22.6 155
Art 23 ..... 8, 120, 156, 159, 182
Art 23.2 157
Art 24 ..... 8, 135, 159, 162
Art 25 ..... 3, 5, 6, 31, 42, 81, 133, 135, 140, 142, 143, 145, 146, 148, 151, 152
Art 25A 135, 163
Art 26 ..... 75, 164, 165, 167, 168, 170, 171
Art 26.1 164
Art 26.2 81
Art 27 172
Art 28 ..... 5, 6, 173–179
Art 28.2 ..... 13, 162
Art 29 ..... 5, 6, 11, 49, 157, 167, 176, 177, 182
Art 29.2 ..... 13, 162, 184, 185
Art 30 ..... 186, 187, 189
Art 30.1 186
Art 30.3 ..... 108, 170, 187, 189
Art 30A 191
Art 31 ..... 192, 193
Art 31.1 186
Art 32 ..... 174, 195, 196
Art 33 54
Art 34 ..... 51, 196
Art 35 197
Art 40A 43

Protocols
Hague Protocol (HP) 1955 ..... 15, 16, 35, 58, 62, 68, 136, 143, 152
Montreal Protocol (No 4) of 1975 ..... 15, 35, 58, 136

Table of Rules

Hague Rules (HR) 14, 21, 23, 131, 183
Art IV.2(n) 158
Art IV.2(q) 126
Art X 7
Hague-Visby Rules (HVR) 116, 131, 183
Art IV.2(n) 113, 158
Hague-Visby Rules (HVR)—*cont.*
Art IV.2(q) 132
Hamburg Rules
Art 25.5 12
Uniform Rules Concerning the Contract of International Carriage of Passengers by Rail (CIV) 83

Page Intentionally Left Blank

Table of United Kingdom Legislation

Statutes

Carriage by Air Act 1961 ..... 16, 32
Parts I, II 32
s. 3 183
s. 4A 167
s. 5(1) 183
s. 10 136
s. 23(1) 123
Carriage by Air and Road Act 1979—
s. 2 167
s. 4 155
Carriage by Air (Supplementary Provisions) Act 1961 137
s. 5(2) 16, 136
Carriage of Goods by Sea Act 1924 21
Civil Aviation Act 1982, s. 105(1) 39
EEC Act 1972, s. 2(2) 16, 136
Factors Act 1889, s. 1(4) 70
Fatal Accidents Acts 183
Law Reform (Contributory Negligence) Act 1945, s. 1(1) 133
Law Reform Miscellaneous Provisions Act 1934 183
Limitation Act 1980, s. 39 185
Misrepresentation Act 1967 121
Sale of Goods Act 1979 ..... 59, 70, 77
Unfair Contract Terms Act 1977 122

Statutory Instruments

Air Carrier Liability Order 1998 (SI 1998/1751) 16, 136
Carriage by Air Acts (Application of Provisions) Order 1967 (SI 1967/480) 7, 37, 39
Art 1 7
Carriage by Air Acts (Implementation) Order 1999 (SI 1999/1312) 182
Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 2002/263) 15, 35
Carriage by Air Acts (Implementation of Protocol No 4 of Montreal 1975) Order 1999 (SI 1999/1312) 183
Carriage by Air (Parties to Convention) Order 1999 (SI 1999/131) 35
Carriage by Air and Road Act 1979 (Commencement No 2) Order 1997 (SI 1997/2565) 155
Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975) 10
Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) 25, 120, 122

Page Intentionally Left Blank

Table of International Legislation

European

Treaty of Rome—
- Art 189 (Art 249) 12
- Art 234 16

EC Regulation 295/91 ..... 10, 121

EC Regulation 2027/97 ..... 10–12, 16, 136
- Preamble 10
- Art 3 12
  - (1)(a) 12
- Art 6 12

EC Regulation 889/2002 11

EC Regulation 261/2004 (C-344/04) 10–13, 122, 183
- Art 3 11
  - (1) 12

EC Regulation 261/2004 (C-344/04)—*cont.*
- Art 3(1)(a) 11, 12
- Art 5(3) 12, 13
- Art 6 11

TFEU
- Art 288 12

France

Civil Code (France), art 1150 152

Germany

BGB (Germany)—
- art 252 152
- art 631 *ff* 160

USA

Restatement (2d) Contracts, s. 200 21

Page Intentionally Left Blank

PART ONE

Introduction to the Conventions on Carriage by Air

Page Intentionally Left Blank

CHAPTER ONE

The Scheme of Liability

1.1 THE MONTREAL CONVENTION (MC)

The general structure of the Warsaw Convention (WSC) and many of its provisions were retained in MC, which came into force in the UK on 28 June 2004. A significant feature of MC is that, unlike other transport law regimes, in certain cases the carrier's liability is absolute. Writing in 1996,[1] a Legal Adviser to the US Department of State said that previously "the tort law concept of unlimited liability was anathema . . . . Today, it is a fixture of international air law that the US Government would be most reluctant to see disappear."

The object of MC, like that of WSC, was to avoid costly litigation, protect the rights of the users of air carriage and to set reasonable limits upon the liabilities of the carrier.[2] Under MC the carrier is liable for occurrences during the carriage which cause injury or death or damage. It is also liable for damage caused by delay. The amount of damages recoverable is significantly larger than under WSC and the range of defences more limited. Jurisdiction has been extended to the "fifth jurisdiction" (where the passenger has his principal residence).

1.1.1 Personal injury and death

The carrier is liable for damage sustained in the event of the death of or personal (physical) injury to a passenger if the accident which caused it occurred during carriage (article 17.1).[3]

However, to the extent that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the claimant, the carrier is wholly or partly exonerated (article 20).[4]

As to the amount of damage, the carrier is liable in full for the actual loss suffered by the claimant. However, to the extent that that loss exceeds 100,000 SDRs,[5] the carrier will not be liable if either (a) the damage was not due to the carrier or (b) the damage was *solely* due to the negligence or other wrongful act of a third party (article 21).[6]

1. Mendelsohn, 21 Air & Space L 183 (1996). However, it has been suggested that the enthusiasm in the US for unlimited liability was shared only by Japan and Switzerland: Schmid, 22 Air & Space L 50, 51 (1997).
2. For the "guiding principles" behind MC see Bin Cheng (2004) 53 ICLQ 833, 844 *ff.*
3. The defence under WSC, that it has taken all necessary measures to avoid the damage or that it was impossible for it to do so (WSC art. 20), is no longer available to the carrier.
4. *Cf* WSC, art. 21.1 which referred the matter to the *lex fori.*
5. Unlike the position under WSC, the carrier's liability up to this figure is strict: MC, art. 21.
6. Unlike the position under WSC (art. 25) it makes no difference whether the claimant can establish that the accident was caused by intentional or reckless behaviour on the part of the carrier, its servants or agents.

It is a defence to the claim that it is out of time (article 35) or that it has been brought in the wrong forum (article 33). However, as to the latter, the range of possibilities was extended by MC to the "fifth jurisdiction" (where passengers have their principal residence: article 33.2).

1.1.2 Baggage

The carrier is liable for damage sustained in the event of the destruction, loss of, or (physical) damage to any "checked" (registered) baggage if it was caused by an occurrence during carriage, unless (and then only to the extent that) it resulted from an "inherent defect" in the baggage (article 17.2).[7]

The carrier is liable for damage sustained in the event of the destruction, loss of, or damage to "unchecked" (cabin) baggage if it was caused by the fault of the carrier or that of its servants or agents (article 17.2 *in fine*).

However, to the extent that the damage sustained in respect of baggage (checked or unchecked) was caused by or contributed to by the negligence or other wrongful act or omission of the claimant, the carrier is exonerated (article 20).[8]

In the absence of a special declaration of interest, the carrier's liability for the damage sustained is limited in amount (article 22.2) unless the claimant can establish that the destruction, loss or (physical) damage was caused intentionally or by reckless behaviour on the part of the carrier, its servants or agents (article 22.5).

It is a defence to the claim that it is out of time (article 35) or that it has been brought in the wrong forum (article 33).

1.1.3 Cargo

The carrier is liable for damage sustained in the event of the destruction, loss of, or (physical) damage to cargo, if it was caused by an occurrence during carriage (article 18.1), unless (article 18.2) the carrier proves that it resulted from:

(a) inherent defect, quality or vice of that cargo; or
(b) defective packing of that cargo, packing performed by a person other than the carrier or its servants or agents; or
(c) an act of war or armed conflict; or
(d) an act of a public authority carried out in connection with the entry, exit or transit of the cargo.

However, to the extent that the carrier proves that the damage sustained was caused by or contributed to by the negligence or other wrongful act or omission of the claimant, the carrier is exonerated (article 20).

The carrier's liability is limited in amount (article 22.3).[9] It is a defence to the claim that it has been brought in the wrong forum (article 33) or that it is out of time (article 35).

7. The defence under WSC, that he has taken all necessary measures to avoid the damage or that it was impossible for him to do so (WSC art. 20) is no longer available to the carrier.

8. *Cf* WSC, art. 21.1 which referred the matter to the *lex fori*.

9. Unlike the position under WSC (art. 25) it makes no difference if the claimant can establish that the accident was caused intentionally or by reckless behaviour on the part of the carrier, its servants or agents.

1.1.4 Delay

The carrier is liable for damage caused by delay unless it is proved that all necessary measures had been taken to avoid the damage or that it was impossible to do so (article 19).

To the extent that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the claimant, the carrier is exonerated, such to be proved by the carrier (article 20).

The carrier's liability is limited in amount (article 22.1) unless the claimant can establish that the damage was caused by intentional or reckless behaviour on the part of the carrier, its servants or agents (article 21.5).

It is a defence to the claim that it has been brought in the wrong forum (article 33) or that it is out of time (article 35).

1.2 THE WARSAW CONVENTION (WSC)

1.2.1 Personal injury and death

The carrier is liable for damage sustained in the event of the death of, or physical injury to, a passenger if the accident which caused the damage occurred during carriage (article 17), unless the carrier proves that it had taken all necessary measures to avoid the damage or that it was impossible for it to do so (article 20).

However, if the carrier proves that the damage was caused by or contributed to by the negligence of the claimant, the court might exonerate the carrier wholly or partly, in accordance with the relevant provisions of the *lex fori* (article 21.1). The carrier's liability is limited in amount (article 22.1) unless the claimant can establish that the damage was caused intentionally or by reckless behaviour on the part of the carrier, its servants or agents (article 25). It is a defence to the claim that it was brought in the wrong forum (article 28) or that it is out of time (article 29).

1.2.2 Registered baggage

The carrier is liable for damage sustained in the event of the destruction, loss of, or damage to, registered baggage, if it was caused by an occurrence during carriage (article 18.1), unless the carrier proves that it had taken all necessary measures to avoid the damage or that it was impossible for it to do so (article 20).

However, if the carrier proves that the damage was caused by or contributed to by the negligence of the claimant, the court might exonerate the carrier wholly or partly, in accordance with the relevant provisions of the *lex fori* (article 21.1).

The carrier's liability is limited in amount (article 22.2(a)) unless the claimant can establish that the destruction, loss or damage was caused by intentional or reckless behaviour on the part of the carrier, its servants or agents (article 25). It is a defence to the claim that it was brought in the wrong forum (article 28) or that it is out of time (article 29).

1.2.3 Unregistered baggage

Unregistered (cabin) baggage is outside the scheme of the Convention. The carrier's liability, if any, depends on national law: in countries of common law the tort of negligence or bailment.

1.2.4 Cargo

The carrier is liable for damage sustained in the event of the destruction, loss of, or damage to cargo, if it was caused by an occurrence during carriage (article 18.2), unless the carrier proves that it was solely caused by excepted causes (article 18.3). These include:

(a) inherent defect, quality or vice of that cargo;
(b) defective packing of that cargo performed by a person other than the carrier;
(c) an act of war or armed conflict; and
(d) an act of a public authority carried out in connection with the entry, exit or transit of that cargo.

To the extent that the carrier proves that damage was caused by or contributed to by the negligence or other wrongful act or omission of the claimant, the carrier is wholly or partly exonerated (article 21.2). In any event, the carrier's liability is limited in amount (article 22.2(b)).

It is a defence to the claim that it was brought in the wrong forum (article 28) or that it is out of time (article 29).

1.2.5 Delay

The carrier is liable for damage caused by delay (article 19) unless it proves that it had taken all necessary measures to avoid the damage or that it was impossible for it to do so (article 20).

As in the other cases, the carrier's liability is limited in amount (article 22) unless as regards passengers and baggage the claimant can establish that the destruction, loss or damage was caused intentionally or by reckless behaviour on the part of the carrier, its servants or agents (article 25). It is a defence to the claim that it was brought in the wrong forum (article 28) or that it is out of time (article 29).

CHAPTER TWO

Scope and Application of the Conventions

2.1 THE CONVENTIONS AND THE CONTRACT: THE CONFLICT OF LAWS

When a case falls within the scope (article 1) of MC (or WSC), the court of a contracting state applies the Convention to what is, *ex hypothesi*, an international contract, without resorting to normal rules of the conflict of laws. That is because a scope rule such as article 1 is a unilateral conflicts rule in the *lex fori* of a contracting state[1]: whenever a court in a contracting state characterises the case before it as a contract of the kind in question (defined by article 1), it applies the Convention as enacted in the *lex fori*.

When a contract does not fall within article 1, the parties to the contract of carriage or, more to the point, the states party to the relevant Convention *may* adopt the Convention and apply it to such contracts.[2] As regards international carriage between the UK and a state not party to the MC, however, the contract is governed by English common law.[3]

Whether a Convention applies *proprio vigore* or by adoption, the relevant provisions are incorporated into and become part of, the contract of carriage.[4] For the carriage of cargo the relevant provisions are supplemented by standard terms in the waybill.[5] The contract is its context and provides an important perspective when the Convention is unclear or incomplete. However, courts also commonly resort to the national law of the forum. That can often be justified on theoretical grounds of the conflict of laws when the *lex fori* is also the law of the place of performance (for example, where the accident occurred) or the law of the place of destination (for example, where the loss or damage was discovered and disputed).

1. Like scope rules of other Conventions such as art. 1 of CMR. International transport conventions like these are seen as *lex specialis* containing their own rule of the conflict of laws: Koller, Vor art. 1 para. 4.

2. Thus most of the rules of the WSC were adopted in the UK for non-international carriage by air: Carriage by Air Acts (Application of Provisions) Order 1967, art. 1.

3. As to which, see Fountain ch. 13.

4. As regards CMR, see *Buchanan v. Babco* [1978] AC 141, 152, *per* Lord Wilberforce in this sense. The air Conventions have been approached in the same way.

5. Since 17 March 2008 these have been the IATA air waybill Conditions of Contract (Cargo Services Conference Resolution 600b). Generally see Clarke and Yates, *Contracts of Carriage by Land and Air* (2nd edn London 2008) 3.707 *ff*. Clause 4 limits carrier's liability. An earlier version of clause 4 came before the High Court of Australia in *Siemens v. Schenker* (2004) 216 CLR 418. For a critical account of the decision see O'Reilly, 70 J Air Law & Com 393 (2005).

2.2 EXCLUSIVITY

The air Conventions do not purport to deal with all matters relating to contracts of international carriage by air but are exclusive on what they do cover.[6] In *Sidhu*[7] Lord Hope, with whom all other members of the House of Lords concurred, said (of WSC) that it "is clear from the content and structure of the Convention that it is a partial harmonisation only of the rules relating to international carriage by air". However, he continued: "I do not find in that phrase an indication that, in regard to the issues with which the Convention does purport to deal, its provisions were intended to be other than comprehensive."[8] He referred to some of its main provisions and concluded that the "idea that an action of damages may be brought by a passenger against the carrier outside the Convention in the cases covered by article 17 . . . seems to be entirely contrary to the system which these two articles were designed to create".[9] The same might well be said today of MC.

Sidhu[10] concerned a flight that was detained in Kuwait during the invasion of Kuwait by Iraq. One issue was whether WSC, which applied, provided "the exclusive cause of action and remedy in respect of claims for loss, injury and damage sustained" in the course of or arising out of this carriage by air.[11] More specifically, the issue was whether a passenger, who suffered personal injury arising out of detention in the terminal at Kuwait but for whom no action lay under WSC article 17, had an action in respect of that injury against the air carrier at common law. On this Lord Hope concluded,

"that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law."[12]

6. Nor do they deal with loss connected with carriage by air but unconnected with contracts of carriage, such as injury suffered by persons impacted by an air crash; e.g. *Glen v. Korean Airlines Co Ltd* [2003] EWHC 643 (QB); [2003] QB 1386.

7. *Sidhu v. BA* [1997] AC 430, 443 *ff*. This part of the judgment was quoted with approval in Quebec in *British Airways v. Safi* (1998) 205 RFDA 166, 170. See also *Fellowes v. Clyde Helicopters* [1997] 1 All ER 775, 791 *per* Lord Hope (HL); and as regards MC art. 17.1 *Barclay v. British Airways plc* [2008] EWCA Civ 1419; [2009] 3 WLR 369; [2009] 1 Lloyd's Rep 297.

8. P. 444. He then referred to the compromise central to the WSC (arts 23 and 24).

9. P. 447.

10. *Sidhu v. BA* [1997] AC 430.

11. P. 437 *per* Lord Hope.

12. P. 453 *per* Lord Hope. He continued:

> "An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. That indeed is the foundation upon which much of our own common law has been built up. The broad principles which provide the foundation for the law of delict in Scotland and of tort in English common law have been developed upon these lines. No system of law can attempt to compensate persons for all losses in whatever circumstances. But the assumption is that, where a breach of duty has caused loss, a remedy in damages ought to be available.
>
> Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the Convention must be judged. It was not designed to provide remedies against the carrier to enable all

Lord Hope also found support in the actual text of the Convention: "article 1(1) states that the Convention applies to '*all* international carriage of persons, baggage or cargo performed by aircraft for reward' ". Moreover, the relevant chapter heading, Chapter III,

"expresses its subject matter in the words 'Liability of the Carrier'. In contrast to the title to the Convention itself, which uses the expression 'Certain Rules', we find here a phrase which is unqualified. My understanding of the purpose of this chapter therefore ... is that it is designed to set out all the rules relating to the liability of the carrier which are to be applicable to all international carriage of persons, baggage or cargo by air to which the Convention applies".[13]

The same is true of the wording of the corresponding provisions of MC.

Moreover, article 22

"is important, because it limits the liability of the carrier ... in terms which enable the limitation of liability to be applied generally to all cases where the carrier is liable in the carriage of persons and of registered baggage and cargo .... The intention which emerges from these words is that, unless he agrees otherwise by special contract—for which provision is made elsewhere in the article—the carrier can be assured that his liability to each passenger and for each package will not exceed the sums stated. This has obvious implications for insurance by the carrier and for the cost of his undertaking as a whole .... The effect of these rules would, I think, be severely distorted if they could not be applied generally to all cases in which a claim is made against the carrier".[14]

The position stated by Lord Hope must now be read subject to the effect of European regulation: below 2.2.1.

In the US too, it has been held of WSC that it was intended to be an "entire liability scheme" which, when a case is within its scope, rules out alternative causes of action in state law.[15] The Convention will take precedence over state law causes of action "when the subject matter demands uniformity vital to national interests such that allowing state regulation 'would create potential frustration of national purposes' ".[16] Some courts in the

losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity."

13. P. 444–445 *per* Lord Hope (emphasis added). He was speaking of WSC but the same could be said now of MC. Concerning the application of the doctrine to MC see *Knowlton v. American Airlines*, 2007 WL 273794 (D Md, 2007); noted by DeMay, 73 JALC 131, 197 (2008).

14. P. 446. Here too the same could be said today of MC.

15. *Velasquez v. Avianca*, 23 Avi 17,153 (SD Fla, 1990); *Re Air Disaster at Lockerbie*, 928 F 2d 1267, 1280 (2 Cir, 1991); *Shah v. Pan Am World Services, Inc*, 148 F 3d 84, 97–98 (2 Cir, 1998); *Waxman v. CIS Mexicana de Aviacion, SA*, 13 F Supp 2d 508, 511 (SDNY, 1998); *Robertson v. American Airlines*, 277 F Supp 2d 91 (DDC, 2003). Germany *idem*: *BGH 28.11.1978*, NJW 1979.496. *cf*, however, the view of the American cases on the point expressed in *Sidhu* pp. 451–452. See e.g. *Abrahamson v. JAL*, 18 Avi 18,064 (3 Cir, 1984): the injury which occurred during the carriage by air was not an "accident" and thus gave rise to no liability under WSC. Whereas this would have left the carrier without liability in England, the court held that the passenger could still seek a tort based remedy in state law. However, in *Adler v. Malev*, 23 Avi 18,157 (SDNY, 1992) a passenger unable to recover for "psychic injury" resulting from an accident (hijacking) during air carriage was not permitted to bring suit in that regard under state law. Generally, see Alimonti, 64 JALC 29, 58 *ff* (1998) and Mann, 72 JALC 401 (2007) with analysis of *Mbaba v. Air France*, 457 F 3d 497 (5 Cir, 2006). *Cf* France: in *Mahomed v. British Airways* the Court of Cassation (15.7.1999) held that the WSC did not provide the only remedy of a passenger held hostage in Kuwait on the outbreak of war with Iraq.

In the US the same principle has been applied to MC: *Ugaz v. American Airlines*, 576 F Supp 2d 1354, 1360 (SD Fla, 2008), applying the WSC case of *El Al v. Tseng*, 525 US 155 (1999); *Booker v. BWIA*, 2007 WL 1351927 (EDNY, 2007); DeMay 73 JALC 131, 229 (2008).

16. *Lockerbie* (above), p. 1275, quoting *San Diego v. Garmon*, 359 US 236, 244 (1959).

US refer to this as the "doctrine of preemption".[17] The uniform regime "preempts claims for '*damages*, however founded' but not claims for equitable relief such as claims for an injunction".[18]

2.2.1 European Regulation

(a) Scope

In 1991 the European Community adopted a Regulation in respect of passengers denied boarding as a result of carrier overbooking.[19] In 1997 it was followed by another Regulation "to improve the level of protection of passengers involved in air accidents" and "to remove all monetary limits of liability" imposed at the time by WSC article 22.1.[20]

Currently the principal EC Regulation in this area is Regulation 261/2004 (C-344/04), providing for compensation and assistance to passengers in the event of their being denied boarding, or suffering flight cancellation[21] or lengthy flight delay.[22] The relationship between 261/2004 and the Conventions, on the one hand, and the earlier Regulations, on the other is not as clear as one might wish, and has been the subject of debate.[23]

17. E.g. *Turturro v. Continental*, 128 F Supp 2d 170, 180 (SDNY, 2000), in which a claimant who had a panic attack as the aircraft was leaving was not permitted to bring an action for false imprisonment in respect of what occurred on board the aircraft. Doctrine applied to MC in *Best v. BWIA*, 581 F Supp 2d 359 (EDNY, 2008).

Note that the doctrine applies also to domestic flights where the Conventions do not apply, e.g. *Martin ex rel Heckman v. Midwest*, 555 F 3d 806 (9 Cir, 2009). For analysis of pre-emption under WSC see e.g. *Rogers v. American Airlines*, 192 F Supp 2d 661 (ND Tex, 2001); and J.G. Sams, 68 JALC 731 (2003). The doctrine was applied to MC in *Aikpitanbi v. Iberia*, 533 F Supp 2d 872 (ED Mich, 2008). As regards flight cancellation see Tompkins, 34 Air & Space L 421, 423 (2009). Generally see the Symposium published in 84 Tul L Rev no 5 (2010).

18. *Bayaa v. United Airlines* 249 F Supp 2d 1198, 1202 (CD Cal, 2002). In this case the claimant obtained a declaration that to remove persons of perceived Arab ethnicity from flights was illegal, and an injunction from doing so in future. See also *King v. American Airlines*, 284 F 3d 352 (2 Cir, 2002). Abeyratne (2002) 35 ETL 401. The same applies, it has been held, to rules of set off: *Sompo Japan v. Nippon Cargo Airlines*, 522 F 3d 776 (7 Cir, 2008).

A passenger has also been allowed to bring an action for damages for false imprisonment: *Fournier v. Lufthansa*, 191 F Supp 2d 996 (ND Ill, 2002). In this case the claimant was arrested (and convicted) for gun smuggling in Greece.

19. Regulation 295/91. Generally see Wouters (2004) 39 ETL 151.

20. Preamble to Regulation 2027/97. It applied to "Community air carriers" (as defined in art. 2(1)) and their passengers, without stating any territorial limit.

21. In Sweden it has been held that cancellation is not delay actionable under MC art. 19: *Brännströms v. Ryanair*, Svea Court of Appeal (26.5.2010), case T 3320-09.

22. On the everyday application of the Regulation from the airline point of view see Arnold, 32 Air & Space L 93 (2007). As regards jurisdiction in such cases see *Rehder v. Air Baltic* Case C-204/08; [2009] ILPr 44. As regards claims under the Regulation by non-professionals see Arnold and de Leon, 35 Air & Space L 91 (2010); and http://www.euclaim.co.uk/. As regards the meaning of "operating carrier" in the Regulation see the Civil Aviation (Denied Boarding, Compensation and Assistance) Regs 2005/975. On the distinction between delay and cancellation see *Sturgeon v. Condor Flugdienst* ECJ Joined Cases C-402/07 & C-432/07 [2010] 2 CMLR 12; [2010] 1 Lloyd's Rep 522.

Similarly, in the US passengers with confirmed tickets for international flights, who were "bumped" from the flight booked, have been allowed to seek compensation under local law: *Weiss v. El Al*, 433 F Supp 2d 361, 2006 WL 1409736 (SDNY, 2006); Beiersdorf and Guidea, 72 JALC 207, 211.

23. E.g. Basedow, Unif. L. Rev 2003. 31, 42 *ff*. Staudinger and Schmidt-Bendung, VersR 2004.971, consider the relationship and consistency of 261/2004 with the air Conventions, as well as other Regulations and (German) national law. If there is inconsistency between Regulations and Conventions or between Regulations *inter se*, *prima facie* this is a problem of the law of Treaties, studied by Yang Zhao in a doctoral dissertation (submitted in Cambridge in 2007) *Multimodal Transport and Competing Regimes*, ch. 4.

(i) The Conventions

The validity of 261/2004 was challenged in the European Court of Justice as being inconsistent with MC[24] but, while the ECJ agreed that the MC is part of the Community "legal order", it rejected the charge of inconsistency.[25] The liability of Community air carriers "in respect of passengers and their baggage" is governed "by all provisions of the Montreal Convention *relevant* to such liability".[26] In *Walz v. Clickair*, for example, MC was applied to loss of checked baggage on a flight between Spain and Portugal.[27] No charge of inconsistency was made.

(ii) The Regulations

The scope of Regulation 261/2004 is extra territorial as regards the European Community.[28] The Regulation applies not to territories as such but to *passengers* travelling to or from certain territories, and their claims. In *Emirates Airlines v. Schenkel*,[29] for example, claimant S booked a journey to which MC applied from Düsseldorf to Manila and back via Dubai. The leg back from Manila to Dubai was delayed and S sought compensation under the Regulation which could only succeed if the round trip was a single flight. The ECJ held that a "flight" in contradistinction to a "journey" was essentially a transport operation and that the leg from Manila to Dubai was a distinct flight, and evidently not one "departing from an airport located in a territory of a Member State" as required by the Regulation.[30] The claim by S for compensation for delay under 261/2004 failed.

24. Notably MC art. 19 dealing with delay. Under art. 19 carriers are not liable for delay if it could not be avoided by all reasonable measures; and, if liable, only liable to a specified number of SDRs. Under EC Regulation 261/2004, however, the extent of liability increases with the length of the delay and may include e.g. meals and hotel accommodation.

25. Case C-344/04; [2006] ECR I-403. The Court said that generally delay may cause two types of damage "First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance care for everybody concerned, through the provision, for example, of refreshments . . . . Second, passengers are liable to suffer individual delay, inherent in the reason for travelling, redress for which requires a case-by-case assessment" of damage. The relevant provisions of the MC "merely govern the conditions under which . . . the passengers concerned may bring actions for damages by way of redress on an individual basis . . . . It does not follow . . . that the authors of the Convention intended to shield . . . carriers from any other form of intervention . . . . [T]he assistance and taking care of passengers envisaged by Article 6 of Regulation No. 261/2004 . . . are not among those whose institution are regulated by the Convention". See Balfour, 5 (4) S & TI (2005).

As regards the possibility of inconsistency (none) between WSC art. 29 and EC Regulation 2027/97, see *Bogiatzki v. Deutscher Luftpool* Case C-301/08 NYR. However in *BGH 10.12.2009* it was held that, the contract of carriage being governed by German law, the 2-year period under MC art. 35 was replaced by the 3-year period in German law: art. 35 applied only to actions brought under MC, whereas the action in *Bogiatzki* was for flight cancellation. In *Bogiatzki* the ECJ decided that the time bar in art. 29 WSC *did* apply to a claim in respect of a passenger's personal injury sustained in 1998.

26. Reg (EC) No 2027/97 (emphasis added). Art. 3(1). MC was implemented by Reg 2027/97, as amended by No 889/2002. "Relevant" was stressed in Case C-63/09 [18]. WSC, however, does not form part of the Community legal order which the ECJ has jurisdiction to interpret in the procedure for a reference for a preliminary ruling: *Bogiatzki v. Deutscher Luftpool* Case C-301/08 NYR, 22 October 2009.

27. Case C-63/09, which applied MC art. 17 and art. 22.

28. Art. 3.1 extends it both to passengers "departing from an airport located in the territory of a Member state to which the Treaty applies" and to those coming to such an airport "from an airport located in a third country".

29. Case C-173/07; [2009] 1 Lloyd's Rep 1.

30. Art. 3(1)(a).

Inconsistency and conflict may also arise between successive Regulations.[31] What then? One answer might be based on the "solution" suggested in the UN Convention on Multimodal Transport 1980.[32] If proceedings are brought in a Contracting State [concerning transport] "between two States of which only one is a contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court . . . may, in accordance with the obligation under such convention, give effect to the provisions thereof". This would appear to favour application of the earlier two Regulations.[33]

Another answer might be to give precedence to a text which binds both parties over one which binds only one of them.[34]

(b) Enforcement

It is unclear whether private persons such as passengers can "enforce" Directives against carriers.[35] In *Marshall I*,[36] the ECJ, relying exclusively on a textual interpretation of the relevant Treaty,[37] set out the principle that, given that Directives are addressed to Member States, they can impose obligations on the State but not on private persons. Consequently, a Directive could not be invoked "horizontally", that is, by one private person against another (because the latter would otherwise become the subject of an obligation of a kind normally reserved for States).[38]

(c) Defence

A defence in article 5.3 of Regulation (EC) 261/2004 arises, where the carrier "can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".

Such might be the case where a flight is cancelled because of bad weather. This was so in *Brännströms v. Ryanair*,[39] as it did not appear to be reasonable, said the court

31. For example, the scope of Regulation 261/2004 (re flight delay or cancellation) is extra territorial as regards the European Community: Art. 3.1 extends 261/2004 to both passengers "departing from an airport located in the territory of a Member state to which the Treaty applies" and to those coming to such an airport "from an airport located in a third country". An earlier Regulation (2027/97), which has not been repealed, applies simply to EC air carriers. Art. 3.1(a) provides that the "liability of a Community air carrier . . . shall not be subject to any financial limit". Art. 6 requires that art. 3 "shall be included in the Community air carrier's conditions of carriage". So, thus alerted, can passengers in New York start actions against e.g. KLM in respect of injuries sustained on a flight having no territorial connection (of the kind required by 261/2004) with the EC?

32. Art. 38. Not in force but the product of much thought and negotiation at the time. Classic studies include Lauterpacht (1936) 52 LQR 494; Jenks (1953) 30 BYIL 401. More recent studies include Czaplinski and Danilenko (1990) 21 NYIL 3; and Tetley, *International Conflict of Laws* ch. 10.

33. As does art. 25.5 of the Hamburg Rules on carriage by sea.

34. *Cf* art. 30.4 VCLT 1969.

35. My thanks to my colleague Dr Albertina Albors-Llorens for alerting me to the literature on this point.

36. Case 152/84, [1986] ECR 723.

37. Art. 189 EC—later art. 249 EC and now art. 288 TFEU.

38. See Case C-555/07, *Seda Kücükdeveci v. Swedex*, (ECJ 19 Jan 2010); Albors-Llorens [2010] CLJ _ _; For a critical study of the policy underlying the "core rule" that generally denies horizontal direct effect to Directives see Craig, 34 EL Rev [2009], 349. Concerning the possibility of indirect horizontal application see further Drake, 30 EL Rev [2005] 329.

39. Svea Court of Appeal (26.5.2010), case T 3320-09. Ryanair was awarded compensation for its litigation costs both in the District Court and in the Court of Appeal.

"that Ryanair, for example, should have had an extra crew available for service in the situation which arose. In light of this, Ryanair must also be deemed to have proven that the cancelled flight was a consequence of extraordinary circumstances within the meaning set forth in Article 5.3 of the Regulation, i.e. circumstances which could not have been avoided, even if Ryanair had taken all reasonable measures, taking into consideration the company's personnel and financial resources."

2.3 BEYOND THE CONTRACT OF CARRIAGE

2.3.1 Carriage

If a carrier fails even to begin to carry out the carriage contracted for, many, if not most, courts agree that any liability on the part of the carrier arises not under the Conventions but under national law.[40] This may not be self-evident to the passenger who turns up to check in and is turned away[41]; but it follows from article 17, the central provision in (both WSC and) MC, which regulates the liability of carriers in respect to accidents "on board the aircraft or in the course of any of the operations of embarking or disembarking or disembarking".

The notion of non-performance was taken a step further, however, in *Shifrin*.[42] A flight from Paris to Chicago was cancelled because of bad weather. However, the carrier boarded the passengers on a flight from Paris to New York, assuring them that it would arrange onward carriage from New York to Chicago. When they arrived at (Kennedy airport) New York, the carrier's agent there refused to arrange their onward carriage to Chicago. The passengers incurred considerable expense on an overnight stay and a transfer to La Guardia airport in order to take a flight they had to pay for from New York to Chicago.

Given that carriers were liable (under WSC) for accidents during transit on flights contracted for and that carriers are liable for baggage or cargo that is misdirected, the plight of the passengers in New York appears to be something for which carrier (Air France) liability was limited under WSC, as indeed was argued by defendant AF. Not so, held the court. "Put simply and at the risk of stating the obvious, New York is not Chicago, providing air travel to New York does not satisfy a contract to provide air travel to Chicago."[43] Less obvious is the answer to (what some might see as) the relevant question, whether providing air travel (only) to New York, is (not non-performance but short) performance in breach of the contract subsequently agreed to provide air travel from Paris to Chicago via New York. The language of the court is reminiscent of the Denning doctrine of fundamental breach in the domestic law of the UK,[44] and of the more extended notion of quasi-deviation in federal carriage law in the US.[45] Such notions are not found outside countries of common law, which is why they should not be allowed to affect the

40. As regards WSC: *Wolgel v. Mexicana*, 821 F 2d 442 (7 Cir, 1987). Giemulla, Introduction para. 19. The same view has been taken of the scope of CMR: Clarke, CMR, para. 65. National law applies under the WSC to certain questions specified: contributory negligence (art. 21), periodical payment of damages (art. 22.1), procedural matters (art. 28.2), calculation of the limitation period (art. 29.2).

41. However as regards such carrier non-performance see EC Regulation 261/2004 (C-344/04) above 2.2.1(a).

42. *Shifrin v. Air France*, 27 Avi 18,514 (ND Ill, 2001).

43. P. 18,517.

44. See *Yeoman Credit Ltd v. Apps* [1962] 2 QB 508 (CA). Also the earlier decision in *The Cap Palos* [1921] P 458 (CA).

45. See Tetley, *Marine Cargo Claims* 3rd edn (Montreal 1988) ch. 35.

interpretation of uniform law such as WSC or MC.[46] The suspicion lingers that in *Shifrin* the court allowed national law to influence the interpretation of the WSC. There is reason to hope that an English court is not likely to follow suit.[47]

2.3.2 Carriers: persons regulated

Although MC, like WSC, is exclusive as regards the liability of the carrier (and its servants and agents) it does not apply to other persons with possible liability arising out of the same incident; these include a manufacturer or certifying authority, as regards defects in the aircraft, or security firms, as regards hijacking or robbery. Nor do the Conventions apply to persons outside the contract of carriage, such as the victims of a crash who were on the ground or persons on board who have "hitched a lift", whether by invitation or as stowaways.

A questionable case is *Perrett v. Collins*,[48] in which a passenger, on board by invitation of the operator and pilot of a light aircraft, was injured when it crashed. The passenger brought a successful action based in the tort of negligence against the inspector, who certified the aircraft as fit to fly. The Court of Appeal expressed the duty of care, which extended to the operator too, in broad terms which on their face might be thought to apply to carriage by air governed by WSC or MC. The defence relied rightly, it is submitted, on a shipping case, *The Nicholas H*,[49] in which an action by a cargo owner against a classification society which had certified that the eponymous vessel was fit to go to sea failed because recovery would outflank the allocation of risks and liabilities achieved by the Hague Rules, the Convention which governed relations between the claimant and the carrier in that case. The "outflanking" point was referred to by Hobhouse LJ[50] in *Perrett* but the situation before him he distinguished on various grounds,[51] none of which, it is submitted, appear to be specifically or sufficiently addressed to that point.

46. In this sense as regards the HR and carriage by sea see *The Antares (No 2)* [1986] 2 Lloyd's Rep 633, 637 *per* Steyn J, with reference to the opinion of Lord Macmillan in *Stag Line v. Foscolo Mango* [1932] AC 328, 350. See also Clarke, CMR, para. 31.

47. See *The Antares (No 2)* (above).

48. [1998] 2 Lloyd's Rep 255 (CA).

49. *Marc Rich v. Bishop Rock Marine (The Nicholas H)* [1996] 1 AC 211.

50. P. 264.

51. An "injured passenger's sole remedy may be against the person who has certified the aircraft as fit to fly" p. 259. Also p. 264:

> "Its reasoning was essentially directed to considerations relevant to economic loss and is not germane to personal injury. (2) It does not, nor does it purport to, re-open established categories of liability, in particular, established categories of liability for personal injury. (3) The decision was based on broad policy considerations relating to the reorganisation and structure of maritime trade which are peculiar to that situation. (4) The role of [the aircraft inspector] was not a subsidiary one to that of [the aircraft constructor and operator]; [the inspector] had an independent and critical role in the granting of the certificate of fitness for flight, without which it could not take off. (5) The existence of a duty of care owed by [the inspector and his employer] would not duplicate the liability of [the operator]; it was perfectly possible that circumstances could exist where an innocent third party would suffer personal injury and be unable to recover from [the operator]. (6) A passenger about to be taken up in an aircraft is entitled to assume that it has met the applicable safety requirements and that those involved have taken proper care, and to rely upon it; this element was lacking in [*The Nicholas H*]. (7) The analogy sought to be drawn between the positions of the [defendant surveyor in *The Nicholas H*] and the [inspector's employer], while showing some features in common, suffices neither to bring the present case within the reasoning in [*The Nicholas H*] nor to take it out of the established categories where defendants, sometimes public bodies, have been held liable for personal injuries suffered by members of the public affected by their activities. [*The Nicholas H*] should not be regarded as an authority which has any relevance to cases of personal injuries . . . ".

See also Swinton Thomas LJ (p. 269) and Buxton LJ (p. 277).

CHAPTER THREE

History: From Warsaw to Montreal[1]

3.1 THE WARSAW ''SYSTEM''

The "system" began with the Warsaw Convention (WSC) of 1929,[2] which came into force on 13 February 1933. It was the subject of a major reform, the Hague Protocol (HP), in 1955. The UK adopted HP and it came into force on 1 June 1967.[3] In 1961, the Guadalajara Convention (GSC)[4] extended WSC rights and liabilities to the actual carrier, as practice had developed since 1929 in such a way that the actual carrier might be one other than the contracting carrier, whether the actual carrier performed the carriage throughout on all stages or on only one or more stages.[5] The UK adopted the Montreal Protocol of 1975, which amended the rules relating to the carriage of goods and which came into force in the UK on 14 June 1998.

The evolution of the "system" culminated in the Montreal Convention 1999 (MC).[6] It was signed on 28 May 1999, and came into force in the UK on 28 June 2004.[7] The two Conventions (MC and the last version of WSC) may still operate in tandem.

The MC, in the words of its Preamble, was intended to "modernise and consolidate the Warsaw Convention and related instruments".[8] Indeed, it consolidated six different legal instruments collectively known as the Warsaw "system". "System" was something of a euphemism for what might have given rise to "at least 44 permutations in what aspires to be a system of international uniform law".[9] MC was intended "to rationalise" what has been described as "a fragmented and ineffective method of dealing globally with liability proceedings in cases of accidents".[10] Fragmentation was to be found mainly in the different liability limits in force in different parts of the world.

1. Generally, see Fountain ch. 1; and Leloudas, *Risk & Liability in Air Law* (London 2009) ch. 4.

2. A succinct account of the events leading up to the 1929 Convention can be found in the judgment of Lord Reed in *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, 129 *ff* (Ct Sess). See also Bin Cheng (2004) 53 ICLQ 833.

3. It was not then in force in the US, which retained the 1929 version, until 1999.

4. Signed at Guadalajara 18 September 1961, Cmd 1568, ICAO Document 88181.

5. Subsequently, the operation of the regime, as regards liability limits, was modified by inter-carrier agreements, which did not have the status of Conventions.

6. It was the work *inter alia* of a special group set up by ICAO, as well as IATA. IATA, incorporated in Canada in 1945, represented in 1999 the interests of more than 260 airlines from approximately 150 countries, carrying approximately 98 per cent of passengers on scheduled international flights. *Cf* Lorne Clark [1999] TAQ 68.

7. The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002: SI 2002/263. As regards the EU see Paulin [2004] RFDA 260.

8. Generally, see Batra, 65 J Air L & Com 429 (2000).

9. Bin Cheng, 49 ZLW 287, 295 (2000).

10. Rattray, ICAO, Doc. P10–05/99.

3.1.1 Different limits on liability

The US did not ratify the HP reform of 1955. In particular, it retained the liability limits of 1929—not because it was satisfied with the latter but because it was dissatisfied with both those of 1929 and 1955. It sought, however, to satisfy domestic pressure by agreeing the Montreal Agreement of 1966 which set limits higher than those of 1929 and of 1955. Nonetheless, many claimants before US courts sought with some success to go through the 1966 ceiling, as the limit was still widely perceived to be too low.

In 1996, the Intercarrier Agreement on Passenger Liability, to which most major carriers around the world were party, was concluded.[11] This allowed recovery of damages for death and personal injury without limit. The carrier's liability was strict up to 100,000 SDRs. Above that figure the carrier was liable for proven accidental loss, unless the carrier could establish the defence of contributory negligence by the claimant provided for by WSC article 20.[12] The provision in the 1996 Agreement is the precursor of the corresponding provision of MC, article 21, which is now in force.[13]

Higher limits, essentially the same limits as those in the US, were applied to carriage to, from, or within the EU by Council Regulation (EC) No 2027/97.[14] The latter, however, (differs from the regime in the US in that it) also provides for advance payments to claimants[15] and criminal penalties for carriers if, for example, they do not include certain terms in their conditions of carriage.

The validity of the Order in force in England, which gave effect to the Regulation, was challenged[16] on the ground that the Regulation violated Member States' obligations to non-Member States under the WSC. The court held that there was indeed a conflict between the Order and the WSC but dismissed the challenge (an application for "judicial review" of the Order) because the consequences of such a conflict were regulated by article 234 of the Treaty of Rome.

3.2 REASONS FOR REFORM

3.2.1 Harmonisation

A primary purpose of the Conventions, like that of other transport conventions, is harmonisation of the law.[17] In particular, courts have understood this to include harmonisation of documentation as well as "procedures for dealing with claims arising out of

11. For more detail, see Pickelman [1998] J Air L & Com 273, 289 *ff*. The Agreements of 1966 and 1996 did not have the status of Conventions (treaties) but of private agreements between carriers. They were regarded as consistent with WSC, which remained in force in its original 1929 version in the US.

12. Generally see Koning, 33 Air & Space L 318, 323 *ff* (2008). For the unusual position in Nigeria see Majiyagbe, 33 Air & Space L 346 (2008).

13. It was ratified by the US and certain other States (not including the UK) on 4 November 2003. It came into force in the UK on 28 June 2004.

14. OJ 1997 L285/1, implemented in the UK by the Air Carrier Liability Order 1998: SI 1998 No 1751, made by the Carriage by Air Act 1961, as applied by the Carriage by Air (Supplementary Provisions) Act 1962, s. 5(2) and of the EEC Act 1972, s. 2(2). On this Directive see further Chapter 2, above.

15. IATA was opposed to these: Weber & Jakob, 21 Air & Space L 175, 179 (1996).

16. *R v. Secretary of State, ex parte IATA* [2000] 1 Lloyd's Rep 242; [1999] 2 CMLR 1385; Grief [2000] JBL 92.

17. *Sidhu v. BA* [1997] AC 430, 444, 453 *per* Lord Hope, a decision cited with approval in *El Al v. Tseng*, 525 US 525, 142 L Ed 2d 576, 590 (1999). Also *Fellowes v. Clyde Helicopters* [1997] 1 All ER 775, 790 *per* Lord Hope (HL). CMR: *Gefco v. Mason (No 1)* [1998] 2 Lloyd's Rep 585, 590 *per* Morritt LJ (CA). HVR: *The Hollandia* [1983] 1 AC 565, 575 *per* Lord Diplock.

international transportation"[18]; and of the limits on "the potential liability of air carriers in the event of accidents".[19] Until MC came into force, harmonisation of the liability limits were no longer the case,[20] mainly because of "the perception in many quarters that the limits of liability were too low", with the result that in the 1990s

"the entire Warsaw Convention system was vulnerable to denunciation by the US government. Denunciation of the Convention by the US would effectively abolish a large part of the framework which carriers and their insurers have relied on for decades to resolve claims arising in international transportation."[21]

Hopefully the vulnerability of "the entire Warsaw Convention system" is now a thing of the past.

3.2.2 Reallocation of risk

On the one hand, the perception that limits were too low was coloured by the greater value put on human "life and limb" in the course of the twentieth century. Whereas only the wealthy could afford to travel by air in the 1930s and that for them and their heirs the amount of compensation was of little concern,[22] realistic levels of compensation became an issue only in the post-war world of mass tourism. On the other hand, the main reason for the relatively low monetary limit of 1929 was no longer accepted in the 1950s. In 1929 this was the "necessary protection of a financially weak industry".[23] The limit was thought to enable airlines to attract capital that might "otherwise be scared away by the fear of a single catastrophic accident".[24] Airlines would be able to obtain affordable insurance rates.[25] The limit "allowed for the inability of carriers to insure against such risks while admitting that passengers could obtain insurance themselves".[26] The passengers of 1929 were wealthy people who could easily insure themselves if, indeed, they bothered to do so.

Generally, the passenger of 1999 was a different person altogether, as is the passenger of 2010. For the well-run airline of the 1990s, when MC was drafted, the insurance cost for a wide-bodied aircraft was less than one per cent of operating costs and for some of the largest aircraft even less than that.[27] An ICAO Study Group set up preparatory[28] to what became the draft MC concluded that to raise the limits in the way that was eventually

18. *Floyd v. Eastern*, 872 F 2d 1462, 1467 (11 Cir, 1989), with reference to Minutes, Second International Conference on Private Aeronautical Law, 4–12 October, Warsaw 13 (transl. Robert C. Horner and Didier Legrez 1975) at 85 and 87. See also in this sense e.g. *El Al v. Tseng*, 525 US 525, 142 L Ed 2d 576, 590 (1999). For an outline of the history of the Warsaw System, see Ortino and Jurgens [1999] J Air L & Com 377 and Pickelman [1998] J Air L & Com 273.

19. *Floyd v. Eastern*, 872 F 2d 1462, 1467 (11 Cir, 1989). See also in this sense *Transworld v. Franklin Mint*, 466 US 243, 256, 80 L Ed 2d 273, 284 (1984).

20. See (above) 2.1 and 2.2.

21. Margo, 24 Air & Space L 134 (1999).

22. De Juglart, para. 2824.

23. *Floyd v. Eastern*, 872 F 2d 1462, 1467 (11 Cir, 1989).

24. Lowenfeld and Mendelsohn, 80 Harv LR 497, 499 (1967).

25. *Ibid* p. 500.

26. *Floyd* (above) p. 1462.

27. Moreover, it is likely that as a percentage of operating costs, insurance will be a smaller figure for large airlines than for small. In 1995 the E.C. Commission stated that for "Community carriers" liability insurance was as little as between 0.1 and 0.2% of operating costs.

28. See Weber & Jakob, 21 Air & Space L 175, 177 *ff* (1996).

agreed would cost no more than $2 *per* round trip.[29] Indeed there was a view that once MC had bedded in there would be fewer litigated claims (especially in the US), liability would be more predictable and that insurance costs might even come down. For cargo interests the limits have usually been less of an issue. Well aware of the Convention limits they have tended to rely for compensation mainly on insurance. For many airlines of 2010, however, insolvency (the spectre of the 1930s) is a threat once again.

3.2.3 The interests of carriers

The need for reform, notably on uniform limits, was widely accepted among the 147 states party to the WSC (in one form or another)[30] in 1999. The initiative for reform, however, was taken by carriers rather than governments.[31] Carriers were motivated in the 1990s, first, by the fear that the Warsaw system would break up unless there were a general and universal agreement on problematic points, notably liability limits. Second, most of the carriers wanted a regime that would better please their customers. The relevant customer was not the trader who might lose cargo but the passenger who might lose life or limb. It was perceived as not being in the carriers' interests to be seen in protracted wrangling with passengers over liability.

Nonetheless, it was ruefully observed in 2000 of the draft MC that the "Convention is no longer a Convention for airlines. It is a Convention for consumers/passengers".[32] Indeed, the Preamble to the MC recognises "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 was described at the time as "the key principle that imbues the whole Convention".[33] The Preamble to MC reads thus:

MONTREAL CONVENTION, 1999

CONVENTION
FOR THE UNIFICATION OF CERTAIN RULES FOR
INTERNATIONAL CARRIAGE BY AIR

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter

29. Batra, 65 J Air L & Com 429, 434 (2000). The average round trip ticket cost at the time was $620: Weber & Jakob, p. 178. *Cf* Margo, 24 Air & Space L 134, 138 *ff* (1999).

30. Moreover, of the 184 Contracting States of ICAO, 72 (representing 80% of international passenger traffic) responded to a questionnaire sent by an ICAO study group at the time: Batra, p. 434.

31. Mendelsohn, 21 Air & Space L 183, 184 (1996). In particular, a striking influence was the "Japanese Initiative"—the action of 10 Japanese carriers in waiving limits in 1992 "in a culture where executives traditionally apologise promptly and publicly if corporate activities harm members of the public": Harold Caplan "What's *really* new in the Montreal Convention 1999" (Paper to IATA Legal Symposium, Dubai, 4 April 2001). He also suggests that the Japanese may have been influenced by the published work of Bin Cheng. See Caplan [1993] 10 Int ILR 327 concerning the Japanese Initiative. Developments were also influenced by perceptions of what would be acceptable to the US Senate: Mendelsohn *loc cit* (perhaps for the last time!). In any event Bin Cheng later described the "Japanese Initiative" as a move which "stunned the aviation world" and stirred ICAO to action: (2004) 53 ICLQ 833, 842.

32. Whalen, 25 Air & Space L 12, 14 (2000). The Drafting Committee was composed of delegates from a group of countries called "The Friends of the Chairman". The author complains (p. 15): "Unfortunately, the airlines had few 'friends' present." For the history of the change of orientation from a Convention for carriers to a Convention for consumers see Bin Cheng, 49 ZLW 484 (2000). For comment and analysis see De Leon and Eyskens, 66 J Air L & Com 1155.

33. Bin Cheng, 49 ZLW 287, 293 (2000). However, in the same year, a Japanese court decided for a carrier apparently by reference to the original aim of the 1930s to protect a nascent industry: *DC Tokyo 25.9.2000*, as reported in Univ L Rev 2002.922.

referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

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;

HAVE AGREED AS FOLLOWS.

3.3 THE MONTREAL REGIME

3.3.1 Limits

In relation to passengers' death or bodily injury, the carrier is liable without limit. However, if the sum claimed exceeds the "limit" of 100,000 SDRs, the carrier may still be liable without limit, but may be excused[34] (liability over 100,000 SDRs) if it proves absence of fault or that it was solely the fault of someone else. This is a "limit" in the sense of the limit of strict liability: it is the line at which liability ceases to be strict and becomes based on fault, however, with a reversal of the usual burden of proof. A purpose of the two tier system was to take account of "the diversity of socio-economic circumstances and variance on the cost of living in different parts of the world".[35] Although the variance on the cost of living in different parts of the world may not be the same now as it was in 2000, the underlying purpose remains.

One of the objections to uniform law through treaty based conventions is that the process of modification is slow and cumbersome—once original agreement is achieved, the regime is written in stone and impervious to the winds of change. To meet this kind of objection, article 24 of MC provides a mechanism for the revision of limits, the feature most likely to become outdated, and this mechanism has been triggered since MC came into force. That is justifiable on the ground that "the law of treaties accepts that clear and concordant practice under a treaty may establish the interpretation of a treaty's provisions and thus enable them to fit the times".[36]

34. The aviation industry argued successfully "that there is no transportation context where liability is both absolute and unlimited" and aviation did "not wish to be the pioneer": Mendelsohn, p. 184.

35. Batra, 65 J Air L & Com 429, 435 (2000). For an outline of the scheme of liability as such, see Chapter 1, 1.1, above.

36. Gardiner *loc cit*. See art. 31.3(b) of the Vienna Convention on the Law of Treaties.

3.3.2 Streamlining

A liability regime which is constantly litigated is not working as it should. The concern to please passengers led to a regime which not only has more acceptable limits but is also for the most part simpler (with fewer defences). If there *is* a disputed claim, it has been made easier for passengers to enforce it in court. The MC liability regime is simpler than that of the WSC in two major areas.

First, the "all necessary measures" defence, available in actions for damage for *all* kinds of loss,[37] is available under MC only for actions for damage occasioned by delay. Second, the breach of liability limits on grounds of intent or recklessness, possible under WSC in all cases, has been restricted to cases concerning baggage (not cargo) and delay (not death or injury) to passengers. Not only is it possible to raise the point less often but the expectation is that claimants will want to do so less often. Indeed, from a US perspective, a major objective of the MC reform was that "the *necessity* to prove wilful misconduct in order to avoid the limitations on damages" in WSC was eliminated.[38]

Associated with simplicity of substance is a streamlining of procedures in a way appropriate to a mode of carriage which is marketed for its speed. In particular, the MC facilitates electronic paperless ticketing, providing a better service by faster check in, something that pleases most passengers.[39]

37. WSC, art. 20.

38. Dubuc, 22 Air & Space L 291, 297 (1997).

39. It was also expected to increase profits by enabling airlines to conduct an electronic auction of unsold seats a day or two before the flight: Dubuc *ibid* p. 291. See Abeyratne, 66 J Air L & Com 1345 (2001); Rueda, 67 J Air L & Com 401 (2002); Abeyratne, 70 J Air L & Com 141 (2005).

CHAPTER FOUR

Rules of Interpretation[1]

4.1 BROAD PRINCIPLES OF GENERAL ACCEPTANCE

The English courts' general approach to interpretation[2] remains that of Lord Macmillan in an early case[3] on the Carriage of Goods by Sea Act 1924 (the "Hague Rules"):

> "It is important to remember that the Act was the outcome of an International Conference and that the [Rules] have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."

This, according to Lord Salmon nearly half a century later, meant that "words . . . should not be construed pedantically or rigidly but sensibly and broadly".[4] Indeed, in the view of distinguished German writers,[5] one of the main purposes of uniform commercial law, the promotion of predictability and security in commerce, is best achieved by a broad interpretation of the law.

Moreover, an Australian court stated in a case concerning WSC that there is "a general principle of statutory interpretation, equally applicable to the interpretation of international agreements, that courts are not at liberty to consider any words as superfluous or insignificant".[6]

4.2 ARTICLE 31 OF THE VIENNA CONVENTION

The call of Lord Macmillan (above) for broad rules of construction is reinforced by the spirit, if not the exact letter, of the Vienna Convention on the Law of Treaties 1969

1. In this chapter no distinction is intended between "construction" and "interpretation", a distinction sometimes found in other common law countries. In the United States, e.g., Patterson (1964) 64 Col L Rev 833, 835 *ff*; and this distinction is reflected in the Restatement (2d) Contracts, s 200. In Australia *cf* Carter (2009) 25 JCL 83, 84 *ff*.

2. Accepted for the WSC in *Fothergill v. Monarch* [1981] AC 251, 282, *per* Lord Diplock, 285, *per* Lord Fraser at 293, *per* Lord Scarman.

3. *Stag Line v. Foscolo Mango* [1932] AC 328, 350 approved in *Buchanan* [1978] AC 141, 152, *per* Lord Wilberforce and 160, *per* Lord Salmon.

4. *Buchanan v. Babco* [1978] AC 141, 160.

5. Zweigert & Kötz, *An Introduction to Comparative Law* (Oxford 1987) Vol. 1, p. 23.

6. *Kotsambasis v. Singapore Airlines* (1997) 140 FLR 318, 322 (CA NSW) concerning "bodily injury" in WSC, article 17.

(VCLT).[7] Because the carriage conventions "employ the form of the international treaty as a technique of private law regulation in the international arena . . . the general rules on the interpretation of treaties are of equal applicability in the field of international Conventions and in the field of uniform private law".[8] Thus in 1980 the House of Lords took the view in a case on WSC[9] that, having ratified the VCLT, the UK had an international obligation to interpret later treaties such as WSC in accordance with articles 31 to 33 of the VCLT. That the WSC largely preceded the VCLT mattered not, as the VCLT largely codified existing public international law.[10] The key provision was then and is still article 31.1:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

4.3 ORDINARY MEANING: IN ENGLISH AND IN FRENCH—AND IN ISOLATION

Central to article 31.1 of the VCLT is the search for "the ordinary meaning" of the words of the document "in their context".[11] Certainly this is where an English court is likely to start as this chimes with the so-called "golden rule" of interpretation,[12] the primary rule of interpretation in English domestic law. What was new to the commercial courts in 1980, however, was that, in the case of the WSC, there was not one (con)text to study but two, French and English.[13]

In other instances of transport Conventions with two texts, such as the CMR, it was suggested[14] that resort to the French text is allowed only when there is ambiguity in the English. With the WSC ambiguity was not a precondition of resort to the French, a cause of relief to some, who regarded French as a language of greater polish and precision.[15] Just

7. Cmnd. 4140. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester University Press 1984), p. 115. See, generally Chapter 5. The approach authorised by the Vienna Convention article 31.1 is broader than that of the golden rule in English domestic law. In *Chubb v. Asiana*, 214 F 3d 301, 309 (2 Cir, 2000) the court concluded that, although the US had not ratified it, we "treat the Vienna Convention as an authoritative guide to the customary law of treaties". The UK is a party to the Convention.

8. Basedow, Unif L Rev 2000. 129, 133; see also Basedow, Unif L Rev 2006.731; and Czapski, Unif L Rev 2006.545.

9. *Fothergill v. Monarch* [1981] AC 251, 283, *per* Lord Diplock. *Idem King v. Bristow Helicopters* [2001] Lloyd's Rep 95, 99 *per* Lord Rodger (Ct Sess). VCLT art. 31 was applied to MC in Ontario in *ACE v. Holden* (2008) 296 DLR (4th) 233, 236.

10. *Fothergill* p. 282, *per* Lord Diplock. 290 *per* Lord Scarman. The degree to which this is true is debated in Jennings and Watts (eds) *Oppenheim's International Law* (9th edn, Longman Harlow 1992) para. 631. In *Fujitsu Computer Products v. Bax Global* [2005] EWHC 2289; [2006] 1 Lloyd's Rep 367 at [17] Christopher Clarke J confirmed that art. 31.1 represents "the correct approach to the interpretation of" WSC.

11. *Oppenheim* (above) para. 632.

12. *Caledonian Ry v. N British Ry* (1881) 6 App Cas 114, 131 *per* Lord Blackburn. Lewison, *The Interpretation of Contracts*, 3rd edn (Sweet & Maxwell London 2004) ch. 5; *cf* McMeel, The Construction of Contracts (Oxford 2007) 1.54 *ff*.

13. See *Fothergill v. Monarch* [1981] AC 251, 272.

14. See, e.g. *Buchanan & Co v. Babco* [1978] AC 141. Clarke CMR no 6.

15. "*Je considère personellement comme criminel l'emploi exclusif, dans un secteur où la vie humaine en dépend, d'une langue aussi ambigue que l'anglais*": Rodière (1983) ETL 24, 29 in a note on WSC, although these words referred not to the Convention itself but to the (exclusive) use of English by air traffic controllers. Rodière, alas, is dead but in France this view of English is very much alive. German courts, required to give precedence to authentic texts in English and French, apply the one that offers the greater precision: Koller, Vor art. 1 CMR, para. 4.

how the English court handles the French text is discussed at 4.9 below. MC, however, is a plurilingual treaty, with six equally authentic texts; and there is a presumption that the terms have the same meaning in each authentic text.[16]

In any event the primacy of the Convention text is such that, initially at least, it must be interpreted in isolation. In practice, of course, a court in England (or in the US) will look first (and perhaps only) at the international English text. In contrast the text of national legislation, purporting to enact the Convention,[17] as well as national rules of interpretation are of secondary significance or none at all.[18] For example, the presumption of English domestic law, that a statutory provision means what it meant in previous statutes, is inapplicable: this is one of the "technical" rules of English law which do not apply to uniform law such as MC or WSC.[19]

Moreover, once the meaning of the words has been found it must be applied, unaffected by rules of substantive national law, e.g. about unconscionability, because that would introduce, as a US court once put it, "the serpent of uncertainty into the Eden of contract enforcement".[20] However, some commentators believe that US decisions show much less regard to considerations of comity than those of other countries and, certainly, the reader of decisions handed down there should be alert to this possibility. A further corollary of the primacy of the Convention text is that courts should not, as sometimes happens in the US, have regard to collateral "private" agreements between air carriers.[21]

4.4 ORDINARY MEANING IN CONTEXT

The immediate context of a word is a phrase, then a sentence, a paragraph and so on—moving out to the boundaries of the Convention itself. When the ordinary meaning of words "in their context", with which article 31.1 of the VCLT instructs the reader to begin, is plain and unambiguous, in practice that meaning will be applied.[22] But is it more than practice? Is it a "rule" of interpretation? One view[23] is affirmative: the court can look beyond the text only when the textual meaning is ambiguous. Indeed, in the leading English decision on WSC Lord Wilberforce and Lord Diplock[24] first found the words unclear on a literal or textual approach before seeking guidance outside the text from the

16. Vienna Convention, article 33.3. See, however, the critical remarks of Bin Cheng (2004) 53 ICLQ 833, 856 *ff*.

17. *Shah v. Pan Am*, 148 F 3d 84, 95 (2 Cir, 1998).

18. *Oppenheim* (above) para. 633 (10). Brandi-Dohrn, TranspR 1996.45, 46.

19. *Buchanan* [1978] AC 141, 152, *per* Lord Wilberforce; *Fothergill v. Monarch* [1981] AC 251, 298–299, *per* Lord Roskill, with reference *inter alia* to *Gosse Millerd v. Canadian Government Merchant Marine* [1929] AC 223. In certain early decisions on HR, too much attention was paid to the meaning of such words in earlier statutes. The point was reaffirmed in respect of MC in *Laroche v. Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12; [2009] QB 778; [2009] 1 Lloyd's Rep 316, [14].

20. *Klos v. Polskie Linie Lotnicze*, 133 F 2d 164, 168 (2 Cir, 1997).

21. Giemulla, Introduction, para. 34. Nonetheless, certain agreements between carriers were once so widely adopted that they were, for all practical purposes, put on a par with the treaty sources; see 3.1.1 (above).

22. *Chan v. Korean Airlines*, 490 US 122 (1989), applied, e.g. in *Spanner v. United*, 177 F 3d 1173 (9 Cir, 1999).

23. Adopted, e.g. by Viscount Dilhorne in *Buchanan* (p. 156). See also *Tai Ping v. Northwest*, 94 F 3d 29, 31 (2 Cir, 1996).

24. *Fothergill v. Monarch* [1981] AC 251, 272 and 279 respectively.

commercial purpose of the Convention.[25] But did they have to find ambiguity first? Vattel has often been quoted as saying: "*La première maxime générale sur l'interprétation est qu'il n'est pas permis d'interprétér ce qui n'a pas besoin d'interprétation*".[26] This, however, seems to beg the question what is need (*besoin*)? "The finding whether a treaty is clear or not is not the starting point but the result of the process of interpretation."[27] The contrary (and better) view,[28] that textual ambiguity is not a precondition of investigation outside the text, rests mainly on two points.

First, the "plausibility of the textual or 'plain meaning' approach depends upon its use within the confines of a system with established patterns for the use of language, strengthened by a symbiotic relationship between the approach to drafting and to interpretation."[29] That relationship works best where there is a common language and a judiciary with a common background.[30] A distinguished American scholar once reminded us, with a quotation from Lord Diplock in *Fothergill*,[31] that the "language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges."

Second, ambiguity as a precondition of outside investigation has no basis in article 31.1 of the VCLT. Commonsense suggests that in most cases, if the ordinary meaning of words in context is plain and unambiguous, that meaning will be applied: the court will stop there. However, it is not obliged to do so. The ordinary meaning of the words of article 31.1 (in the context of the entire sentence) is surely plain and unambiguous enough: the ordinary meaning of a Convention such as MC is to be sought "in good faith" and in the light of "the object and purpose" of the Convention. Indeed, ambiguity is one of two preconditions, not under article 31, but for resort to "supplementary means of interpretation" under article 32: *expressio unius*.[32] So, the better view is that even when the "ordinary meaning" of words "in their context" is plain and unambiguous, the court may, if it chooses, consider what the bearing might be on the meaning of those words of relevant considerations, notably, "good faith" and "the object and purpose" of the Convention. This is borne out in practice by decisions on the WSC and, more recently, MC.[33] Moreover, now that MC has replaced WSC, it should not be forgotten that the context of MC is that of the regime intended to succeed WSC. This being so, a primary

25. *Ibid*. *Idem Corocraft v. Pan Am* [1969] 1 QB 616, 654, *per* Lord Denning MR (CA); criticised by Mankiewicz, 18 Am J Com L 177 (1970). But Lord Scarman in *Fothergill* (p. 290) appeared to take both steps at once: in this case the ordinary literal meaning of a word ("loss") in WSC gave way to the meaning that fulfilled the commercial purpose of the provision.

26. "It is not allowable to interpret what has no need of interpretation": Vattel, ii, para. 263.

27. *Oppenheim* (n. 10 above) para. 629.

28. Accepted by the US Supreme Court: *Air France v. Saks*, 470 US 372, 396–397 (1985). Brandi-Dohrn, TranspR 1996. 45, 48. Accepted in English commercial law generally in *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896, 912–913 *per* Lord Hoffmann (HL); *BCCI v. Ali* [2001] UKHL 8; [2002] 1 AC 251, [8] *per* Lord Bingham, [38] *ff*, *per* Lord Hoffmann.

29. Honnold, *Uniform Law for International Sales*, 2nd edn (Kluwer, Deventer 1991) para. 90, citing support from *Fothergill*: pp. 281–282, *per* Lord Diplock.

30. Even then a plain meaning may be far from plain and unambiguous: Clarke, *The Law of Insurance Contracts* (6th edn, London 2009) 15–2.

31. *Fothergill* p. 282.

32. Generally on this maxim, see McMeel, *The Construction of Contracts* (Oxford 2007) 8.22.

33. Thus, reference to the purpose of such conventions is a primary rather than supplementary aid to interpretation: e.g. *Fothergill* p. 279 *per* Lord Diplock; *Sidhu v. BA* [1997] 1 All ER 193, 202 *per* Lord Hope (HL). Also applied in *Deep Vein Thrombosis and Air Travel Group Litigation (the DVT case)* [2005] UKHL 72; [2006] 1 AC 495; [2006] 1 Lloyd's Rep 231, [11]; and to MC article 17.1 in *Barclay v. British Airways plc* [2008] EWCA Civ 1419; [2009] 3 WLR 369; [2009] 1 Lloyd's Rep 297, [16]. Clarke, Unif L Rev 2006.187.

feature of interpretation of MC is that, where the same words are used in MC as were used in WSC, they are intended to mean the same thing.[34]

4.5 GOOD FAITH

The principle of good faith in international law is closely linked to the principle "*pacta sunt servanda*". Although a doctrine of good faith in national law is more developed in civil law countries,[35] the "basic obligation of good faith to observe promises and agreements—*pacta sunt servanda*—was originally enforced on grounds of conscience in the Court of Chancery in England".[36] Whether a general doctrine in that sense if not necessarily that name can be found there today is a matter that merits discussion.

Certainly a doctrine of "good faith" can be found in disputes arising out of contracts subject to the Unfair Terms in Consumer Contracts Regulations 1999.[37] The way in which English courts will apply the Regulations is not clear, however, one view is that there too "good faith" embodies the principle *pacta sunt servanda*.[38] More recently a senior judge took some by surprise in the Commercial Court when he referred to a general "requirement of good faith and rationality" and claimed that commercial contracts generally "assume such good faith, which is why express language requiring it is so rare".[39]

More general is the view that all contract terms will be interpreted consistently with a "duty to fulfil the expectations engendered by one's contractual promise".[40] This is an objective exercise and, moreover, a rule of interpretation that "strongly implies the element of reasonableness".[41] Although not the same, a rule of interpretation of this kind is entirely consistent with the rule that looks to the (mutual) object and purpose of a transaction (below) and is not inconsistent with what many understand as interpretation in good faith.

See also *Povey v. Qantas Airways* [2005] HCA 33. For the same line in respect of commercial contracts generally see Clarke, *The Law of Insurance Contracts* (6th edn, London 2009) 15–2C.

34. See Tompkins, 33 Air & Space L 468 (2008); and 34 Air & Space L 121 (2009). For example the meaning of "damage" in MC article 17 is the same as that in article 17 of WSC: *Cowden v. British Airways plc* [2009] 2 Lloyd's Rep 653; likewise "accident": *McCarthy v. American Airlines*, 2008 US Dist LEXIS 49389 (SD Fla, 2008); and "damages": *In re Air Crash at Lexington, Kentucky*, 2008 US Dist LEXIS 11255 (ED Ky, 2008).

35. Lucke, in Finn (ed.), *Essays on Contract*, p. 155. See e.g. Markesinis, Uberath and Johnston, *The German Law of Contract, A Comparative Treatise* (2nd edn, Oxford 2006) ch. 3.2.

36. O'Connor, *Good Faith in English Law* (Dartmouth Aldershot 1989), p. 99. That it stands for *pacta sunt servanda* is also the view of Lucke (above) at p. 162. On the history of the idea in England, see Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979) pp. 168 *ff*.

37. SI 1999 No 2083. See Butterworths, *The Law of Contract*, (4th edn, London 2010) ch. 3F.

38. O'Connor (above) p. 18; Lucke (above) pp. 152, 162.

39. *Socimer* v *Standard Bank London* concerning not a contract of carriage but a contract to value assets: [2008] EWCA Civ 116; [2008] 1 Lloyd's Rep 558 at [116] *per* Rix LJ. In the case before the Court that was "a sufficient protection" where the "danger to be guarded against . . . is abuse caused by self interest". Generally see further Peden (2009) JCL 50.

40. Lucke (above) p. 162. See also in this sense Steyn (1997) 113 LQR 433, 439; Waddams (1995) 9 JCL 55, 59; and the summary of Farnsworth, 30 Chi L Rev 666, 669 (1962–63) by Brownsword (1994) 7 JCL 197, 209. But see *Director General of Fair Trading v. First National Bank* [2001] UKHL 52; [2002] 1 AC 481; [2002] 1 Lloyd's Rep 489; and *OFT v. Abbey National* [2009] UKSC 6; [2010] 1 Lloyd's Rep 281.

41. *Oppenheim* (above n. 10) para. 632.

4.6 OBJECT AND PURPOSE

Interpretation by reference to the object and purpose of the drafters is a practice that has been applied often to carriage conventions. In an early CMR case[42] Lord Denning MR famously referred to "the European method", by which he meant "the 'schematic and teleological' method of interpretation" of legislation. He continued:

> "It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design and purpose which lies behind it . . . . the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect."

On appeal in the same case, however, the House of Lords[43] took what was then a more "traditional" view. The danger of this "licence", as it once appeared to the "old school" of judges, "is not, indeed, that the Judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation".[44] This danger, highly pertinent in a tradition of commercial law that lionises certainty, can be averted, as it appears to a judge in the Netherlands,[45] if the judge is willing to make reference to the other aids to interpretation. More recently, an English judge, speaking of contracts generally, warned of "creative interpretation", but also conceded that purposive interpretation "is a useful tool where the purpose can be identified with reasonable certainty".[46] That, surely, is true of contracts based on the air Conventions. So, it is scarcely surprising that, after the CMR case, the House of Lords in *Fothergill*,[47] the leading English case on the WSC, took a "European" view of interpretation more like that of Lord Denning; and there is now little doubt that English courts will interpret the words of the air Conventions in the light of their object and purpose.

In this exercise the court will consider not only the purpose of the Convention as a whole but, where it is appropriate and possible, the purpose of particular provisions, which it is called to interpret.[48] This it does with due regard for commercial convenience,[49] "commercial sense",[50] in effect what seems reasonable in the particular context.[51] Thus, for example, courts have taken account of changes in transportation (*in casu* the use of

42. *Buchanan v. Babco* [1977] QB 208, 213. Lawton LJ agreed: p. 222. See *Debattista* [1997] JBL 130, 136, 140.

43. [1978] AC 141; Munday (1978) 27 ICLQ 450; Herman (1981) 1 LS 165.

44. Megaw LJ in a CMR case: *Ulster-Swift v. Taunton Meat Haulage* [1977] 1 Lloyd's Rep 346, 351 (CA). See also the scepticism expressed by Sacks and Harlow (1977) 40 MLR 578.

45. Haak, *The Liability of the Carrier under the CMR* (The Hague 1986) p. 17.

46. *Investors Compensation v. West Bromwich BS* [1998] 1 WLR 896, 904 *per* Lord Lloyd (HL).

47. *Fothergill v. Monarch* [1981] AC 251, 294, *per* Lord Scarman; see also p. 276, *per* Lord Wilberforce. Also taken since then in *Deep Vein Thrombosis and Air Travel Group Litigation (the DVT case)* [2005] UKHL 72; [2006] 1 AC 495; [2006] 1 Lloyd's Rep 231, [11]; and as regards MC article 17.1 in *Barclay v. British Airways plc* [2008] EWCA Civ 1419; [2009] 3 WLR 369; [2009] 1 Lloyd's Rep 297 [16].

48. *Fothergill v. Monarch* [1981] AC 251; reaffirmed in *Sidhu v. British Airways* [1997] AC 430, 442 by Lord Hope, with whom other members of the House agreed. See also *Ross v. Pan American*, 85 NE 2d 880, 885 (NY CA, 1949); *Eck v. United Arab Airlines*, 360 F 2d 804 (2 Cir, 1966). More specifically, see e.g. *Johnson v. American*, 834 F 2d 721, 723 (9 Cir, 1987), re "goods". *Denby v. Seaboard World*, 575 F Supp 1134 (EDNY, 1983), *revs'd on other grounds*: 737 F 2d 172 (2 Cir, 1984), re "damage", and adopting reasoning in *Fothergill*. Also in this sense: *BGH 19.3.1976*, ULR 1977.282.; and *BGH 16.6.1982*, RIW 1982.910.

49. *Samuel Montagu v. Swiss Air Transport* [1966] 2 QB 306, 315 *per* Lord Denning MR and p. 317 *per* Salmon LJ (CA).

50. *Denby* at p. 1140, citing *Fothergill*, as well as decisions given in Argentina and Holland.

51. Brandi-Dohrn, TranspR 1996.45, 53.

containers) to give an interpretation "in line with modern industrial practice and needs".[52] Whether and when a court will allow this kind of interpretation to change what seems to be the unambiguous ordinary meaning of words varies from country to country.[53]

4.7 THE OBJECT AND PURPOSE OF THE CONVENTIONS ON CARRIAGE BY AIR

One purpose of the Conventions on carriage by air, like that of other carriage conventions, is harmonisation of the law.[54] In addition, the twin purposes of the WSC in 1929 were, first, "to establish uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation".[55] That is also a concern behind MC allied with the promotion of electronic ticketing: see above 3.3.2.

The second, clearly the more important of the two in 1929, was "to limit the potential liability of air carriers in the event of accidents"[56] and to ensure the "protection of a financially weak industry".[57] The limit would enable airlines to attract capital that might "otherwise be scared away by the fear of a single catastrophic accident".[58] The limit "allowed for the inability of carriers to insure against such risks while admitting that passengers could obtain insurance themselves".[59] After 1929 these concerns receded in importance and this led to interpretation of the rules in question that was less lenient to carriers. However, in 2010 these concerns can be sensed again.

Another concern in the past, in conflict with today, was that "the liability limitation sought to avoid litigation by facilitating quick settlements and establishing a uniform law with respect to the amount of recoverable damages".[60] This thinking in the 1990s led to the much increased limits set by MC.[61]

4.8 SUPPLEMENTARY MEANS OF INTERPRETATION

According to article 32 of the VCLT, when "the interpretation according to article 31 leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly

52. *Denby* at p. 1140.

53. See Brandi-Dohrn, TranspR 1996.45, 53–54.

54. *Sidhu v. BA* [1977] 1 All ER 193, 202 *per* Lord Hope (HL); *Fellowes v. Clyde Helicopters* [1997] 1 All ER 775, 790 *per* Lord Hope (HL). CMR: *Gefco v. Mason* [1998] 2 Lloyd's Rep 585, 590 *per* Morritt LJ (CA). HVR: *The Hollandia* [1983] 1 AC 565, 575 *per* Lord Diplock.

55. *Floyd v. Eastern*, 872 F 2d 1462, 1467 (11 Cir, 1989), with reference to Minutes, Second International Conference on Private Aeronautical Law, 4–12 October, Warsaw 13 (transl. Robert C. Horner and Didier Legrez 1975) at 85 and 87. See also in this sense e.g. *El Al v. Tseng*, 525 US 155, 142 L Ed 2d 576, 590 (1999). For an outline of the history of the WSC, see Ortino and Jurgens [1999] J Air L & Com 377; Pickelman [1998] J Air L & Com 273.

56. *Floyd v. Eastern*, 872 F 2d 1462, 1467 (11 Cir, 1989), with reference to Minutes at 37. See also in this sense *Transworld v. Franklin Mint*, 466 US 243, 256, 80 L Ed 2d 273, 284 (1984).

57. *Floyd v. Eastern*, 872 F 2d 1462, 1467 (11 Cir, 1989).

58. Lowenfeld and Mendelsohn, 80 Harv. L.R. 497, 499 (1967).

59. *Floyd* (above) *loc cit*. A limit enabled air carriers to obtain affordable insurance rates; Lowenfeld and Mendelsohn, p. 500.

60. *Floyd* pp. 1467–1468. See also *Sidhu v. BA* [1997] AC 430, 447, 453 *per* Lord Hope.

61. See (above) 3.3.7.

absurd or unreasonable",[62] *or* "to confirm the meaning resulting from the application of article 31", recourse may be had to "supplementary means of interpretation".

Once again, ambiguity (or absurdity) are not preconditions of recourse to supplementary means.[63] However, "nor is their use mandatory. The court has a discretion" and an appeal court is not bound by the choice of means made by the lower court.[64] English courts handle this kind of discretion, it was once observed,[65] rather like a dangerous drug: to be dispensed with care and in small quantities. Today, it is less true, but, the courts remain cautious.

According to article 32, the means include "the preparatory work of the treaty and the circumstances of its conclusion".

4.8.1 Preparatory work: legislative history

Recourse by English courts to the legislative history (*les travaux préparatoires*) of the Conventions, said Lord Wilberforce, will be rare[66] and cautious.[67] Contrast Rogers J in the Supreme Court of New South Wales who once made the unqualified remark that the legislative history of the WSC has "an important role to play in the task of interpretation".[68] Contrast further the wisdom of an American scholar, renowned in the field of uniform law: "Legislative history (like vintage wine) calls for discretion."[69] Be that as it may, resort to legislative history has been more common in other states,[70] including the US,[71] than in England. English courts are cautious *inter alia* because it may be difficult to tell whether what is recorded is the view of the conference or only of particular delegates[72]; resort will occur only when the materials "clearly and indisputably point to a definite legislative intention"[73] and "the material involved is public and accessible".[74] Moreover, the ICJ recently adopted what has been called "an evolutionary approach to treaty interpretation".[75] The court ruled that the meaning of commerce in a treaty of 1858

62. The avoidance of an unreasonable result is a well-established object of construction in English law: *Schuler v. Wickman* [1974] AC 235, 251, *per* Lord Reid; *Vesta v. Butcher* [1989] 1 All ER 402, 418, *per* Lord Lowry (HL). However, it is avowedly so only in extreme cases. Courts feel more comfortable if they can describe the result they seek to avoid not as "unreasonable" but as "absurd".

63. *Oppenheim* (above n. 10) para. 633.

64. *Fothergill* pp. 294–295, *per* Lord Scarman.

65. Jacobs and Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell London, 1987) p. 81 (Dr J. A. Frowein) and p. 117 (H. G. Schermers).

66. *Fothergill v. Monarch* [1981] AC 251, 278, see also p. 280, *per* Lord Diplock.

67. *Fothergill* (above) p. 278, See also p. 287 *per* Lord Fraser. Lord Wilberforce repeated his view in *Gatoil v. Arkwright-Boston* [1985] AC 255, 263 where Lord Fraser and Lord Roskill concurred with his judgment.

68. *SS Pharmaceuticals v. Qantas* [1989] 1 Lloyd's Rep 319, 323.

69. Honnold (above n. 29) para. 91.

70. Listed by Brandi-Dohrn, TranspR 1996.45, 51.

71. *Fishman v. Delta*, 132 F 2d 138, 144 (2 Cir, 1998), with reference to *Zicherman v. Korean Air*, 516 US 217 (1996); *McCarthy v. Northwest*, 56 F 3d 313, 316 (1 Cir, 1995); *Cortes v. American Airlines*, 177 F 3d 1272, 1287 *ff* (11 Cir, 1999). See also *Floyd*, 499 US 530, 544–545 (1991); *El Al v. Tseng*, 525 US 155, 142 L Ed 2d 576, 593 (1999). *BGH 16.6.1982*, RIW 1982.910. Such reference may be made "if necessary": *Shah v. Pan Am*, 148 F 3d 84, 95 (2 Cir, 1998). Readily practised by e.g. the Swiss Federal Court in *Claudio v. Avianca*, 29.6.1987 (1988) 23 ETL 498, as regards article 25.

72. See *Sidhu* pp. 448–449; also Clarke [1999] LMCLQ 36, 66 and references cited.

73. *Fothergill* (above) p. 278, *per* Lord Wilberforce, who repeated his view in *Gatoil* (above, *loc cit*).

74. *Fothergill* (above) p. 278, *per* Lord Wilberforce, and pp. 287–288, *per* Lord Fraser. Lord Wilberforce repeated this view in *Gatoil* (above, *loc cit*).

75. McCaig [2010] CLJ 251.

should be given the meaning it had in 2009 rather than that of 1858.[76] This is consistent with reference sometimes made today to subsequent practice.

4.8.2 Subsequent practice

According to the VCLT, article 31.3(b), it is legitimate to have regard to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". English courts have indeed had such regard, for example concerning the meaning of "bodily injury" in article 17.[77]

4.8.3 Commentaries

Books and commentaries on any convention are usually published after the conclusion of the convention in question. So, conference

> "delegates cannot have taken them into account in agreeing on the text. To a court interpreting the Convention subsequent commentaries can have persuasive value only; they do not come into the same authoritative category as that of the institutional writers in Scots law. It may be that greater reliance than is usual in the English courts is placed upon the writings of academic lawyers by courts of other European states where oral argument by counsel plays a relatively minor role in the decision-making process. The persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend on the cogency of their reasoning."[78]

Also, as Lord Scarman observed in the same case,[79] it will depend on the eminence and experience of the writer. Unanimity among writers cannot be expected, and their opinions should not, any more than those of the judges, be discarded simply because those opinions are diverse[80] but, where time permits, be considered on their merits. That has been the recent practice not only of courts on mainland Europe but also courts of common law.[81]

4.8.4 Case law

The recent practice of English courts has been to look at decisions of foreign courts on points of uniform commercial law.[82] The power of persuasion exercised by a foreign decision depends, first, on the coverage of the reporting system.[83] If the report of a case is too brief to give any reliable guide to its reasoning, it is likely to be ignored.[84] Secondly, it depends on the deciding court's reputation and status,[85] and the extent to which its

76. *Dispute regarding Navigational and Related Rights*, (Costa Rica v. Nicaragua). ICJ (13 July 2009).
77. See Note 4 to MC article 17.
78. *Fothergill v. Monarch* [1981] AC 251, pp. 283–284 *per* Lord Diplock.
79. P. 295.
80. *Silber v. Island Trucking* [1985] 2 Lloyd's Rep 243, 245, *per* Mustill J.
81. E.g. the House of Lords in England in *Fothergill* (above); the US Supreme Court in *Air France v. Saks*, 470 US 372 (1985); and *Chan v. Korean Air* (1989) 490 US 122. Also in Australia in *SS Pharmaceuticals v. Qantas* [1989] 1 Lloyd's Rep 319 (SC NSW).
82. See e.g. *Fothergill v. Monarch* [1981] AC 251, 275, *per* Lord Wilberforce as regards WSC. For an overview of practice at that time, see Brandi-Dohrn, TranspR 1996.45, 56. *Cf Data Electronics v. UPS* [2007] UKHL 23; [2007] 2 Lloyd's Rep 114 as regards previous cases on CMR.
83. *Fothergill* (above) p. 276, *per* Lord Wilberforce, 284, *per* Lord Diplock.
84. *Silber v. Island Trucking* [1985] 2 Lloyd's Rep 243, 246, *per* Mustill J.
85. *Fothergill* (above) p. 275, *per* Lord Wilberforce, 284, *per* Lord Diplock, 295, *per* Lord Scarman.

decisions are binding on other courts in the same jurisdiction.[86] A particular decision may be inconsistent with another decision of a court of similar status in that country, e.g. in Belgium and France, where there are regional courts, or in the US and Germany, where decisions of the courts of one state are not binding on courts of another. It was asserted in the past that, although in such countries "a single decision of a German, French or Italian court is not a binding precedent, it is nevertheless of high persuasive authority".[87] That is still true today at least of the higher courts. Moreover, consistent case law in such countries is accorded respect there, comparable with that given to binding precedent, as custom or legislation; and common law courts will have regard to consistent case law of that kind on the air Conventions.[88]

Where there is consistent case law, however, UK courts will look at that which is most accessible. In 1966, Lord Denning observed that it was "of the highest importance that we should be in keeping with the courts of the United States on this matter",[89] a point of air law. More recently, English courts have been more discriminating and more catholic. The US "is only one jurisdiction among many", said Lord Hope in 1996 in *Sidhu*.[90] Moreover, some caution must be exercised when "following" American decisions because of the sentiment sometimes expressed there that seeks consistency between federal law (and the Convention) and state law.[91] Lord Hope also said:

> "Clearly, much must depend upon the status of each court and of the extent to which the point of issue has been subjected to careful analysis. Material of this kind, where it is found to be of the appropriate standing and quality, may be of some help in pointing towards an interpretation of the Convention which has received general acceptance in other countries."[92]

There must, as been said many times before, be a consistent practice of the courts in question.

Last but not least, the energy and enterprise of counsel, on which UK courts depend, is not endless. In *King*,[93] for example, a Scots judge cautioned "that we were referred only to decisions from three jurisdictions . . . I do not criticize counsel in that regard; but I bear in mind that, as Lord Wilberforce observed in *Fothergill*, there are dangers inherent in trying to assess a balance of foreign judicial opinion from available cases".[94] Nonetheless, albeit with varying degrees of enthusiasm, UK courts often try to do it.

86. *Fothergill* (above) p. 284, *per* Lord Diplock.

87. Lipstein, (1946) 28 Journal of the Society of Comparative Legislation (3rd se.) 34, 36. See also Goodhart, (1934) 50 LQR 40; Honnold (above n. 29) para. 92.

88. See e.g. *Fellowes v. Clyde Helicopters* [1997] 1 All ER 775, 792 *per* Lord Hope (HL). *Re Air Disaster at Lockerbie*, 928 F 2d 1267, 1274 (2 Cir, 1991), citing *inter alia Chan v. Korean Airlines*, 490 US 122 (1989).

89. *Samuel Montagu v. Swiss Air Transport* [1966] 2 QB 306, 316 (CA). See also p. 317 *per* Salmon LJ. Deference was also paid to US decisions in *Morris v. KLM* [2002] UKHL 7; [2002] 2 WLR 578.

90. *Sidhu v. British Airways* [1997] AC 430, 452 *per* Lord Hope.

91. E.g. *In Re Flight Explosion on TWA Aircraft Approaching Athens Greece on April 2, 1986*, 778 F Supp 625, 639 (EDNY, 1991).

92. P. 443 *per* Lord Hope. The House was referred not only to cases decided in the US but one decided in France which, however, was not regarded as persuasive, being a court of first instance that did not refer to other French decisions and was being appealed: pp. 452–453. See also in this sense *Deep Vein Thrombosis and Air Travel Group Litigation (the DVT case)* [2005] UKHL 72; [2006] 1 AC 495; [2006] 1 Lloyd's Rep 231, [11]; and as regards MC article 17.1 *Barclay v. British Airways plc* [2008] EWCA Civ 1419; [2009] 3 WLR 369; [2009] 1 Lloyd's Rep 297, [16].

93. *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, 142 *per* Lord Reed (Ct Sess).

94. The reference (omitted) is to *Fothergill v. Monarch* [1981] AC 251, 276.

4.8.5 Other conventions

For the interpretation of uniform transport law some European writers in the field once suggested a "comparative convention" approach.[95] In these terms one might have thought it unlikely to appeal to the focused mind of the English judge, but some judges have been adventurous in this respect.[96] Be that as it may, now that MC is in force, reference to WSC is likely because MC is a development of WSC (on most points the rules of law have not been changed). Indeed, reference to the corresponding provision of WSC is justifiable as part of the search for the purpose, or as part of the context and legislative history (above 4.4 and 4.8.1), of a provision of MC.[97] The "comparative convention approach" argues for reference further afield to other carriage conventions. This approach to interpretation is found in some commentaries published in other countries,[98] although not often in the courts there.[99]

Other writers have suggested a very different "autonomous meaning" approach. An interpretation may be described as "autonomous", according to a German scholar,[100]

"if it does not proceed by reference to the meanings and particular concepts of a specific domestic law. However, this is a negative definition ... The autonomous interpretation of uniform law can also be defined in a positive sense. The Convention's terms and concepts are to be interpreted in the context of the Convention itself ... by reference to the Convention's own system and objectives. Autonomous interpretation, in this sense, may be said to rest on systematic and teleological arguments ... Thus, autonomous interpretation is not a method of interpretation *in addition* to other methods such as literal, historical, teleological or systematic interpretation. Rather, it would seem to be a *principle* of interpretation that gives preference to a particular kind of teleological and systematic argument in interpreting a legal text."

This, it seems, is a more developed even conjectural version of reference to object and purpose.[101] An instance might be found in the interpretation of "damage" in article 17.[102]

In England, however, Rix LJ once observed of CMR[103] that, unlike the position with the Brussels Convention 1968,[104] there is no European Court of Justice to ensure a uniform

95. For example Haak, in Theunis (ed.), *International Carriage of Goods by Road (CMR)* (London, 1987) p. 226. Brandi-Dohrn, TranspR 1996.45, 49.

96. In England, comparative reference was made in a CMR case to uniform transport law, with which the court was more familiar, HVR: *Eastern Kayam Carpets v. Eastern United Freight* (QBD, December 6, 1983). More recently in *Gefco v. Mason* [2000] 2 Lloyd's Rep 555, another CMR case, reference was made to WSC. There is support for this view from Rix LJ in *Andrea Merzario v. Leitner* [2001] 1 Lloyd's Rep 490, para. 50 (CA).

97. See Tompkins, 33 Air & Space L 468 (2008); and 34 Air & Space L 121 (2009). For example the meaning of "damage" in MC art. 17 is the same as that in art. 17 of WSC: *Cowden v. British Airways plc* [2009] 2 Lloyd's Rep 653.

98. E.g., Koller *op cit.*

99. See, however, for example *BGH 21.9.2000*, TranspR 2001.29, 33 on WSC, art. 25 with reference *inter alia* to CMR cases.

100. Gebauer, ULR 2000.683, 686–687 (references omitted).

101. See 4.7, above.

102. In *Walz v. Clickair*, Case C-63/09, the ECJ considered the meaning of "damage" in MC art. 22.2. The claim was for both material and non-material damage and together, the amount claimed exceeded the limit then imposed under art. 22. The question for the ECJ (posed in para. 16) was whether the limit applied to both. It noted (para. 21) that MC did not define "damage" and that therefore the aim should be to give the word "a uniform and autonomous interpretation". To this end it applied art. 31 of the Vienna Convention, and concluded (para. 26) that the "nature of the damage sustained by a passenger is irrelevant in that regard".

103. In a CMR case: *Andrea Merzario v. Leitner* [2001] 1 Lloyd's Rep 490, 494 (CA).

104. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968.

approach to interpretation throughout the contracting states. Of course, the same is true of WSC and MC. He continued: "The doctrine of an 'autonomous meaning', familiar from the jurisprudence of the Brussels Convention, therefore has uncertain status. There is a fair body of academic opinion, however, that, as far as possible, uniform law . . . should be autonomous and interpreted only by reference to itself" and with due respect for the objective of uniformity.[105]

4.9 CONSIDERATION OF THE FRENCH TEXT OF WSC

As regards the WSC the English court has been not only entitled but also obliged to consider the French text.[106] What this means is a process of interpretation which, as Lord Wilberforce once described it,[107] is

"1. Interpretation of the English text, according to the principles upon which international conventions are to be interpreted. 2. Interpretation of the French text according to the same principles but with additional linguistic problems. 3. Comparison of these meanings."[108]

Moreover, in *Buchanan*[109] on CMR Lord Wilberforce said:

"My Lords, I would not lay down rules as to the manner in which reference to the French text is to be made. It was complained—by reference to the use of the French text by Roskill L.J. and Lawton L.J.—that there was no evidence as to the meaning of the French text, and that the Lords Justices were not entitled to use their own knowledge of the language. There may certainly be cases when evidence is required to find the exact meaning of a word or phrase; there may be other cases when even an untutored eye can see the crucial point (*cf. Corocraft Ltd. v. Pan American Inc*. [1969] 1 Q.B. 616 (insertion of 'and' in the English text). There may be cases again where a simple reference to a good dictionary will supply the key (see, *per* Kerr J. in *Fothergill v. Monarch Airlines Ltd*. [1978] Q.B. 108 on '*avarie*'). In the present case, when one is dealing with a nuanced expression, a dictionary will not assist and reference to an expert might also be unhelpful, for the expert would have to direct his evidence to a two-text situation rather than simply to the meaning of words in his own language, so that he would be in the same difficulty as the court. But I can see nothing illegitimate in the court looking at the two texts and reaching the conclusion that both are expressed in general or perhaps imprecise terms, so as to justify rejection of a narrow meaning."

Article 33.4 of the VCLT provides that, if a comparison of the two texts "discloses a difference of meaning which the application of articles 31 and 32 [VCLT] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty shall be adopted".

105. P. 494.

106. WSC (in its 1955 version) was imported into English law by the Carriage by Air Act 1961. This contained a first Schedule in two parts. Part I set out an English text of the Warsaw Convention, as amended. Part II set out the French text of that Convention as amended. Subsection (2) provided that "If there is any inconsistency between the text in English . . . and the text in French . . . in French shall prevail."

107. *Fothergill v. Monarch* [1981] AC 251, pp. 273–274. Reference to dictionaries and to expert evidence on the meaning of the French text was approved by Lord Wilberforce at p. 286, Lord Fraser at p. 293, Lord Scarman at p. 300.

108. P. 272 (citations omitted).

109. *Buchanan v. Babco* [1978] AC 141, pp. 152–153; see also p. 161, *per* Lord Salmon. The case concerned the French text of CMR and the words "*autres frais*" (translated as "other charges"). Whether the primacy of the French text is such as to justify interpretation in the light of French law is controversial (see Brandi-Dohrn, TranspR 1996.45, 47–48) but is unlikely to occur in England anyway.

PART TWO

The Conventions and Commentary

Page Intentionally Left Blank

MONTREAL CONVENTION 1999

WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955 AND BY PROTOCOL NO 4 OF MONTREAL, 1975

The Montreal Convention 1999 (MC) came into force in the UK on 28 June 2004.[1] The Preamble to the MC is set out in Chapter 3, 3.2.3, above.[2]

The text of the Warsaw Convention (WSC) is also printed and considered here after the corresponding text of the Montreal Convention. WSC is the unified text of the original 1929 Convention, as amended by the Hague Protocol of 1955, which came into force in the UK on 1 June 1967, and by the Montreal Protocol of 1975, which came into force internationally on 14 June 1998 and in the UK in June 1999.[3]

The Guadalajara Supplementary Convention of 1961,[4] supplementary to the WSC but forming an integral part of MC (articles 39 *ff*), is set out in Appendix 3.

NOTE TO READERS

- THE TEXT OF THE MONTREAL CONVENTION IS SET IN BOLD TYPE;
- THE TEXT OF THE WARSAW CONVENTION IS SET IN ITALICS;
- THE NUMBERS THAT APPEAR IN BRACKETS WITHIN THE EXTRACTS FROM THE ARTICLES OF THE CONVENTIONS REFER TO THE NOTES.

CHAPTER I

GENERAL PROVISIONS

Article 1—Scope of Application

1. This Convention applies to all international carriage(1) of persons,(2) baggage(3) or cargo(4) performed by aircraft(5) for reward.(6) It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.(7)

1. The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002: SI 2002/263.
2. The titles and texts printed here are those found in the published documents of IATA, *Essential Documents on International Air Carrier Liability* (Montreal 1999), which do not include the Preambles to the Conventions.
3. See Carriage by Air (Parties to Convention) Order 1999: SI 1999/131.
4. The Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, 1961. As regards implementation in the UK see Yates para. 5.1.1.3.

CHAPTER I

Scope—Definitions

Article 1

1. This Convention applies to all international carriage[(1)] of persons,[(2)] baggage[(3)] or cargo[(4)] performed by aircraft[(5)] for reward.[(6)] It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.[(7)]

Comment

Article 1 is the central scope provision of the air Conventions. They apply to international carriage as defined in article 1.2. However, in Europe Council Regulations have the effect *inter alia* of extending rules, notably those concerning the liability of EC registered carriers in respect of death of or injury to passengers, to domestic flights. See Chapter 2, 2.2.1 above.

Notes to article 1.1

1. *International carriage*, as defined in article 1.2,[5] includes operations incidental to carriage, round trips and voyage charters.

1.1 *Operations incidental* to carriage have included that of an aircraft standing on the airport apron prior to take-off,[6] and what occurs to goods lost while in custody of an airport authority after landing.[7] They do not include a preliminary flight: the movement ("*déplacement*") contracted for must be the major purpose of the flight. In other words, a passenger flight must have been "undertaken for the principal purpose of moving the individual from point A to point B".[8]

1.2 *Round trips* from State A to State B and back again are international carriage: see below MC article 1.2. However, a round trip entirely in State A alone is not international carriage.

Nonetheless the French Court of Cassation once applied WSC to a first flight (by novice and instructor) in a hang-glider. The argument that this was not carriage because the purpose was not to get a passenger from one place to another was rejected.[9] This is questionable. Apart from the inconsistency with article 1 WSC (or MC), the decision

5. Note that the international texts may be applied in substance to domestic carriage by means of appropriate national legislation. *Laroche v. Spirit of Adventure* [2008] EWHC 788 (QB); generally see Clarke and Yates 3.389 *ff.*

6. *Clarke v. Royal Aviation Group* (1997) 34 OR (3d) 481.

7. *OLG Frankfurt 21.4.1998*, TranspR 1999.24.

8. *Mexico City Aircrash*, 798 F 2d 400, 417 (9 Cir, 1983); *Korper v. Aéro-Club Sarre, C.A. Colmar 22.5.1992* (1992) 45 RFDA 323.

9. *CPAM du Var v. Sarrat, Cass Civ 19.10.1999*, BTL 1999.827, concerning a first flight by hang-glider. See also Cass Civ 22.11.2005, Unif L.R. 2006.210.

ignores a series of French decisions on national law intended to be in line with WSC which ruled out flying lessons,[10] test flights,[11] and demonstration flights,[12] because carriage ("*déplacement*") was not the main purpose. Hang-gliding, surely is not concerned with carriage in that sense but with the experience of flight itself and, in some instances, the attractions of the view. This was the line taken by the Court of Appeal in *Disley v. Levine*.[13] The question was whether a claim for damages for personal injuries sustained in a tandem paraglider accident, while the claimant was under a course of instruction by the defendant, was within the scope of WSC as applied to domestic flights. The Court held not *inter alia* because, although the claimant had paid money for the experience, her flight was not carriage. However, in *Laroche*[14] the decision in *Disley* was distinguished and explained as based on the fact that in *Disley* the claimant was there not as a passenger but as a pilot under instruction.[15]

1.3 *Charters* may be treated as carriage within article 1.[16] However, if the charter provides for a preliminary movement to collect passengers or goods, the carriage does not commence until the movement from the place of collection.[17]

In one case,[18] the organiser of "ethnic entertainment" bought tickets to fly performers from Lahore to New York via Karachi. The court held that the reference to "stipulation" rather than contract of carriage contemplated a broad relationship; and that WSC applied to an action by the organiser, who had had to cancel performances because the flights were so delayed that the performers got no further than Karachi, against the carrier, although not himself a passenger.

2. *The persons carried*, generally referred to as passengers, are persons who consent to be carried.[19] A passenger does not have to consent expressly to the terms of the contract or even see the ticket; it is enough that the passenger consents to be carried on the flight in question.[20] Thus in *Ross*[21] an entertainer whose flight was entirely arranged and paid for by the US Army was a passenger under the version of WSC then in force. Concerning charters of aircraft, see note 1.3 above.

10. *Sté Mutuelle v. Gauvain, Cass Civ 4.8.1967*, (1967) 21 RFDA 436.
11. *Aéro-Club de l'Aisne v. Klopotowska, Cass Civ 20.1.1970*, (1970) 24 RFDA 195.
12. "Baptêmes de l'air": *Valade v. Aéro-Club de Brive, Riom, 21.11.1974*, (1975) 29 RFDA 202; *Lefebvre v. Aéro-Club "Les Ailes Dieppoises", Rouen 20.11.1973*, (1974) 28 RFDA 202.
13. [2001] EWCA Civ 1087; [2002] 1 WLR 785.
14. *Laroche v. Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12; [2009] QB 778; [2009] 1 Lloyd's Rep 316. The decision concerned an accident that occurred in 2003 and the possible application (yes) of the Carriage by Air Acts (Application of Provisions) Order 1967 which applied the rules of WSC to domestic flights.
15. *Laroche* at [26]. The *Laroche* court decided that the natural and ordinary meaning of "aircraft" was wide enough to include hot air balloons, which were capable of use for international transport.
16. See *Adjoyi v. Federal*, 137 F 2d 498 (SDNY, 2001). See also below note 7.1.
17. *United Int Stables v. Pacific Western Airlines* (1969) 5 DLR (3d) 67, 70 Seaton J (BC CA).
18. *Pakistan Arts v. PIA*, 660 F Supp 2d 741 (1997); ULR 1998.885.
19. *Block v. Air France*, 386 F 2d 323, 333.
20. *Ross v. PanAm*, 85 NE 2d 880, 884–885 (NY CA, 1949); *Stratis v. Eastern*, 682 F 2d 406 (2 Cir, 1982). *Cf* the question whether the passenger has notice of the terms of the contract: it was enough that Stratis knew his flight was international (p. 412). *Stratis* was distinguished in *Pimentel v. Lot*, 748 F 2d 94 (2 Cir, 1984).
21. *Ross* (above).

As consent must be on the basis of a contract of carriage, that rules out stowaways,[22] persons on the flight to be expelled from the State of departure,[23] persons employed by the carrier to carry out routine maintenance,[24] flight attendants,[25] and student pilots.[26] Although they consent to be on the flight, they have not contracted for carriage as such: they are not primarily there for transportation.[27] The position of airline employees not acting as such but e.g. enjoying free travel is unsettled.[28]

3. ***Baggage*** is defined less by what it is than by how it is dealt with, although in practice the nature of the thing affects how it is dealt with. The Conventions distinguish between unchecked (unregistered) baggage which remains in the charge of the passenger and travels in the cabin, on the one hand, and checked (registered) baggage which is taken in charge by the carrier and travels in the hold of the aircraft, on the other (see MC article 3). Usually checked baggage is carried on the same aircraft as the passenger but this is not necessarily the case.[29]

The line between checked baggage and cargo, which also travels in the hold of the aircraft, depends on party intention which, in turn, depends mostly on the carrier's view of the transaction. This appears from the documentation. In *Newell*,[30] for example, the court decided that live dogs checked in by the passenger were baggage, by looking at the carriers' regulations i.e. how the carrier treated pets.

4. ***Cargo*** applies to anything that can be carried and which the carrier has agreed to carry, but which is not "baggage" (see above note 3).[31] In France "goods" have been translated as *marchandises*, a word which has a narrow connotation confined to commerce, but one irrelevant to MC. Be that as it may, in the US WSC has been applied to the repatriation or other carriage of human remains,[32] and the same is likely to be ruled in respect of MC.

5. ***Aircraft*** are not defined in the air Conventions but judges "know a jumbo when they see one". The French Court of Cassation[33] once decided that a hang glider (*parapente*) is an aircraft. This is questionable (see above note 1.2). In *Disley v. Levine*[34] the question for the Court of Appeal was whether a claim for damages for personal injuries sustained in a tandem paraglider accident, while the claimant was under a course of instruction by the defendant, was within the scope of the WSC as applied to domestic flights. The Court held not, *inter alia*, because on a purposive interpretation of the legislation paragliders are not

22. *Block* (above) p. 334.
23. *Galu v. Swissair*, 20 Avi 18,550 (SDNY, 1987).
24. *Sulewski v. Federal Express*, 933 F 2d 180 (2 Cir, 1991).
25. *Re Mexico City Aircrash of 31 October 1979*, 708 F 2d 400 (9 Cir, 1983).
26. Even when the instructor takes over control of the aircraft: *Johnson Estate v. Pischke* [1989] 3 WWR 207, 216 (Sask).
27. *In Re Mexico City* (above) p. 417.
28. In past practice they were issued with tickets so that WSC applied.
29. See, e.g. *Collins*, discussed below under art. 4 (note 1).
30. *Newell v. Canadian Pacific* (1976) 74 DLR (3d) 574 (Ont).
31. *Johnson v. American*, 834 F 2d 721, 723 (9 Cir, 1987).
32. *Ibid*, followed in *Onyeanusi* v. *Pan Am*, 23 Avi 18,122 (3 Cir, 1992).
33. *Cass Civ 19.10.1999*, BTL 1999.827.
34. [2001] EWCA Civ 1087; [2002] 1 WLR 785.

aircraft.[35] However, in *Laroche*[36] the decision in *Disley* was distinguished and differently explained as based on the fact that in *Disley* the claimant was there not as a passenger but as a pilot under instruction.[37] The *Laroche* court decided that the natural and ordinary meaning of "aircraft" was wide enough to include hot air balloons, which were capable of use for international transport. Indeed in 2010 airships were under construction with a view to such carriage of certain cargo.

In an earlier case in the House of Lords,[38] Lord Hope stressed "all" in article 1.1 and continued: WSC "was intended to be, and is, capable of accommodating changes in the practice of airlines and aircraft operators with regard to the purpose for which aircraft are used to carry people and goods".[39] The plain meaning of the relevant words indicated in that case that a helicopter flight in Scotland was carriage by air. Judgments suggesting limits on the meaning of carriage by air[40] must be read in, and perhaps confined to, their context.

6. ***Reward*** is not essential as MC also applies equally "to gratuitous carriage by aircraft performed by an air transport undertaking" (article 1.1). The French for reward (*remunération*) implied that the carrier's ultimate purpose must be to make a profit,[41] whether or not the contract or flight in question is profitable. Reward is not defined. In the UK, however, the Civil Aviation Act 1982 provides that reward includes any form of consideration received or to be received wholly or partly in connection with the flight, irrespective of the person by whom or to whom consideration has been given or is to be given.[42] As long as the carrier is being remunerated, the remuneration does not have to come from the passenger in question. Thus, in *Gurtner v. Beaton*,[43] members of a curling team were passengers under the WSC although some other body had paid for their flight.

7. ***Transport undertaking*** is not defined. However, although, from the point of view of the consignor of the goods or the passenger, transportation must be the main purpose of the flight,[44] it does not have to be the main object or activity of the person undertaking the transportation. Thus, a holiday tour company may be (liable as) an air carrier, if transportation by air is part of the package sold to a customer.[45] Moreover, the German

35. The Court followed *Holmes v. Bangladesh Biman* [1989] AC 1112.

36. *Laroche v. Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12; [2009] QB 778; [2009] 1 Lloyd's Rep 316; Lawson, 34 Air & Space Law 221 (2009). The decision concerned an accident that occurred in 2003 and the possible application (yes) of the Carriage by Air Acts (Application of Provisions) Order 1967 which applied the rules of WSC to domestic flights.

37. *Laroche* at [26].

38. *Fellowes v. Clyde Helicopters* [1997] 1 All ER 775, 791 (HL).

39. Pp. 791–792.

40. Such as that of Lord Bridge in *Holmes v. Bangladesh Biman* [1989] AC 1112, 1131 and Greene LJ (in *Grein v. Imperial Airways* [1937] 1 KB 50) from which Lord Bridge quoted.

41. Godfroid (1987) 41 RFDA 22, 23, with reference to the French domestic law notion of *contrat à titre onéreux*; and 27 *ff* with reference to the legislative history of the WSC.

42. Section 105(1). A similar conclusion was reached, by interpretation of WSC, in *BGH 24.6.1969*, (1970) 5 ETL 97, 112 *ff*.

43. Unreported. The point was not contested on appeal: [1993] 2 Lloyd's Rep 369 (CA). See also *BGH 24.6.1969* and *BGH 2.4.1974*, outlined above.

44. See note 1.

45. In *Akehurst v. Thomson Holidays* (unreported), known as the "Gerona Air Crash Group Litigation" ((2004) 154 NLJ 62) compensation was awarded against a package tour operator.

Supreme Court (BGH) once held that a flying club transporting its members to an event was an air carrier subject to the WSC.[46]

7.1 *Charterers of aircraft* may be regarded as a transport undertaking under article 1. However, in *Block*,[47] the United States Court of Appeals concluded from the legislative history of WSC that WSC applies "when the carrier is the owner of the aircraft", not the charterer. The BGH, however, has applied WSC to companies that charter aircraft.[48] *Block* is a decision of 1967 out of line with modern commercial practice. Aircraft "owners", like shipowners, include disponent owners.

In the US, decisions more recent than *Block*, mostly concerning the carriage of goods, drew a distinction between direct carriers and indirect carriers. Direct air carriers "are those who operate aircraft, while indirect air carriers hold out a transportation service to the public under which they utilise the services of a direct carrier for the actual transportation by air".[49] Although they carry no goods themselves, they "assume the responsibility of a carrier".[50] More depends on what is stated in the documents recording the agreement than on what a company calls itself. To avoid uncertainty a contract term is commonly included, that the person issuing the ticket, the baggage check or AWB is the carrier, unless proved to the contrary. Moreover, it has been suggested by a leading commentator that a charterer will be regarded as a carrier if it issues its own timetables (with abbreviated reference to the actual carrier), or its own tickets.[51]

7.2 *Flying clubs and instructors* are not usually transport undertakings. In *Disley v. Levine*[52] the question for the Court of Appeal was whether a claim for damages for personal injuries sustained in a tandem paraglider accident with the defendant, while the claimant was under a course of instruction by the defendant, was within the scope of the WSC as applied to domestic flights. The Court held not *inter alia* because the defendant was not an air transport undertaking. However exceptional cases arise: see the decision of the BGH mentioned *above*.[53]

8. ***The principle of restitution*** has been described by one of the fathers of modern air law as "the key principle that imbues the whole [Montreal] Convention",[54] albeit one aimed mainly "at passenger death and injury, and only subsidiarily at delay, baggage and cargo".[55]

46. *BGH 5.7.1983,* NJW1984.2445.
47. *Block v. Air France*, 386 F 2d 323, 347 (5 Cir, 1967).
48. See e.g. *BGH 24.6.69,* (1970) 5 ETL 97 and other such decisions cited by Koller, art. 1 para. 3.
49. *DHL v. Civil Aeronautics Bd*, 584 F 2d 914, 915 (9 Cir, 1978). See also *Royal v. Amerford Air Cargo*, 654 F Supp 679 (SDNY, 1987).
50. *DHL* (above) *loc cit, cf* Whalen, 25 Air & Space L 12, 15 (2000): that "undertaking" is unclear; that it is wider than the HP word "enterprise" which it replaces; and that an IBM flight carrying customers gratuitously from New York to Toronto would be an "undertaking", although not an "enterprise" because IBM is not in the air transportation business. Certainly, this is likely under MC in view of the reference to "equitable compensation" in the Preamble.
51. Giemulla, art. 1, para. 30, with reference to German decisions.
52. [2001] EWCA Civ 1087; [2002] 1 WLR 785.
53. Above note 7.
54. Bin Cheng, 49 ZLW 287, 293 (2000).
55. Bin Cheng, 49 ZLW 484, 488 (2000).

Article 1.2

2. For the purposes of this Convention, the expression international(1) carriage(2) means any carriage in which, according to the agreement between the parties,(3) the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories, of two States Parties(4) or within the territory or a single State Party if there is an agreed stopping place(5) within the territory of another State, even if that State is not a State Party.[56] **Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.**

Article 1

2. For the purposes of this Convention, the expression "international(1) carriage"(2) means any carriage in which, according to the agreement between the parties,(3) 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(4) or within the territory of a single High Contracting Party if there is an agreed stopping place(5) within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

Comment

The points of contact which characterise transportation as international vary from one transport convention to another. The requirement for the air Conventions (article 1.2), the double requirement of two points of contact with contracting States, is unusually strict.[57] The requirement is one of comity and one which does not exclude voluntary adoption of the Conventions.[58] Problems may well arise during the interim period while some States apply MC but others still apply WSC in one or other of its forms.[59]

The instance of carriage "within" the territory or a single High Contracting Party, if there is an agreed stopping place within the territory of another State, is unlikely to be a movement which the average passenger thinks of as within the home state because what is mainly in mind is the round trip: the single contract to a foreign state and back again.

In contrast, the average exporter will be concerned with the modern practice of intermodal (or multimodal) carriage of goods, where one mode (often the main mode in terms of distance but not necessarily in other respects) is by air. That, however, was not in the mind of the drafter at all. This flaw in WSC (MC is little better) has given rise to acute

56. *Cf* the round trip; see above art. 1.1, note 1.1.
57. *Cf* CMR for international carriage by road which requires only one such contact.
58. *Philippson v. Imperial Airways* [1939] AC 332.
59. See Chapter 2.

difficulties[60] not least because of the restrictive interpretation given to "destination"; see article 18, Comment (d).

"High Contracting Party" in WSC is a phrase rendered in modern idiom in MC as "State Party",[61] although in MC, article 53.2, MC is applied to entities not regarded as States in international law.[62]

Notes to article 1.2

1. ***International*** carriage means carriage that is international according to party intention as indicated by the agreement of the parties (below note 3). If a foreign destination has been agreed, the flight is international, although in the event the aircraft never leaves the airspace of the State of departure.[63] "In choosing the *contract* as the basis for determining the application of the Convention, the drafters [ensured] that events beyond the control of the parties (crashes on take-off, at sea, or in non-signatory countries) would not deprive the carrier or passengers of uniform treatment under the Convention."[64] Needless to say the same is true of consignors and consignees of cargo.[65] As regards evidence of party agreement, see below note 3.

1.1 *Stages of a journey* are "international" when the contract of carriage as a whole is international. This includes a preliminary stage, i.e. a feeder flight to connect with an international flight. It is "international" if part performance of a contract concluded for an entire movement[66] but not otherwise,[67] unless of course the feeder flight itself is international. It makes no difference that carriage is performed not by a single carrier but by two or more carriers, if the case comes within article 1.3. Moreover, if an international carriage involves a purely national stage undertaken by a sub-contractor, the rights of the passenger against the international carrier are governed by MC (or WSC). If so, however, the passenger or consignor's rights against the sub-carrier are thought to be governed by local law.[68]

2. ***Carriage*** means the physical operation of carriage; see article 1.1, note 1.

60. See e.g. *Quantum v. Plane Trucking* [2002] EWCA Civ 350; Clarke [2002] JBL 128.
61. For past confusion, see the account by Bin Cheng, [1959] JBL 30.
62. Bin Cheng, 49 ZLW 287, 300 (2000).
63. *Wyman v. Pan-Am*, 1943 US Av R 1, 3 (Sup Ct); *Surprenant v. Air Canada* [1973] CA 107 (CA Quebec).
64. *Karfunkel v. Air France*, 427 F Supp 971, 977 (SDNY, 1977) with reference to a highjacking. Also in this sense: *OLG Düsseldorf 21.1.1993* TranspR 1993.246.
65. In particular, argument by analogy with the common law of deviation, that "fundamental departure from the contractual voyage entitled the plaintiffs to repudiate the contract of carriage which thus became deprived of its international character and so no longer subject to the terms of the Convention", was rejected: *Rotterdamsche Bank NV v. BOAC* [1953] 1 WLR 493, 502 *per* Pilcher J, with the reservation that deviation might amount to "wilful misconduct" that triggered WSC art. 25 (see now MC art. 22.5). It is now accepted that common law notions of deviation should not be read into international carriage conventions: *The Antares* [1987] 1 Lloyd's Rep 424 (CA). Clarke, CMR para. 31a.
66. *Stratis v. Eastern*, 682 F 2d 406 (2 Cir, 1982). *Idem* under MC (as regards the final stage of a round world trip: *Gerard v. American Airlines*, 2007 WL 2205364 (Conn Super Ct, 2007); noted by DeMay 73 JALC 131, 204 (2008).
67. *In Re Air Crash at Warsaw*, 18 Avi 17,705 (EDNY, 1984); *Lemly v. TWA*, 20 Avi 17,520 (2 Cir, 1986).
68. Koller, art. 1, para. 12.

3. ***The agreement of the parties,*** which is likely to be characterised by national law as a contract for services,[69] is a reference to the original contract of carriage.[70] In practice, the best evidence of the agreement is likely to be the ticket or AWB, in the absence of which other available evidence will be considered.[71] The importance of the latter has increased with the trend to electronic documentation, which is specifically provided for by MC.[72]

4. ***High contracting parties*** (in WSC) are what MC calls the "States Parties" (to MC). State territory includes "not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible".[73]

5. ***Agreed stopping place*** means any "place where according to the contract the machine by which the contract is to be performed will stop in the course of performing the contractual carriage, whatever the purpose of the descent may be and whatever rights the passenger may have to break his journey at that place". Such was the view in the 1930s.[74] Reference to "a published and readily available timetable" was a sufficient compliance with this element of the definition a decade or so later.[75] However, where there is more than one stopping place, it remains true that the document (such as an AWB) must refer to all of them and not omit one.[76]

The purpose of stopping at the place is irrelevant. On the one hand, a place is nonetheless an agreed stopping place because it enables the aircraft to refuel but the passengers have no right to get off the aircraft[77] or desire to do so. On the other hand, the place may be central to the passenger's reason for taking the flight and what the passenger sees as the destination, where the passenger plans to have a holiday,[78] or to attend a meeting, a conference, a concert, or a celebration.[79] However, that place may not be the destination according to the contract and the law, notably in the case of round trips. This is important as the place of destination is one of the places with jurisdiction over claims arising out of the operation (MC article 33).[80]

69. E.g. *BGH 21.12.1973*, TranspR 1974.852. *Cf* "umbrella" contracts in which parties agree the framework for future contracts of transport by whatever mode seems appropriate at the time. See e.g. *Paris 6.12.2002*, BTL 2003.139 in which the possibility of applying WSC was considered. In the UK the problem has arisen in connection with whether CMR should apply: see Clarke, CMR, no 10.

70. E.g. *Egan v. Kollsman*, 234 NE 2d 199, 201 (NY CA, 1967); *OLG Hamm 24.10.2002*, TranspR 2003.201.

71. *Stratis v. Eastern*, 682 F 2d 406 (2 Cir, 1982).

72. Article 3.2 for passenger tickets and article 4.2 for cargo documentation. Generally, see Giemulla, article 1, para. 9. Rueda 67 J Air L & Com 401 (2002); Ruhwedel TranspR 2004.421; Abeyratne, 70 J Air L & Com 141 (2005).

73. WSC, article 40A. For the complete list today, together with reservations, see http://treaties.un.org/Pages/ParticipationStatus.aspx.

74. *Grein v. Imperial Airways* [1937] 1 KB 50, 80 *per* Greene LJ (CA).

75. *Kraus v. KLM*, 92 NYS 2d 315, 317 (1949) *per* Hecht J.

76. *Warner Lambert Co v. LEP*, 517 F 3d 679 (3 Cir, 2008).

77. *Grein* (above) *loc cit.* Also p. 81.

78. E.g. Manchester to Los Angeles for a holiday and back to Manchester: *Collins v. British Airways* [1982] QB 734 (CA). See also *Southern Electronic Distributors v. Air Express*, 994 F Supp 1472 (ND Ga, 1998) concerning freight.

79. E.g. Montreal to Islamabad and back via London: *British Airways v. Safi* (1998) 205 RFDA 166 (Quebec). See also *Lee v. China Airlines*, 21 Avi 17,129 (CD Cal, 1987).

80. The place of destination has been seen to be that of the passenger rather than that of the aircraft: *Coyle v. Garuda* 27.6. 2001, 180 F Supp 2d 1160 (D Or, 2001). See art. 18, Comment (d).

Article 1.3

3. Carriage to be performed by[(1)] several successive air carriers[(2)] is deemed, for the purposes of this Convention, to be one undivided carriage[(3)] if it has been regarded by the parties as a single operation,[(4)] whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.[(5)]

Article 1

3. Carriage to be performed by[(1)] several successive air carriers[(2)] is deemed, for the purposes of this Convention, to be one undivided carriage[(3)] if it has been regarded by the parties as a single operation,[(4)] whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.[(5)]

Comment

Article 1.3 amplifies the concept of international carriage in article 1.2 where (common in long journeys) actual carriage is undertaken by successive carriers, whether or not the carriers concerned are part of an alliance of carriers. Code sharing is successive provided that, although a later carrier is not identified then, its participation is apparent from the timetables of the carrier with which the passenger deals at the beginning. In any case, successive carriage is distinguished from carriage which is contracted to be carried out by one carrier which sub-contracts one or more of its stages to another "actual" carrier: see note (1). Such carriage was dealt with by GSC while WSC was in force. It is now the subject of MC Articles 39 *ff.*

Notes to article 1.3

1. ***Carriage to be performed by*** is a phrase which implies that it must have been the initial intention that performance be by more than one carrier, in contrast with the case of "substitution"[81] where performance undertaken by a single carrier is sub-contracted—something not uncommon between carriers in the same alliance; or where, by reason of some accident or technical problem, the carriage has to be taken over by another carrier after part performance by the intended carrier.[82] Once the carriage is intended to be performed by more than one carrier, it is a case for article 1.3.

2. ***Carrier*** means the person, usually a corporate legal entity contracting the carriage, as well as its employees; see article 22, note 1.

3. ***Undivided carriage*** is what successive carriage is presumed to be according to the proper interpretation of article 1.3. For this purpose a court will look to the "record"

81. Giemulla, art. 1, para. 14.
82. Giemulla, art. 1, para. 16. On the position of "actual" and "contracting" carriers, see MC arts 39 *ff.*

including evidence, such as the ticket or AWB, of the parties' contract to seek their mutual intention.[83] It is not deemed to be undivided solely because the parties "deem" it to be, e.g. by stating that it is so. Moreover, if there is indeed an international carriage governed by an air Convention, the passenger cannot add on or insert another stage, which might not be governed by the Convention, by means of a separate contract, and thus bring the latter stage within the scope of the Convention.[84]

4. ***The parties*** is a reference to all parties concerned.[85] Obviously, this will be so, to take a common example, when the ticket provides for two or more stages to be performed by different carriers.[86] However, if, for example, a passenger contracts a domestic flight with carrier A to the border, crosses the border by other means and continues by a domestic flight with carrier B, neither contract is international.[87]

5. ***Carriage within the territory of the same State*** may or may not be part of international carriage, according to the case. Once "the contract is ascertained to be a contract for the class of carriage described, it matters not that the journey is broken. Thus, if the contract were for carriage of a passenger from Paris to Madrid it would make no difference if the passenger was entitled under the contract to break his journey at Toulouse; he might be entitled to remain at Toulouse for a week or a month and then resume his journey, the carriage would none the less satisfy the definition. The reason for this is clear once it is appreciated that the contract is the unit, not the journey".[88] An incident on the flight from Paris to Toulouse would then have been governed by the WSC. In that case there was one contract and just one ticket; but the decision was the same in 1988 when there were a number of tickets for a number of connected flights on a round business trip all bought and paid for at the same time.[89]

National stages of international flight are not uncommon in a large country such as the US, where the national stage may be performed by a local carrier which does not undertake the international stages to or from the US.[90] Thus, in the case of a round trip from Geneva to various places in the US and back to Geneva, it made no difference that the tickets for flights within the US were in a different booklet issued by a different carrier or that the entire trip took more than a month, because the trip was the subject of a single contract.[91]

83. *Nahm v. SCAC Transport*, 21 Avi 17,478 (Ill App, 1988). See also *Kenner v. Flying Tiger Line*, 20 Avi 18,282 (ND Ill, 1987).

84. "The unilateral expectation of one party alone cannot be controlling": *P.T. Airfast Services v. Superior Court*, 17 Avi 18,087 (Cal App, 1983), quoted with approval in *Nahm* (above).

85. *Kenner v. Flying Tiger Line*, 20 Avi 18,282 (ND Ill, 1987).

86. *Friesen v. Air Canada*, 1982 ULR II. 146 (Alta, 1981).

87. *Hernandez v. Aeronaves de Mexico*, 18 Avi 18,227 (ND Cal, 1984).

88. *Grein v. Imperial Airways* [1937] 1 KB 50, 78 *per* Greene LJ (CA); applied in *United Int Stables v. Pacific Western* (1969) 5 DLR (3d) 67, 69 (BC CA); and in *Stratton v. Trans-Canada* (1962) 32 DLR (2d) 736, 747 (BC CA). *Cf Emirates Airlines v. Schenkel* Case C-173/07; [2009] 1 Lloyd's Rep 1 (ECJ), discussed in Chapter 2.

89. *Duff v. TWA*, 527 NE 2d 498 (Ill App, 1988). See also *Stratis v. Eastern*, 682 F 2d 406 (2 Cir, 1982).

90. E.g. *Attal v. PanAm, TGI Paris 16.11.1989*, (1990) 44 RFDA 222.

91. *Haldimann v. Delta*, 168 F 3d 1324, 1326 (DC Cir, 1999); applied in *Robertson v. American Airlines*, 277 F Supp 2d 91 (DDC, 2003).

If, however, a national stage is not part of the trip originally contracted for but (not being regarded as a rerouting) a flight added later at the passenger's request, it would not be part of the international flight.[92] But if one leg of an international round trip is taken by bus because the flight for that leg was fogbound, a subsequent leg of the trip within one state is none the less part of the international flight.[93]

Flights contracted to be undertaken within a single state are not governed by the Conventions, however, it may well be that the law applicable in that state is based on the Conventions.[94]

Article 1.4

4. This Convention applies to carriage as set out in Chapter V, subject to the terms contained therein.

Comment

WSC contains no provision corresponding to MC, article 1.4. MC Chapter V covers carriage by air performed not by the contracting carrier but by another carrier, referred to as "the actual carrier". This chapter, however, substantially re-enacts GSC; see (MC) articles 39 *ff.*

Article 2—Carriage Performed by State and Carriage of Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.
2. In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.(1)
3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.(2)

Article 2

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.
2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.(1)
3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.(2)

92. *Stratton v. Trans-Canada* (1962) 32 DLR (2d) 736 (BC CA): business round trip with 26 legs and 28 (sic) coupons, including Seattle–Vancouver and back, via Victoria BC Phoned airline agent to add V–Calgary–V. To make connections the coupon S–V was changed to S–V–C. All killed on V–C leg. Argued that it was rerouting and thus part of original trip; (or—rejected on facts—a new contract made in S for C via V). But rerouting is "carriage to the destination specified in the ticket or portion thereof surrendered": p. 741.

93. *Egan v. Kollsman*, 234 NE 2d 199 (NY CA, 1967).

94. E.g. in the UK, see e.g. Clarke and Yates paras 3.389 *ff.*

Comment

If carriage is provided directly by the State, i.e. without interposing a state controlled corporation, States may reserve the right to exclude the application of MC: article 57. A similar exclusion is provided for in respect of carriage for the armed services "on aircraft registered in or leased by" States.

Notes to article 2

1. ***Relationship with State postal administration***: article 2 spells out the corollary of the exclusion of postal items which had been inferred under WSC in its original version, even in the absence of a provision corresponding to article 2.2.[95]

2. ***The carriage of postal items*** is effected under a contract made by the sender of a postal item with the postal authority. The sender does not conclude, as required by article 1 for the application of the Conventions, a contract of carriage with a carrier. However, a contract for carriage of postal items made by a sender with a commercial organisation, which operates aircraft, may well be governed by the Conventions.

If the elements of the tort can be established an action may lie in conversion or negligence. In *Moukatoff*[96] an action on both grounds succeeded in respect of a large amount in banknotes. However, later cases in the English law of tort suggest that the law of tort would not be applied today, at the very least, as regards an action in negligence. In general terms, it has been said that it "should be no part of the law of tort to fill contractual gaps"[97] or to allow it to disturb the allocation of risk established by contract[98] or by international convention.[99]

CHAPTER II

DOCUMENTATION AND DUTIES OF THE PARTIES RELATING TO THE CARRIAGE OF PASSENGERS, BAGGAGE AND CARGO

Article 3—Passengers and Baggage

1. In respect of carriage of passengers, an individual or collective document of carriage(1) shall be delivered(2) containing:(3)

(a) an indication of the places of departure and destination;(4)

95. Giemulla, art. 2, para. 2.
96. *Moukatoff v. BOAC* [1967] 1 Lloyd's Rep 396. WSC was not in issue, however, the principle would be the same.
97. *Keyser Ullmann v. Skandia* [1990] 1 QB 665, 800 *per* Slade LJ (CA).
98. *Tai Hing v. Liu Chong Hing* [1986] AC 80, 107 (PC).
99. See *Marc Rich v. Bishop Rock Marine* [1996] 1 AC 211.

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being[5] within the territory of another State, an indication of at least one such stopping place;

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

(For paragraph 3, see below.)

4. The passenger shall be given written notice[6] to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

CHAPTER II

DOCUMENTS OF CARRIAGE

Section I. Passenger Ticket

Article 3

1. In respect of the carriage of passengers a ticket[1] shall be delivered[2] containing:[3]

(a) an indication of the places of departure and destination;[4]

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places[5] being within the territory of another State, an indication of at least one such stopping place;

(c) a notice[6] to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks[7] without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

Comment

What is required of a passenger ticket is *mutatis mutandis* the same as what is required of a baggage check by MC articles 3.3 *ff* (or WSC article 4). The two can be combined in a single document. MC accommodates the wishes of carriers as well as many of their customers for electronic ticketing.[100] Information of the kind required to be contained in a paper ticket *may* be preserved by "other means": MC article 3.2. However, article 3.2 contains an element of compromise. There is the proviso that the carrier *shall* offer to deliver to the passenger "a written statement of the information so preserved".

In the past, one of the most important features of the ticket was the "Hague Notice", to warn the passenger that the carrier's liability might well be limited. Without such notice, article 3.2 of WSC provided *in fine* that "the carrier shall not be entitled to avail himself of the [limitation] provisions of article 22".[101] In contrast, MC article 3.4 states that in spite of non-compliance with article 3, including the requirement of notice, the rules limiting liability apply.[102]

Notes to article 3

1. ***Ticket*** means what it meant at the time the 1929 text of the Convention was drafted: a paper document which shows the terms of contract. The contract was "expressed in the passenger ticket".[103] The ticket was also an effective vehicle for incorporating standard terms, notably, the IATA Conditions of Carriage.

1.1 *The form of the ticket* expected since 1929, a paper document, is reflected in the language of the WSC text. The trend to electronic ticketing is accommodated by MC article 3.2.

The ticket required by the WSC had to be not only a paper-based document but one in form and kind generally regarded as a ticket. In *Miceli*,[104] a firm chartered an aircraft to carry its employees on tour. The carrier's argument, that the charter document was a ticket for all on board, was rejected by the court in California because the word "ticket" should be given its ordinary meaning; and also because the Convention (WSC) drew a distinction between the ticket and the contract of carriage.[105] Whereas a ticket is seen as evidence of the contract of carriage but not the contract itself, a charter is usually regarded as the contract. In contrast, the BGH has taken a more relaxed view of charters and a more

100. Rueda 67 J Air L & Com 401 (2002).

101. See e.g. *Ludecke v. Canadian Pacific Airlines* (1979) 98 DLR (3d) 52 (SC Can). *Cf* US: *Chan v. Korean Airlines*, 490 US 122 (1989). However, the carrier was none the less entitled to plead the time bar contained in article 29: *BGH 2.4.1974*, (1974) 9 ETL 777.

102. MC art. 3(5) was applied in Ontario in *ACE v. Holden* (2008) 296 DLR (4th) 233, 235: the limits applied even though the claimants had not received a notice of the kind required by WSC 3(1)(c).

103. *In Re Air Crash at Bali*, 462 F Supp 1114, 1121 (CD Cal, 1978); *Thai Airways v. Eeckhout, Brussels 11.1.1995* (1995) 30 ETL 546. The latter also held that the carrier could not enter a reservation in the ticket, as this was contrary to its purpose.

104. *Miceli v. MGM Grand Air*, 59 Cal Rptr 2d 311 (Cal App 2 Dist, 1996).

105. Pp. 314–5.

functional view of what might be a ticket: to prove that a particular person is entitled to take a particular flight.[106]

1.2 *The content of the ticket*, as regards certain important matters, is determined by the Conventions. However, a document is still a ticket if it lacks some of the particulars required,[107] unless perhaps "its shortcomings are so extensive that it cannot be reasonably described as a 'ticket' (for example, a mistakenly delivered blank form, with no date filled in)".[108]

1.3 *The intelligibility of the ticket* depends to a degree on the ticket holder, the passenger. The purpose of the ticket is in part to inform the ticket holder and to record the terms of the contract in a way that is accessible to that person. None the less, the carrier is entitled to make two assumptions about that person. The first concerns language and the second, travel experience.

First, although the ticket must be legible,[109] the language in the ticket does not have to be one that the particular passenger can understand: "it would be untenable to require tickets to be printed in languages which all passengers can understand".[110] On the other hand, a court is likely to strive to find against a carrier who used a language knowing that it was one which most passengers on a flight would not understand. However, article 3 says nothing about the language of the required contents, and to hold against the carrier the court would have to hold, analogously with common law, that a concealed or unintelligible notice is not a notice at all.[111]

Second, in the US a court has held that some passengers may be deemed to have constructive notice of terms. In 1987 a court concluded,[112] consistently with common law[113] and common sense (but not it seems the Conventions at the time), that a passenger who had often flown as a courier should have known that the WSC applied so it did not matter that the ticket lacked the required Hague Notice. The notice requirement is unqualified. It is difficult to see how a ticket with no notice can be regarded as a ticket with notice, unless there is a gap in the Convention regime. If so, common law could be brought in through the gap. At common law people are deemed to know that carriers have such terms[114]; and that the terms apply unless shown to be unusual in content and also

106. *BGH 24.6.1969* (1970) 5 ETL 97, 116 *ff*.

107. See MC art. 3.5.

108. *Chan v. Korean Airlines*, 490 US 104, 129 *per* Scalia J (1989). *Cf Preston v. Hunting Air Transport Ltd* [1956] 1 QB 454, 459 *per* Ormerod J.

109. A notice in such small print that it could only be read with a magnifying glass would be no notice at all: *Chan v. Korean Airlines*, 490 US 104, 150 *per* Brennan J (1989).

110. *Mahmoud v. Alitalia*, 17 Avi 17,598 (SDNY, 1982) *in casu* Arabic. Aliter in *Vandelay v. Roberts, TGI Paris 8.2.1978* (1997) 33 RFDA 97 because the ticket was issued in France where the use of the French language in such documents was compulsory.

111. E.g. *Geier v. Kujawa* [1970] 1 Lloyd's Rep 364.

112. *Republic National Bk v. Eastern*, 815 F 2d 232 (2 Cir, 1987). See also *Collins v. British Airways* [1982] QB 734, 745 *per* Lord Denning MR (CA): "In my opinion, every airline which issues the standard form of 'passenger ticket and baggage check' for international carriage has the benefit of the limitation of liability under the Warsaw Convention, even though nothing is filled in the 'baggage check'. This is well understood by travellers by air."

113. In England this is the effect of the ticket cases: Clarke [1976] CLJ 51, 54 *ff*.

114. *Fosbroke-Hobbes v. Airwork* [1937] 1 All ER 108, 114 which refers to one of the leading railway ticket cases: *Thompson v. LMS* [1930] 1 KB 41 (CA).

onerous.[115] The difficulty about this "solution", sensible as it might be, lies in the wording of article 3.

2. ***Delivery of the ticket*** means the handing over of the document[116] by the carrier who has contracted carriage[117] or the actual carrier[118] to the right person: the passenger concerned or someone acting on the passenger's behalf.[119] For example, in the case of a group it is likely that the group leader or organiser would have express or implied authority to receive the ticket on behalf of individual passengers.

2.1 *Proof of delivery* of the ticket, as required by the Conventions, may be difficult. Practically speaking, however, the burden of proof is one that the carrier is better placed to bear. Today's air carrier with computerised reservations systems "is in the best position to show delivery, having access to its own records and copies of tickets sold and actually used for passenger travel. Its agents and ground personnel will also be available to reconstruct critical events. In contrast, the passenger may have been severely injured or killed in the accident".[120] It is notoriously difficult for claimants to prove a negative: in this case that no ticket was issued. The better view then is that the carrier must show that its normal ticketing procedures were in motion and that probably, like every other passenger at the time and place, the passenger in question did receive a ticket. Note that a ticket is not required in the "extraordinary circumstances" contemplated by MC article 51 (and WSC article 34).

2.2 *The time of delivery* must be such as to achieve the purpose of delivery. The purpose of delivering a ticket is to provide the passenger with information.[121] So, some courts have required that the ticket and the notice be delivered to the passenger in time "to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability", such as "deciding not to take the flight, entering a special contract with the carrier, or taking out additional insurance".[122] Delivery to the passenger when the aircraft is already thousands of metres in the air is clearly too late.[123] When a journey has more than one stage, the question has arisen whether delivery which is too late for the first stage may yet be in time for the next stage.[124] A negative answer suggests itself. Bearing in mind the purpose of delivery, can a transit passenger really be expected to respond by taking out insurance in a foreign transit lounge or by travelling by an alternative method? Delivery may also be ineffective because it is too early.[125]

115. *Interfoto v Stiletto* [1989] QB 433 (CA); *O'Brien v. MGN* [2001] EWCA Civ 1279.

116. Giemulla, article 3, para. 2 with reference to the WSC French text "*délivré*".

117. *BGH 24.6.1969* (1970) 5 ETL 97, 109–110. Not, e.g. the charterer of an aircraft which sold tickets to a travel agency which then sold the tickets to the passenger: *Look Voyages v. Generali France, Paris 29.4.1998* (1998) 208 RFDA 230.

118. Thus avoiding the contrary submission as in *Rotterdamsche Bank NV v. BOAC* [1953] 1 WLR 493.

119. *Ross v. Pan American*, 85 NE 2d 880, 884 (NY CA, 1949), affirmed *sub nom Froman v. Pan Am*, 349 US 947 (1955).

120. *Manion v. Pan Am*, 449 NYS 2d 693, 695 (CA NY 1982).

121. And in some cases to entitle the holder to take the flight.

122. *Mertens v. Flying Tiger Line*, 341 F 2d 851, 856–7 (2 Cir, 1965). A special contract might comprise the special arrangements contemplated by article 22: *Seth v. BOAC*, 329 F 2d 302, 307 (4 Cir, 1964).

123. *Mertens* (above) p. 857.

124. In cases such as *Manion v. Pan Am*, 449 NYS 2d 693 (CA, 1982).

125. See *Re Air Crash Disaster at Warsaw, Poland*, 748 F 2d 94 (2 Cir, 1984), distinguishing *Stratis v. Eastern*, 682 F 2d 406 (2 Cir, 1982). Also *Bodnar v. United*, 23 Avi 18,509 (ED Pa, 1992).

3. ***The indications required*** by article 3 to be contained in the ticket are mainly to warn the passenger that Conventions may apply and that, therefore, the carrier's liability may be limited: what was once called the "Hague Notice" (see note 6 below).

4. ***The places of destination and departure*** are commonly stated on the ticket. These are the "indications" required by article 3.1.

5. ***Stopping places*** are to be stated on the ticket. The purpose of the requirement is to alert the passenger or consignor that a movement that is not international as regards the places of departure and destination is nonetheless international.[126] To achieve this it has been held to be enough for the document to refer to the carrier's timetable[127]; and it has been argued[128] and accepted as regards the carriage of cargo[129] that mention of IATA airport codes[130] are notice enough. It must be doubted that these codes are sufficient to alert passengers today to the route.[131]

6. ***The Hague Notice*** that a Convention applies is such an important requirement that a form of notice was prescribed by IATA.[132] Courts have insisted that notice must be sufficiently clear to achieve its purpose.[133] As long as it is legible[134] it has been held, for example in Texas,[135] that it can be on any part of the ticket (which the passenger should realise concerns the contract of carriage) including the back. However, in the view of the Canadian Supreme Court, to be a notice at all, it must be *noticeable*.[136]

The meaning of "a notice" under WSC article 8[137] was the issue before the Commercial Court in England in 2005 in *Fujitsu v. Bax*,[138] in which an IATA form had not been used. The front of the waybill stated that the goods were accepted "*subject to the conditions of contract on the reverse hereof. The shipper's attention is drawn to the notice concerning carrier's limitation of liability*". Limits on liability were indeed stated on the back and the carrier argued that that was enough to satisfy article 8. The Court, however, rejected the argument *inter alia* on the "technical" ground[139] that the conditions on the back did not tie in with the Convention to the degree required by article 8. Moreover, "a notice" as

126. *Southern Electronics v. Air Express*, 994 F Supp 1472, 1476 (ND Ga, 1998).

127. *Kraus v. KLM*, 92 NYS 2d 315 (1949); *Brinks Ltd v. SAA*, 93 F 3d 1022, 1035 (2 Cir, 1996), with reference *inter alia* to *Corocraft v. Pan Am* [1969] 1 QB 616, 628. Applied in *Southern Electronics* (above).

128. Giemulla, art. 3, para. 6.

129. E.g. in *Southern Electronic* (above) p. 1477 concerning Taipei (TPE).

130. Such as ATH (Athens), FRA (Frankfurt) and LHR (London Heathrow).

131. *Cf* LSN (London Stansted), LGW (London Gatwick) etc.

132. IATA Resolution 724. The label "Hague Notice" is a legacy of the chequered history of WSC.

133. E.g. *Seth v. BOAC*, 329 F 2d 302, 307 (4 Cir, 1964).

134. *Seth* (above). *Lisi v. Alitalia* [1967] 1 Lloyd's Rep 140, 143 (2 Cir, 1966); affirmed 390 US 455 (1968); [1968] 1 Lloyd's Rep 505; *Mertens v. Flying Tiger Line*, 341 F 2d 851, 857 (2 Cir, 1965); *Egan v. Kollsman*, 234 NE 2d 199 (NY CA, 1967). Rejected in Italy: *Marino v. Air France, C.A. Milan 31.12.1969*, ULR 1970.276.

135. *Parker v. Pan Am*, 447 SW 2d 731, 735 (Tex Civ App, 1969), in which the text of the notice was in a part headed "CONDITIONS OF CONTRACT".

136. *Montreal Trust v. Canadian Pacific* [1977] 2 Lloyd's Rep 80, 83; [1977] 2 SCR 793. The Canadian Supreme Court decided that "the four and one half point type in which the requisite notice is reproduced at the foot of the first page of the ticket is reasonably readable" but could not be "described as noticeable".

137. The equivalent provision of MC is Art. 5.

138. *Fujitsu Computer Products v. Bax Global* [2005] EWHC 2289; [2006] 1 Lloyd's Rep 367.

139. At [27] *per* Christopher Clarke J.

required by article 8, is "a discrete form of words warning the reader of the potential applicability of the Convention. [It] is not the same as 'a statement', an 'indication', 'notification' or even 'notice'. It suggests something more defined than these".[140]

These requirements aim to ensure that the recipient has sufficient actual notice of the applicability of the Convention. National law may well be that people are deemed to know that air carriers have standard contract terms limiting their liability (constructive notice), regardless of the appearance of the ticket or the prominence of the notice.[141] Given the importance of the notice it is not clear that the same can be said of the Convention terms. The notice is "especially important in [the US], where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realise that, although they are travelling the same number of miles on an international flight that they have frequently travelled domestically, the amount they may recover in the event of an accident is drastically reduced".[142] More to the point. MC article 3.4 requires "written notice".[143] Such language cannot easily be construed to allow carriers to plead constructive notice.[144]

7. *Embarkation* is not defined. *Prima facie* it is the physical process of boarding the aircraft. However, in *Domangue*,[145] the court adopted a purposive interpretation. A principle purpose of the ticket requirement is the notice, and the purpose of that is to enable the passenger to protect himself (from the liability limit) by, for example, taking insurance. That cannot be done inside the aircraft, which pointed to an earlier point in time as the start of embarkation.

Article 3 (continued)

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.
4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.
5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be

140. At [19].

141. E.g. for carriage by sea *McCutcheon v. David Macbrayne* [1964] 1 WLR 125 (HL). *Cf Fosbroke-Hobbes v. Airwork* [1937] 1 All ER 108.

142. *Lisi v. Alitalia* [1967] 1 Lloyd's Rep 140, 143 (2 Cir, 1966); affirmed 390 US 455 (1968); [1968] 1 Lloyd's Rep 505. *Lisi* remains the subject of debate: Andemariam 71 J Air Law & Com 251, 259 *ff* (2006).

143. WSC art. 3 requires "a ticket . . . containing . . . (c) a notice" etc *cf*, however, *Stratis v. Eastern*, 682 F 2d 406 (2 Cir, 1982) in which notice in a ticket for a domestic leg of the journey was regarded as sufficient notice for a subsequent international leg, for which a separate ticket had been issued but not delivered to the passenger. A later court pointed up unusual features of *Stratis*: *Re Air Crash Disaster at Warsaw, Poland*, 748 F 2d 94, 96 (2 Cir, 1984).

144. For discussion of the notice requirement under MC art. 3, see Andemariam 71 J Air Law & Com 251, 268 *ff* (2006).

145. *Domangue v. Eastern*, 531 F Supp 334 (ED La, 1981), affirmed 722 F 2d 256 (5 Cir, 1984). Hence, it was enough in that case that the passenger received a ticket from the carrier's ticket counter just before proceeding to check in for the flight.

subject to the rules of this Convention including those relating to limitation of liability.

Section II. Baggage Check

Article 4

1. In respect of the carriage of registered baggage,(1) a baggage check(2) shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places(3) being within the territory of another State, an indication of at least one such stopping place;

(c) a notice(4) to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute prima facie evidence(5) of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss(6) of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1(c)) does not include the notice required by paragraph 1(c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

Comment

The requirements of a baggage check (or "receipt") are *mutatis mutandis* the same as those made of a passenger ticket. The two can be combined in a single document. The essence is that checked (or registered) baggage is baggage of which the carrier has taken charge and for which it assumes responsibility. In this situation, if the carrier wants to limit liability, it must issue a baggage check containing notice, so that the passenger knows or should know that the carrier's liability is limited and, if so minded, can insure the layer above the limit.

Passengers usually assume that they are entitled to bring baggage on board with them. The Conventions are silent on this but MC article 27 does allow carriers to lay down "conditions" on such matters,[146] which do not conflict with MC. Carriers usually make it clear that they are entitled to refuse certain items of baggage, as well as specifying the nature, weight and size limits which, if exceeded, will trigger refusal or a surcharge.

146. Referred to as "regulations" in WSC, art. 33.

Notes to article 3 (continued)

1. ***Checked (Registered) baggage*** is not defined. In *Collins*[147] this was described by Lord Denning, MR, as "an amazing omission". However, in the same case Kerr LJ said that he saw no difficulty about this. "I think that it has exactly the same meaning as in the ordinary context of registering a letter or parcel for carriage by post or registering articles for carriage by rail, etc. Registration in all these contexts means the delivery of the articles to the carrier for carriage, and his acknowledgement of their acceptance by keeping some written record for himself and the delivery of a corresponding receipt to the consignor, who, in the context of the carriage of passengers, is likely to be the passenger himself".[148] Nonetheless, the emphasis placed by courts is less on the written record[149] than on the fact the carrier has taken charge of the baggage.

Taking charge of baggage on the part of the carrier is easily proved in the typical case of baggage checked in at a desk in the airport terminal,[150] but less so when, it is alleged, baggage is taken from a passenger later, for example, when boarding. *Prima facie* this is done less to protect or save the baggage than to save passengers from the inconvenience or danger posed by items that are too large for the available cabin space. Can it be said that the carrier assumes responsibility for it and is liable accordingly?

In *Hexter*,[151] the court held the carrier liable for an overnight bag taken from a Concorde passenger and placed in a closet in the cabin. The decision turned on the wording of WSC concerning limitation. The court drew a distinction between items "handed over to the carrier" for which the carrier assumes responsibility and items "of which the passenger takes charge himself". The latter marks the line: anything else is taken charge of by the carrier. Registration is not an element which defines the range of items for which the carrier is responsible but a duty imposed on the carrier when items are formally handed over.[152] The court rejected the carrier's argument that, once a passenger takes charge of an item by seeking to board with it, it is treated as cabin luggage whatever happens to it after that. The *Hexter* court concluded that "when the airline by its unilateral act removes baggage from the passenger's charge, the airline thereby accepts the baggage within the meaning of article 4.4, and must issue a baggage check to preserve its right to limited liability".[153]

In contrast, when a passenger is momentarily deprived of an item, the passenger does not relinquish charge of the item and the carrier does not take charge of it. When, for example, "the passenger only briefly relinquishes physical possession of her hand-carried property

147. *Collins v. British Airways* [1982] QB 734, 742 (CA).

148. P. 752. He dissented from the decision of the court but not on this point.

149. *Cf* Lord Denning, MR in *Collins*, p. 743.

150. *Cf* items sent to the same destination as the passenger who sends them but on a different flight and thus under a contract distinct from the passenger contract: that is to be regarded not as registered baggage but cargo: Giemulla, art. 4, para. 3.

151. *Hexter v. Air France*, 563 F Supp 932 (SDNY, 1982). See also *Schedlmayer v. Trans International*, 416 NYS 2d 461 (NY Civ Ct, 1979).

152. P. 935.

153. P. 936. *Idem BGH 28.11.1978*, NJW 1979.496, when, in anticipation of an emergency landing, passengers were required to hand over personal items such as spectacles and wrist watches to cabin staff. But *cf Paris 1.2.2002*, BTL 2002.306.

for a necessary security check conducted in her presence" she remains in charge of the item.[154] However, if an oversize item such as a bicycle or set of skis is registered but then left on the concourse awaiting a handler, the passenger has relinquished charge of the item and the carrier has taken it.

2. *Tags.* The "baggage check", which heads article 4 WSC is not defined and differences appeared between the interpretation in the UK and that in the US as regards whether anything can be implied about its function and contents. MC has no such heading but article 3.3 requires carrier to deliver a "baggage identification tag for each piece of checked baggage".

2.1 *Checking* is an activity and a check is not a check, on one view, unless it actually "checks" something: a document, which makes statements of the kind required without more, is not a check at all. This view, which might be described as a purposive view, is not that which has been applied in the UK. There it was no more than a box to be filled in (or left blank) on the document headed "passenger ticket and baggage check"; a place on the document, the *means* of recording the relevant information without regard to whether it does actually record the information required.[155]

That was the view taken in *Collins*,[156] where the defendant carrier issued to each of the claimants, a husband and wife, a document entitled "Passenger ticket & baggage check" to fly them and their baggage from Manchester to Los Angeles and back. Each document contained four boxes entitled "Baggage checked" "Unchecked". Their checked luggage was recorded there for the journey to Los Angeles but not for the flight back. There was insufficient time to make any entries on the baggage check[157] because the claimants were late checking in. Their baggage had to be sent on a flight the following day, but when it arrived in Manchester they found that the contents had been ransacked. The claimants argued that, as the baggage had not been checked in for the return journey, there was no baggage check and therefore, the carrier could not limit its liability.

Judge Pitchford held that a "baggage check" meant a document recording that the baggage had been checked in, as did Kerr LJ dissenting in the Court of Appeal.[158] The document issued for the return flight contained information of the kind required by WSC article 4.1 but not enough of it: nothing about the baggage. Although article 4 did not regulate itemisation, the underlying purpose of the document was to provide evidence that

154. *Baker v. Lansdell*, 590 F Supp 165, 169 (SDNY, 1984). The court (p. 168) was not impressed by (the claimant's) argument "which in essence would require a carrier to provide a baggage check for each item it subjects to a brief, pre-boarding X-ray examination in order to retain its liability protection under the Convention".

155. See *Collins v. BA* [1982] QB 734, 744 (CA) *per* Lord Denning, MR. See also Eveleigh LJ (p. 748): "the words 'shall constitute' . . . merely mean that such matters as are contained on the baggage check shall constitute *prima facie* evidence".

156. Above. Criticised by Giemulla, art. 4, para. 10.

157. According to Lord Denning, MR, (p. 742). The same decision was reached when passengers checked in late in *Martino v. Air France, Strasbourg 31.3.1995* (1995) 48 RFDA 265.

158. Kerr LJ considered (p. 757) the literal view to be unbusinesslike, and not the intention of the draftsman: "the need for some documentary evidence of the receipt of registered baggage and cargo is in my view in accordance with both the letter and the spirit".

the carrier had taken charge of the luggage (as it did not deny) and assumed responsibility for it. This had been done for the outward journey but not for the return journey.

However, the majority of the Court of Appeal disagreed. The carrier had provided a document with boxes for the relevant information and that was enough.[159] The boxes did not have to be completed. Alternatively the Court held that, if that was incorrect, nevertheless, in this case, they were filled in at the "place of departure", which was Manchester.[160] So the airline was entitled to the benefit of the limitation. A consonant decision in France is that when misdirected baggage is redirected to the correct destination, a check does not have to be issued: the operation is part of the obligation assumed under the initial contract.[161]

2.2 *Statements in the check*, to be effective, must be legible. According to *Collins* (note 2.1 above) an illegible check is nonetheless a check. However, it may still be an ineffective check.[162] Passengers are entitled to ignore printed material "in minuscule type".[163]

2.3 *The form of check* may be that of a document quite separate from the passenger ticket. However, to satisfy the requirements of WSC article 4.1 it was obviously more sensible that it be "combined and incorporated in a passenger ticket"; and that was the practice.[164] MC article 3 simplified the matter further by requiring simply "a baggage identification tag for each piece of checked baggage".

3. ***Stopping places*** are also required to be indicated in a passenger ticket.

4. ***The notice*** is the so-called "Hague Notice", which was also required in a passenger ticket.

5. ***Prima facie evidence*** is rebuttable evidence. However, if the wrong person is able to take the baggage from the belt at destination, *prima facie* the carrier is liable. In this the baggage check is like the bill of lading issued for goods carried by sea.

159. E.g. *per* Eveleigh LJ (p. 747): "Such a document does not fail to live up to its description because it has not yet been used for its intended purpose and has not yet had entered upon it all the information which it is designed to record." He listed a number of textual arguments for the conclusion of the majority, among them that, in the original Warsaw Convention "it was specifically stated by paragraph (3)(*f*) of article 4 that the luggage ticket should contain the number and weight of the packages. The article concluded with the words: '(4) . . . if the luggage ticket does not contain the particulars set out at . . . (*f*) . . . the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.' The omission of those words from the present Convention is significant. I cannot believe that we are called upon to read them back in again."

160. P. 745 *per* Lord Denning, MR: "There is nothing in article 4 which requires it to be filled in at every stopping-place or at every stop-over."

161. *Puaux v. Air Inter, TGI Evry 11.10.1966*, (1997) 51 RFDA 56, 58.

162. See *Ludecke v. Canadian Pacific* [1979] 2 Lloyd's Rep 260, 264 (SCC).

163. *Stolk v. Air France*, 299 NYS 2d 58, 60 (NY, 1969), affirmed 316 NYS 2d 455 (1970). The court also held (pp. 61–62), not surprisingly, that a legible reference to limitation of liability for death and personal injury could not be treated as notice of limitation for baggage too: *expressio unius.*

164. See Bin Cheng, (2000) 49 ZLW 287, 306. See also the discussion in *Schopenhauer v. Air France*, 255 F Supp 2d 81 (EDNY, 2003).

6. ***Absence, irregularity or loss of the check*** does not render the contract invalid. However, the carrier might lose the all important limitation of liability accorded by article 22—whether the passenger has been prejudiced or not.[165] This is not true of a defective waybill for cargo: MC article 9.

Article 4—Cargo

1. In respect of the carriage of cargo, an air waybill(1) shall be delivered.
2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Section III. Documentation Relating to Cargo

Article 5

1. In respect of the carriage of cargo an air waybill(1) shall be delivered.
2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.
3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this Article does not entitle the carrier to refuse to accept the cargo for carriage.

Comment

Under the Hague Protocol 1955, the carrier of cargo was entitled to require the consignor to make out an AWB (air waybill) and the consignor was entitled to require the carrier to accept one. Since 1998, the rule[166] was simply that one should be delivered, the deliverer being unspecified. In practice today, usually the consignor makes out an AWB which is provided by the carrier: one which is in blank as regards the particular consignment but which includes the carrier's standard conditions. These blank forms are available to forwarders and shipping agents who make them out on behalf of the consignor. The carrier is entitled to require the consignor to make out a separate waybill for each package: MC, article 8a. If packages are consolidated, e.g. in a single loading unit, a practice has developed in some countries of issuing two AWBs: a master AWB for the entire consignment and the relations of the consolidator, usually a forwarder, with the carrier, as well as a house AWB issued by the forwarder to the consignor of each package consolidated. The intention is that the forwarder assumes the role of carrier in relation to each individual consignor under the house AWB but that of consignor under the master AWB in relation to the actual carrier.[167]

165. *Spanner v. United*, 177 F 3d 1173 (9 Cir, 1999).
166. The rule in force in the UK, until MC came into force., i.e. the 1955 version of WSC as amended also by Montreal Protocol No 4.
167. The practice is not reflected in the terms of the Conventions. See Giemulla, art. 5, para. 8.

Note to article 4

1. ***The AWB*** evidences the existence and terms of the contract, as well as serving as a receipt by the carrier for the cargo: MC article 11.1. In English law, AWBs are not negotiable. That is to say that, unlike bills of lading in maritime commerce, they are not transferable. If they were transferable, making the cargo deliverable "to order" or "to order or assigns" indorsement and delivery of the AWB would affect the ownership of the cargo. Indeed, in most respects, the AWB is quite unlike the maritime bill of lading.[168] However, it has been argued that AWBs are documents of title within the meaning of the Sale of Goods Act, 1979.[169]

Article 5—Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include(1)

(a) an indication of the places of departure and destination;(2)
(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places(3) being within the territory of another State, an indication of at least one such stopping place;
(c) an indication of the weight of the consignment.

Article 8

The air waybill or the receipt for the cargo shall contain(1)

(a) an indication of the places of departure and destination;(2)
(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places(3) being within the territory of another State, an indication of at least one such stopping place;
(c) an indication of the weight of the consignment.

Comment

These provisions state the information to be contained in the AWB. For passenger tickets the corresponding provision is MC article 3.1. These are the minimum requirements; additional information may also be included. Indeed, some additional information is necessary, such as the names of the parties to the contract of carriage and the persons to be notified on the arrival of cargo; see MC article 6. An indication of the additional information that has been found useful in the past is found in the original 1929 text of WSC, which contains a more extensive list of requirements. The current requirements are minimal by comparison with not only those of 1929 but also with those of other carriage conventions. In practice, however, AWBs are made out which contain more than the minimum requirements.

MC article 5 is essentially the same as the corresponding provision of WSC article 8. Apart from article 8(c), the indications required served the purpose of the "Hague

168. Giemulla, art. 5, para. 3.
169. Fountain, 6.27 *ff.*

Notice".[170] The current text assumes that a consignor, having more experience of such matters than a passenger, will draw the "Hague" inference from indications (a) and (b).

Notes to article 5

1. ***The AWB*** contains not only what is expressly stated in it[171] but also, according to courts in the US, particulars "contained" by incorporation of or reference to any other document which sets out the particulars in question. A notable example is a list of stopping places listed not in the AWB itself but in published timetables to which the AWB refers.[172] Again, in cases of consolidated shipments where there may be both a master AWB and a house AWB reference in one to the other may be sufficient for this purpose.[173] The courts have reached this position by invoking "traditional methods of interpretation".[174] In England, courts are likely to take a similar view.[175] For this rule to apply, however, the contract of carriage "must clearly and accurately identify a document to effectively incorporate it by reference",[176] and the document, especially if it is a timetable, must be readily available.[177]

2. ***The places of departure and destination*** are required in order to alert shippers that the flight is international[178] because, if so, one of the air Conventions is likely to apply. The places may be sufficiently indicated by standard (IATA) abbreviations for airports such as LHR for London Heathrow.[179] Moreover, an AWB "that refers the shipper to readily available timetables provides sufficient information to notify the shipper" of these places.[180]

3. ***Agreement on stopping places*** has been interpreted more or less literally by different circuits of the US Court of Appeals. The literal view, preferred in the Ninth Circuit, is that the AWB must mention the stopping places actually agreed with the consignor before the AWB was issued. Thus in one case "the parties did not agree that the shipment of computer modules would stop at Memphis. Rather, the air waybill makes it perfectly clear that there were no agreed stopping places. Federal Express explicitly

170. See (above) note 6 to art. 3. See further *Fujitsu Computer Products v. Bax Global* [2005] EWHC 2289; [2006] 1 Lloyd's Rep 367, discussed above in connection with art. 3.

171. See *Brinks Ltd v. SAA*, 93 F 3d 1022, 1034 (2d Cir, 1996); applied e.g. in *Southern Electronic v. Air Express*, 994 F Supp 1472 (ND Ga, 1998). See also *Sotheby's v. Federal Express*, 97 F Supp 2d 491, 497 (SD NY, 2000).

172. *Brinks* (above).

173. *HIH v. Virgin Atlantic*, 105 F Supp 2d 1083 (ND Cal, 2000). See the Comment to art. 5.

174. *Intercargo v. China Airlines*, 208 F 3d 64, 67 (2 Cir, 2000).

175. In cases of carriage by rail at common law, English courts have reached a similar result as regards the requirement of "sufficient notice" of the contents, i.e. of the terms of a contract: e.g., *Thompson v. LMS* [1930] 1 KB 41 (CA).

176. *Sotheby's* (above) p. 500. For that reason the incorporation in that case failed, as it did in *Federal v. Yusen*, 232 F 3d 312 (2 Cir, 2000).

177. *Tai Ping v. Northwest*, 94 F 3d 29, 32 (2 Cir, 1996) as regards a passenger and a passenger timetable.

178. *Brinks* (above) *loc cit*. The court rejected the argument that it was also intended to warn consignors of stops where their goods might be placed at risk.

179. Giemulla, art. 9, para. 14.

180. *Brinks v. SAA*, 93 F 3d 1022, 1035 (2 Cir, 1996). See also *Tai Ping v. Northwest*, 94 F 3d 29 (2 Cir, 1996), which was argued at the same time as *Brinks*.

reserved the right to route the shipment as it saw fit".[181] Nothing in the Conventions prohibits carriers from doing this.

The literal view was rejected in New York in *Sotheby's v. Federal Express*.[182] The court took the line taken by the Court of Appeals (Second Circuit) in *Intercargo*,[183] stressing that article 8 WSC, then in force, was a notice provision. The New York court reasoned that, if "agreed" is interpreted literally, "then notice to the shipper of those stopping places would be superfluous" and that a more logical interpretation of article 8(b) was "that it requires the carrier to include on the air waybill all stopping places contemplated by the carrier. The shipper then 'agrees' to these stopping places, explicitly or implicitly, by accepting shipment under the waybill".[184] Moreover, a corollary of the literal interpretation would be that the carrier would not be required to notify the consignor of a stopping place planned by the carrier but to which the carrier had not troubled to gain the consignor's (even tacit) consent. Such a result, said the court, would be "nonsensical".[185]

However, in the *Sotheby's* case,[186] the carrier also argued that, given the purpose of the notice provision, the requirement was limited to mentioning one planned stopping place per country; and that, therefore, an extra stop within any one country (*in casu* the US where the damage to artwork occurred) did not have to be mentioned. The court rejected that argument: "agreed stopping places" meant all stopping places, wherever they were.

Article 6—Document Relating to the Nature of the Cargo

The consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

Comment

This provision, to which there was no corresponding provision in WSC, is virtually self-explanatory; however, see the Comment on MC article 5.

Article 7—Description of Air Waybill

1. The air waybill shall be made out(1) by the consignor in three original parts.(2)
2. The first part shall be marked "for the carrier"; it shall be signed(3) by the consignor. The second part shall be marked "for the consignee"; it shall be signed by

181. *INA v. Federal Express*, 189 F 3d 914, 918–999 (9 Cir, 1999). *Idem* when the carrier has a contractual discretion about whether and where to stop: *Nissan v. KLM*, 27 Avi 18,170 (ND Cal, 2000).
182. 97 F Supp 2d 491, 498 (SDNY, 2000).
183. *Intercargo v. China Airlines*, 208 F 3d 64, 67, 69 (2 Cir, 2000).
184. Pp. 498–499.
185. P. 499.
186. 97 F Supp 2d 491, 497 (SDNY, 2000), with reference *inter alia* to *Intercargo* (above) p. 68. See also *Mitsui v. China Airlines*, 101 F Supp 2d 216 (SDNY, 2000).

the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.(4)
3. The signature of the carrier and that of the consignor may be printed or stamped.
4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.(5)

Article 6

1. The air waybill shall be made out(1) by the consignor in three original parts.(2)
2. The first part shall be marked "for the carrier"; it shall be signed(3) by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.(4)
3. The signature of the carrier and that of the consignor may be printed or stamped.
4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.(5)

Comment

Article 7 concerns the form and content of the AWB. Many such matters, however, are not regulated by the air Conventions but by the standard AWBs drawn up by IATA.[187]

Notes to article 7

1. ***Making out the AWB*** does not involve signature. This is the inference that has been drawn from the fact that the Conventions deal with making out AWBs and signing AWBs separately.[188] However, one must have been made out. When cargo is flown to destination under one AWB but the consignee rejects the cargo and arranges for their return at own expense, another AWB must be made out for the return journey.[189]

2. ***Three original parts*** are required mainly because that was the practice of maritime commerce in the 1920s and, largely, since.

3. ***Signature*** is a requirement that reflects the influence of French lawyers on the 1929 text.[190] It has been suggested, however, that the requirement of signature may be useful today, although in a way not originally anticipated.[191]

4. ***After the cargo has been accepted*** (article 7.2 *in fine*) is a phrase introduced to WSC in 1955 to change the words of 1929. Note that in modern practice the carrier's documentary department may be far removed from where cargo is handed over.

187. See Clarke and Yates *Contracts of Carriage by Land and Air* (2nd edn, London 2008) paras 3671 *ff*.
188. *United Int Stables v. Pacific Western* (1969) 5 DLR (3d) 67, 73 (BC CA).
189. *Fujitsu v. Federal Express*, 247 F 3d 423 (2 Cir, 2001).
190. Prominent among them was Georges Ripert, a leading writer on shipping law in the first half of the twentieth century. French courts are still insistent of signature e.g. *Cass Com 4.3.2003*, Univ L Rev 2004.1006.
191. Giemulla, art. 6, para. 4.

Moreover, the importance of the third part, once in the hands of the consignor, is that the consignor can use it to dispose of the cargo in transit: article 12. So, the third part should be handed by the carrier to the consignor *only* after the cargo has been accepted. If the carrier hands it over without having received cargo, the carrier will be liable under article 12.3, most probably to the consignee, for the consequences.[192]

5. ***The consignor*** is the carrier's principal in this respect. The carrier is the consignor's agent and the rights and duties *inter se* are regulated by national law of agency. As regards third parties, however, the effect is as stated in MC article 7.4. Thus, for example, if a false AWB is made out by the carrier's agent, that agent is acting for the consignor and the conduct of that agent does not deprive the carrier of defences.[193] Whether or not the carrier is liable to the consignor in such a case is determined by the national law of agency or, if relevant, the standard IATA conditions in the contract of carriage.

Article 8—Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;
(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 7

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;
(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of article 5 are used.

Comment

Article 8 is designed to meet the practical needs of moving cargo by air. For example, a single consignment of several packages may be such that the carrier is unable or unwilling to carry them together in a single aircraft.

Article 9—Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

192. *BGH 19.3.1976*, ULR 1977.282.
193. *Confeccoes Textesis v. Space Tech*, 22 Avi 17,494 (WD Wash, 1989).

Article 9

Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Comment

The original rule was that if, with the consent of the carrier, cargo was loaded[194] on board the aircraft without an AWB having been made out or if the AWB did not include the Hague Notice, the carrier was not entitled to avail himself of the provisions limiting its liability. MC Article 9 (like WSC article 9) reaffirms that liability can nonetheless be limited.

Article 10—Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo(1) inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.
2. The consignor shall indemnify the carrier against all damage(2) suffered by it, or by any other person to whom the carrier is liable,(3) by reason(4) of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor.

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo(1) inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.
2. The consignor shall indemnify the carrier against all damage(2) suffered by him, or by any other person to whom the carrier is liable,(3) by reason(4) of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.
3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5.

194. Loading, the time at which art. 9 had to be complied with, replaced the time of "acceptance of the goods" in the 1929 Convention; its meaning has been the subject of debate: Giemulla, art. 9, para. 6.

Comment

Article 10 allocates responsibility for the correctness of the information inserted in the AWB to the person (usually the consignor) best placed to obtain and to verify the information.[195]

Notes to article 10

1. ***Statements relating to the cargo*** *only* are envisaged and not other statements in the AWB: hence the consignor is not responsible for incomplete or inaccurate particulars about stopping-places.[196] There appears to be no significant difference in article 10.1 between "particulars" and "statements".[197]

2. ***Damage*** is not defined by the Conventions but left to national law. See below, article 18, note 5.

3. ***The carrier's liability to third parties*** is unaffected by the fact that the consignor and carrier may have reached their own agreement about which of them is responsible or to what extent, as that agreement is *res inter alios acta* for third parties.[198] The third parties to which the carrier is most likely to be liable are consignees but they may also include passengers and employees of the carrier.

4. ***Causation*** is a requirement: the damage suffered by the carrier must have been "by reason of" the incorrect insertion.[199]

Article 11—Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is prima facie(1) evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.(2)
2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo,(3) as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the waybill or cargo receipt to have been, checked(4) by it in the presence of the consignor, or(5) relate to the apparent condition of the cargo.(6)

Article 11

1. The air waybill or the receipt for the cargo is prima facie(1) evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.(2)

195. See, e.g. *Confeccoes Textesis v. Space Tech*, 22 Avi 17,494 (WD Wash, 1989). *Cf*, however, *BGH 19.3.1976*, NJW 1976.1583; ULR 1977.282: the carrier, who issues an AWB which was inaccurate in that it referred to goods that the carrier had not received, was himself liable to the consignee.
196. *American Home v. Maeder*, 999 F Supp 543, 548 (SDNY, 1998).
197. Giemulla, art. 10, para. 4.
198. See Giemulla, art. 10, para. 13.
199. *American Home v. Maeder* (above).

2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo,(3) as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked(4) by him in the presence of the consignor, or relate(5) to the apparent condition of the cargo.(6)

Comment

The evidential role of the AWB is the subject of article 11. To "make out a *prima facie* case" with respect to the carrier's liability for damage, the claimant must establish on the balance of probabilities:

(1) that the cargo was delivered to the carrier in a certain condition;
(2) that the cargo arrived in a different condition; and
(3) that that difference resulted in financial loss (precise amount to be specified later) to the claimant.[200]

Likewise to make out a *prima facie* case with respect to the carrier's liability for loss of cargo, the claimant must establish on the balance of probabilities:

(1) that a certain quantity of cargo was delivered to the carrier;
(2) that some or all of the cargo was not delivered at destination; and
(3) that that resulted in financial loss (precise amount to be specified later) to the claimant.

To "meet the first prong of the test" the claimant usually "relies upon the air waybill issued by [the carrier] coupled with the presumption created by article 11 of the Convention".[201]

The claimant's task is like that of claimants against carriers by other modes of transport. If a claimant is to make a case of breach of contract against a carrier, it is not sufficient to establish that the carrier has lost or damaged "something". The thing, its nature, quantity, weight, value, as the case may require, must also be established in evidence. The transport document has a central role in this aspect of a claimant's case against the carrier. As regards the AWB, article 11 provides that it is "*prima facie* evidence" of the existence of the contract of carriage and of its terms and thus of what it says about cargo.[202] The MC (and WSC) differ, however, from the regimes for other modes of transport in that the only facts which, in principle, the air carrier is obliged (by MC article 5) to admit in the AWB concern route and weight. Although article 11.1 states that the AWB is *prima facie* evidence of the "receipt of cargo", and of *any* statements about weight etc, which the carrier chooses to make, it does not oblige the carrier to make such statements or to admit receipt of cargo with sufficient specificity to enable the claimant to make a case. National

200. *Offshore Aviation v. Transcon*, 831 F 2d 1013, 1014 (11 Cir, 1987). See also *Boehringer Mannheim v. Pan Am*, 531 F Supp 344, 347 (SD Tex, 1981), affirmed on other grounds: 737 F 2d 456 (5 Cir, 1984). *OLG Frankfurt 15.11.1983*, RIW 1984.69.

201. *Arkwright-Boston v. Intertrans*, 777 F Supp 103, 107 (D Mass, 1991).

202. It must give sufficient notice of the terms themselves; see note 2.

law may require certain aspects of cargo to be checked but that is the exception rather than the rule.[203]

Even if some kind of check is required or is made anyway, the carrier is not required to record the results in the AWB, although of course it is likely to do so.[204] If not, the AWB evidences nothing in that regard.[205]

Notes to article 11

1. ***Prima facie evidence*** of these matters[206] is rebuttable evidence—rebuttable by whatever means are available to the carrier and acceptable to the court.[207] As for statements made in the AWB which are not referred to in article 11.2, such as declarations under article 22.2, the Conventions are silent on the evidential effect of such statements and, it seems, that must be determined by national law.

2. ***The conditions mentioned*** therein (referred to in article 11.1) are not only those printed on the AWB but also any other conditions which, according to national law,[208] have been incorporated by reference. The air carrier may well wish to incorporate its standard terms without setting them out in full. English law is that consignors of cargo should realise that the carrier has relevant contract terms not set out in a transport document such as the AWB.[209] Rather than assume such awareness by a consignor, however, the carrier is likely to give notice: it is sufficient for the carrier to give a notice of incorporation, before or at the time of concluding the contract, which identifies the conditions, provided that they are available on request.[210] However, a different rule applies "if the conditions or any of them are particularly onerous or unusual".[211]

Moreover, the conditions mentioned in or incorporated by reference into the AWB may not be the only terms of the particular contract of carriage. A party may adduce evidence of other terms actually agreed.[212] Evidence may also be adduced to contradict the terms

203. Koller, art. 11, para. 19. E.g. *OLG Frankfurt 15.11.1983*, RIW 1984.69 (cartons of flowers), followed in *Lg Frankfurt 6.1.1987*, RIW 1987.392 (packed fruit). A shipping case of this kind is *Polskie v. Hooker* 1980 AMC 1748 (SDNY). *Cf The Hoyanger* [1979] 2 Lloyd's Rep 79 (Federal Ct Canada).

204. E.g. *BGH 1.10.1986*, NJW 1987.590.

205. Kronke, art. 11, para. 17.

206. It has been suggested that an AWB has no evidential value unless or except insofar as all three original AWBs say the same thing. The better view is that this is not necessary. The evidential value and effect depends on the character of the particular AWB: who makes it out, who relies on it and for what purpose: see Giemulla, art. 11, para. 3; Kronke, art. 11, para. 5.

207. Koller, art. 11, para. 16; Kronke, art. 11, para. 19. E.g. *Harvest Tones v. PIA*, 19 Avi 18,415 (SDNY, 1985).

208. Giemulla, art. 11, para. 8; Kronke, art. 11, para. 8.

209. *Parker v. S E Ry* (1877) 2 CPD 416, 412 *per* Mellish LJ.

210. *Circle Freight v. Medeast* [1988] 2 Lloyd's Rep 427, 433 *per* Taylor LJ (CA), a case of carriage by road. See Clarke, CMR, para. 203. *Fosbroke-Hobbes v. Airwork* [1937] 1 All ER 108, concerning the carriage of passengers by air.

211. *Circle Freight loc cit*. As regards the rule for unusual or onerous conditions, see *Thornton v. Shoe Lane Parking* [1971] 2 QB 163 (CA); *Interfoto v. Stiletto* [1989] QB 433 (CA). English courts have taken a robust view of what is usual as regards carriage by road: *Overland Shoes v. Schenkers* [1998] 1 Lloyd's Rep 498 (CA), as well as what is onerous: *O'Brien v. MGN* [2001] EWCA Civ 1279.

212. *Mayers v. KLM* 108 NYS 2d 251, 256 (NY, 1951).

(conditions) mentioned in the AWB.[213] However, terms of the original contract of which it does not have notice cannot be pleaded against a successive carrier.[214]

3. ***Weight, dimensions and packing*** are matters required to be stated in the AWB by the 1929 Convention but optional since the 1955 amendment of WSC; and optional under MC article 11.2. In practice, however, these matters have been stated in AWBs in States, such as the UK.[215]

4. ***Checking cargo*** in the presence of the consignor is essential. Simple acceptance and issue of an AWB that includes such statements but without the checking procedure, which would be enough to make a *prima facie* case against the carrier under other transport regimes and under common law, is not enough.[216] In this regard, article 11.2 WSC (unchanged in MC) appears to reflect French ideas about the responsibility of the carrier as an organ closely associated with the State and about establishing evidence (*le constat contradictoire*).[217]

5. ***Statements relating to condition***, i.e. statements that the cargo described was received in good order and condition, are essential if the AWB is to be *prima facie* evidence against the carrier about the condition of the cargo.[218] Otherwise, if the point is raised by the carrier, the state of the cargo when it was handed over to the carrier must be proved by the claimant in some other way.[219] Thus, if a sealed carton or container is stated to contain raw diamonds but turns out on arrival to contain pieces of scrap metal, the AWB alone is not evidence enough to make a case against the carrier for failure to deliver raw diamonds. If, however, a sealed carton or container is stated to contain 15 kg of raw diamonds but turns out on arrival to contain not pieces of metal but a lesser weight, for example 14 kg, of raw diamonds, the effect is a *prima facie* case against the carrier of the loss of 1kg of raw diamonds: the court will infer from what *was* delivered, what *was not* delivered and should have been.[220]

6. ***Apparent condition,*** what is referred to at the end of MC article 11.2, is what meets the eye of the carrier's personnel when dealing with the cargo in the normal way. The carrier is neither obliged nor entitled to go beyond a superficial examination of the cargo without good reason, unless *entitled* to examine cargo e.g. under the carrier's contract

213. *OLG Düsseldorf 11.11.1993*, TranspR 1995.30.

214. *Lufthansa v. CNRS, Paris 26.3.1971*, 1971 ULR 122.

215. For the position in Germany see *OLG Frankfurt am Main 30.8.2004*, TranspR 2004.471.

216. *Pacific Employers v. KLM, Cass Belg 30.9.1988* (1989) 24 ETL 97; *Arkwright-Boston v. Intertrans*, 777 F Supp 103, 107 (D Mass, 1991).

217. If, indeed, a formal procedure has been followed, that, it has been argued, is conclusive "evidence" of the result stated in the AWB. The argument rests on the distinction drawn by art. 11.2 between that "evidence" and "*prima facie*" evidence of the other matters. Mostly, however, courts and commentators have not attached much importance to that distinction; see Giemulla, art. 11, para. 14.

218. E.g. *Armour v. Jet Air* (1992) 27 ETL 411 (EDNY, 1992).

219. *Cf* sweeping and erroneous statements such as: "the Waybill is *prima facie* evidence of the conclusion of the contract . . . . The Court must presume, therefore, that the damage occurred during the transportation by air unless the defendant proves to the contrary": *Boehringer Mannheim v. Pan Am*, 531 F Supp 344, 347 (SD Tex, 1981).

220. See *Sphere Drake v. Swissair, Rb Antwerp 12.10.1990*, (1990) 25 ETL 687. A comparable and well-known case decided in England (on the quantity of rice carried by sea) is *A-G for Ceylon v. Scindia* [1962] AC 60 (PC).

terms. This part of the provision spells out, what has been inferred in other carriage conventions such as those on carriage by sea, the presumption about any observations by the carrier about the condition of cargo: they are confined to the *apparent* condition.

In *BRI v. Air Canada*,[221] for example, the courts affirmed that when "a shipper packs cargo for shipment and the packing is sealed, 'apparent good order and condition' means only that the goods were properly packed for shipment. [Citations omitted] On the other hand, if the cartons were not sealed and defendant had an opportunity to view the furs, the air waybill is evidence that the furs were delivered [to the defendant carrier] without damage".

Article 12—Right of Disposition of the Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage,(1) the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated,(2) or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice(3) the carrier or other consignors(4) and must reimburse any expenses occasioned(5) by the exercise of this right.

2. If it is impossible(6) to carry out the instructions of the consignor the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage,(1) the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated,(2) or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such

221. 725 F Supp 133, 139–140 (EDNY 1989). The claimant being unable to prove that the carrier had had an opportunity to view the furs, it failed to establish a *prima facie* case that the damage to the furs had occurred during transit. See also *Arkwright-Boston v. Intertrans*, 777 F Supp 103, 107 (D Mass, 1991) and cases cited.

a way as to prejudice(3) the carrier or other consignors(4) and he must repay any expenses occasioned(5) by the exercise of this right.
2. If it is impossible(6) to carry out the orders of the consignor the carrier must so inform him forthwith.
3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.
4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

Comment

To facilitate trade, MC and WSC (like CMR and CIM for land transport) provide for the disposition of cargo by the consignor during transit. The right of disposition is provided for in article 12 and is a contractual right. It is not a property right: it should be distinguished from rights of property in cargo in transit which in the UK are regulated by the Sale of Goods Act 1979.[222] Indeed, the consignor may have the right of disposition but may have no property rights in the cargo at all. None the less, if the consignor does own the cargo, exercise of the right of disposition may well assist in the sale of the cargo; also in the retrieval of cargo sold and to prevent its falling into the hands of a buyer, perhaps the consignee originally designated, who has not paid for it as required by the contract of sale. Hence, it has been argued[223] as regards English law, that AWBs are documents "used in the ordinary course of business as proof of possession or control of the goods"[224] and thus documents of title for the purposes of the Sale of Goods Act, 1979.

The right of disposition is linked to possession of the third part of the AWB.[225] The carrier's obligation to comply with directions is conditioned on production of that AWB: article 12.3. Without it the consignor has no right of disposal.[226] An example of particular importance arises when his cargo has been grouped with that of others and the (master) AWB for the whole consignment is held by the forwarder who organised the groupage. In that situation the rule in article 12.3 promotes operational efficiency. However, the rule also seeks to protect third persons who may be in possession of the original copy of the AWB: not only buyers from the consignor but also lenders who may have taken the AWB as security. In any event, the consignor loses the right of disposal when that right is acquired by the consignee: article 12.4. The rights of the consignor are governed principally by article 12 and those of the consignee by article 13. Rights of suit in respect of disposition are the subject of article 14.[227]

222. See *Morton-Norwich v. Intercen* [1978] RPC 501, 518 *per* Graham J. Generally see Chuah, *Law of International Trade* (3rd edn, 2005) chs 3–5; Murray et al, *Schmitthof's Export Trade* (11th edn, 2007) Part 1.
223. Fountain, 6.32, pointing in particular to the effect of art. 12.3.
224. The test provided by the Factors Act 1889, s. 1(4).
225. See art. 6.
226. See Giemulla, art. 12, para. 22.
227. But see also the *Gatewhite* controversy, discussed in art. 18, note 1.2.

The right of disposition is a contractual right arising from the contract of carriage, which can be modified by party agreement provided that their agreement is recorded in the AWB.[228] The law of contract sees exercise of the right of disposition as a unilateral modification of the contract of carriage by the consignor in accordance with article 12. The original contract of carriage obliges the carrier to deliver the cargo to a particular person or kind of person at a particular place. Exercise of the right of disposition modifies the carrier's delivery obligation. Subject to the terms of the initial contract, it must be done in one or more of the ways set out in article 12.1. Exercise of the right of disposition is not a variation of the contract; its exercise neither requires nor involves any further consideration (such as payment) to be given to the carrier and does not require carrier consent.

That being so, the consignor's right is limited by article 12.1 in order to protect the legitimate interests of the carrier. If the consignor had an unlimited right of disposition, that would be potentially burdensome for the carrier. However, with one reservation, the carrier can only be required to obey instructions of the kind set out in article 12.1. In particular, the repeated reference to "the course of the journey" indicates that the consignor cannot require the carrier to alter the route.[229] Whereas the corresponding article 12.1 of CMR (for carriage by road) gives the sender the right "to change the place at which delivery is to take place", the air carrier can be called on only to deliver the cargo "at the place of destination" albeit "to a person other than the consignee named" in the AWB. Moreover, the interests of the carrier are protected in general terms by article 12.1 *in fine*: the carrier must not be prejudiced.[230] And the carrier cannot be called upon to do the impossible: article 12.2. However, the reservation is that carrier and consignor can agree to modify the position, provided that their agreement is recorded in the AWB, and that might permit a wider range of instructions, that may be given by the consignor, than those permitted by article 12.1—such as even a change of route.[231]

As stated above, the right of deposition is tied to possession of the appropriate AWB. Thus, the assumption[232] is that the consignor's right of disposition is dependent on receipt from the carrier of the third copy of the AWB after the cargo has been accepted,[233] which the consignor presents to the carrier (but does not hand over) when seeking to exercise the right.[234] The consignor's right of disposition ceases when that of the consignee begins: article 12.4. However, the consignor by air resumes the right, if the consignee declines to accept the cargo.

228. Article 15.2.

229. Koller, art. 12, para. 2.

230. Moreover, it has been argued that the carrier cannot be ordered to do anything of a kind not within the scope of the original contract of carriage, such as to sell the goods: Giemulla, art. 12, para. 7.

231. Koller, art. 12, para. 2.

232. See *BGH 19.3.1976*, ULR 1977.282.

233. Article 6.2.

234. If a carrier gives an AWB to the consignor without having received the relevant cargo, the carrier will be liable (probably to the consignee) for the consequences. See *BGH 19.3.1976*, ULR 1977.282, 285, in which the basis of liability is said to be arts 17 *ff*. *Sed quaere*. As this does not appear to be a case of loss etc. which "took place during the carriage by air". For the Conventions to apply there must have been some "carriage": see below, art. 18, note 10.

If the carrier obeys the consignor's instruction without production of the third AWB, the carrier is liable to the person, if any, that does have it lawfully: article 12.3.[235] If the consignor does produce the AWB and the carrier does not carry out a valid instruction, the carrier is in breach of contract; but the remedy is not specified by article 12. Commonly the carrier's failure will result in loss, damage or delay actionable under article 18 or article 19, and the remedy for breach of these provisions applies.[236]

Notes to article 12

1. ***Subject to obligations under the contract of carriage*** means subject, above all, to the payment of carriage charges due. Moreover, it has been argued that, if the contract does not indicate when the charges are due, the carrier may call upon the consignor for payment before carrying out an instruction that is in accordance with article 12 because it would be "unfair to require the carrier to wait longer for payment".[237]

2. ***A person other than the consignee*** originally designated, referred to in article 12.1, includes the consignor, for example in a situation in which the named consignee has not paid for the cargo, but the consignor does not wish to part with the cargo until payment or is seeking an alternative buyer but has yet to find one.

3. ***Prejudice to the others***, the "carrier or other consignees, "also referred to in article 12.1, will not be presumed, however, it is for the consignor, if called upon to do so, to make out a case that the instruction will not prejudice others.[238] There is no specific prohibition on an instruction which entails a division of the consignment.[239]

4. ***Other consignors*** can and should be read as *the* other consignors. This is more obvious from the French "aux *autres expediteurs*" and German "die *anderen Absender*" texts of WSC. Arguably, the inclusion of the definite article has the effect of limiting the relevant consignors to those with cargo on the same aircraft; and to exclude those only consequentially affected such as those whose consignment is delayed on a subsequent flight because the aircraft is held up while the carrier obeys the instruction of the consignor in question.[240]

5. ***Expenses occasioned***, referred to in article 12.1, are necessary expenses intentionally incurred to carry out the instruction. Expenses must be repaid once they have been incurred. Can the carrier demand an advance on likely expenses when it receives the instruction? Seemingly not unless that has been provided for in the contract of carriage.[241]

235. The basis of this liability is unclear. It does not appear to be based on arts 17 *ff*: Giemulla, art. 12, para. 25.

236. In this sense: Giemulla, art. 12, paras 19 and 21; Koller, art. 12, para. 11.

237. Giemulla, art. 12, para. 10.

238. *BGH 9.10.1964*, NJW 1964.2348, 2350.

239. *Cf* e.g. CMR, art. 12.5(c). Whether or not it is permitted under the air Conventions has divided writers in Germany: Giemulla, art. 12, para. 15, as regards WSC.

240. Giemulla, art. 12, para. 13, as regards WSC.

241. *Cf* Giemulla, art. 12, paras 9 and 12; Koller, art. 12, para. 6 with regard to WSC.

6. ***Impossibility*** is not defined and therefore, it has been argued, must be interpreted according to national law.[242] In Germany, where this has been the position, there is a broad conception which extends to the case of a carrier which, although perfectly capable of carrying out the order, refuses to do so. The carrier, as required by article 12.2, must inform the consignor of its position. However, this broad interpretation of article 12, which is not all obvious from the wording of article 12, is based not only on national law (good faith) but also the *travaux* that led to article 12 of WSC.[243] A broad interpretation is also found in France, where it has been suggested that it is impossible to carry out an order when, although literally it is possible, to do so would cause unreasonable delay.[244]

The burden of proof, that it is impossible to carry out the order, is on the carrier. In connection with the corresponding provision of CMR,[245] it has been held that it is for the consignor to prove that it was possible to carry out the instruction *inter alia* because possibility is a requirement, a condition, of the consignor's right of disposition, the purpose of which is to protect the carrier.[246] Under the air Conventions, however, possibility is not described as a condition, to which exercise of the right is subject. Given that the carrier is better placed to prove what it can or cannot do in the circumstances, it is submitted that the onus of proof, like that of prejudice (note 3, above), should be on the carrier.

Article 13—Delivery of Cargo

1. Except when the consignor has exercised its right under Article 12,1[(1)] the consignee[(2)] is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due[(3)] and on complying with the conditions of carriage.[(4)]
2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.
3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived,[(5)] the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.[(6)]

Article 13

1. Except when the consignor has exercised his right under Article 12,[(1)] the consignee[(2)] is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due[(3)] and on complying with the conditions of carriage.[(4)]

242. Giemulla, art. 12, para. 14, arguing, for example, for a distinction known to German law between objective impossibility and subjective impossibility. The latter would include the case of a particular carrier which, unlike others, lacked the staff to carry out the instruction. See also *ibid*, para. 20.
243. Giemulla, art. 12, para. 20.
244. De Juglart, para. 2639. Such a view is also found in relation to the corresponding provision of CMR: see Clarke, CMR, para. 32a. The position of common law, likely to be that of the English Commercial Court, is different: Treitel 19–032 *ff*.
245. Article 12.5(b).
246. *BGH 27.1.1983*, (1985) 20 ETL 349, 353.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.
3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived,(5) the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.(6)

Comment

Article 13 MC (like article 13 WSC) is concerned mainly with the consignee—the right to have delivery of the cargo and to bring an action against the carrier if the cargo has been lost, damaged or delayed. Insofar as delivery cannot be effected without possession of the cargo to be delivered, article 13 is well placed after article 12, which is concerned centrally with the consignor's right to dispose of the cargo: if the consignor has lawfully disposed of it in a way that renders delivery to the consignee impossible or which requires the carrier to deliver the cargo to a third party, the carrier is not obliged to deliver it to the consignee.

When the consignor has not exercised the right to dispose of the cargo to a person other than the original consignee and the carrier is obliged to deliver cargo to that consignee, the respective rights of consignor and consignee are dovetailed by article 12.4 and article 13.1. Article 12.4 provides that the right of the consignor "ceases when that of the consignee begins in accordance with Article 13". Under article 13.1 the consignee is entitled "to require the carrier to hand over" the cargo—not when it has been unloaded, transferred to the cargo terminal or otherwise made ready for actual delivery, but earlier: "on arrival of the cargo at the place of destination". Unlike the time of subsequent operations such as unloading, the time of arrival, i.e. usually the time of landing, can be precisely determined.[247]

Both MC (and WSC) differ from the version of WSC in force in the UK before 1998 in that they do not require the carrier to hand over the (second) AWB when delivering the cargo. The usefulness of that requirement had been questioned for some time.[248]

Notes to article 13

1. ***Except when disposed of*** (in accordance with article 12), the opening phrase of article 13, refers to a circumstance that might arise when, although the cargo has arrived at the place of destination, the consignor has exercised the right of disposition "by calling for it to be delivered at the place of destination . . . to a person other than the consignee originally designated, or by requiring it to be returned" to the place of departure, as provided by article 12.1.

2. ***The consignee entitled to delivery*** is the consignee originally designated: article 12.1. If the AWB mentions person A as consignee and person B as "notify party", delivery

247. Giemulla, art. 13, para. 3.
248. E.g. De Juglart, para. 2640.

to B is a misdelivery. Even if there is an industry practice of regarding the "notify party" as the agent of the consignee, carriage contracts usually distinguish clearly between the two persons and, absent ambiguity, to deliver to the notify party is a breach of the contract of carriage.[249] Any other view would be "destructive of the integrity of documents used in international trade".[250]

3. ***Charges due*** (article 13.1) include, notably, outstanding freight charges.[251]

4. ***Conditions of carriage to be complied with,*** referred to in the last line of article 13.1, are those in the contract evidenced by the AWB and are likely to be conditions agreed with the carrier by the consignor. They affect the consignee in the circumstances of article 13 whether or not they were conditions of a kind that the consignee should have expected.[252]

5. ***Arrival late***, i.e. at the expiration of more than seven days after the date on which it ought to have arrived (article 13.3), triggers the rules that apply to arrived cargo, including the requirement of MC article 31 (WSC article 26) to give notice of complaints.[253] Whenever cargo does arrive, note that article 13.2 (of both MC and WSC) requires the carrier to notify the consignee or its agent.[254]

6. ***The rights which flow from the contract of carriage*** "place the consignee in the position of the consignor" and give "a right to assert a contractual relationship" with the carrier.[255] Whereas the right to delivery of the cargo under article 13.1 is lost to the consignee, whenever the consignor has properly exercised the right of disposition under article 12, the consignee's right of action in respect of cargo that is late or lost is subject to no such qualification: the designated consignee may still "put into force against the carrier the rights which flow from the contract of carriage".[256] If the consignee's claim is based on non-delivery, the claim will fail if the carrier can show that it obeyed a proper instruction from the consignor under article 12. If the claim is based on damage or destruction to cargo, which *ex hypothesi* has not been handed over to the consignee, the consignee is entitled to claim in respect of financial loss suffered not only by itself but also by "another": article 14.

249. *Kologel v. Down in the Village*, 17 Avi 17,104 (SDNY, 1982).

250. P. 17,105 (citation omitted).

251. If the AWB is marked "freight prepaid", *ceteris paribus* the carrier is entitled to assume that that is correct: *Lg Frankfurt 27.3.1992*, TranspR 1992.414.

252. See Giemulla, art. 13, para. 17.

253. *Hewlett v. Flying Tiger*, 669 SW 2d 412, 415 (Tex App, 1984) on the basis that art. 13.3 applies only "to goods which are lost or destroyed as distinguished from damaged or delayed goods". This reasoning has been criticised as sweeping and unjustified by SB VII(608) who agree with the result, however, on the basis that even if article 13.3 did apply to damaged or delayed goods that does not rule out the simultaneous application of article 26.

254. For breach of this duty under WSC see *Nipponkoa Ins Co v. Globeground Services*, 2007 WL 2410292 (ND Ill, 2007); and under MC see *Wea Farms v. American Airlines*, 2007 WL 1173077 (SD Fla, 2007); noted by DeMay 73 JALC 131, 234 *ff* (2008).

255. *Vassallo v. Trans Canada* (1963) 38 DLR (2d) 383, 387 (Ont).

256. *American Banana Co v. VIASA*, 404 NE 2d 1330 (NY CA, 1980).

Article 14—Enforcement of the Rights of the Consignor and Consignee

The consignor and consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 14

The consignor and consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage.

Comment

Article 14 is necessary to side-step the rule of national law that a party can recover compensation in respect of his own loss but not that of others.[257] However, the rights referred to are "the rights given them by Article 12 and Article 13".[258] Thus the consignee originally designated can bring proceedings to recover the loss of a person to whom cargo was redirected when it had been rejected by the consignee.[259] It seems, however, that it was not intended to extend the right to a forwarder named as consignee in the AWB.[260] If, however, the forwarder is also the named consignor, the forwarder can of course "call for" the cargo to be delivered to somebody else (the "real" consignee) in accordance with article 12.1 and thus bring proceedings "in the interest of" the real consignee under article 14. Moreover, the reference to article 12 and article 13 indicates that the rights are rights that will not be possessed simultaneously by consignor and consignee and that therefore only one of them may enforce the rights at a time.[261]

Article 15—Relations of the Consignor and the Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.
2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

257. In England see e.g. *The Albazero* [1977] AC 774 and *Alfred McAlpine v. Panatown* [2001] AC 518. Generally see Treitel 14–026 *ff*.

258. *Cf HR 19.4.2002*, (2005) 40 ETL 139.

259. E.g. as in *American Banana* (*above*).

260. *Cf* the controversial decision in *Johnson v. American*, 834 F 2d 721 (9 Cir, 1987) that the effect of art. 14 is that only the consignor and consignee named in the AWB can bring suit under the WSC, even when the rights to be enforced were not given by art. 12 or art. 13 but *in casu* art. 18. Also it seems in this sense: *Globus v. Sabena, TC Bruxelles 15.5.1981*, (1983) 37 RFDA 371; *Air France v. Sté Laiterie de Curepipe, Paris 21.6.1985*, (1985) 39 RFDA 343; *OLG Düsseldorf 11.11.1993*, VersR 1994.1498. See Giemulla, art. 14, para. 1. See art. 18, note 1.2.

261. Giemulla, art. 14, para. 4.

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.
2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo.

Comment

Article 15 wraps up some outstanding questions about articles 12 to 14. Unlike most provisions of the Conventions, these *can* be varied, however, in the interests of others any variation agreed must be recorded in the AWB for all to see: article 15.2.[262] In particular, the most likely case is that a variation is agreed at the outset by the consignor and the carrier, of which the consignee is unaware until alerted by the mention in the AWB.

The rights bestowed by articles 12 to 14 are in respect of orders to the carrier and may or may not be in accordance with agreements, notably those of the consignor, with other persons. In particular, the exercise of the right of disposition by the consignor may be in breach of the consignor's contract (of sale) with the consignee. Article 15.1 makes it clear that the rights of the consignor under article 12, when exercised, do not derogate from the consignor's obligations to the consignee. Moreover, what article 15.1 does not make clear, in one view,[263] is that, as regards third parties whose rights are derived *from* either the consignor or the consignee, articles 12 to 14 do not affect their rights *against* the consignor or consignee.

According to English law, AWBs are not negotiable: the relative speed of carriage by air is such that international commerce has found little use for negotiable AWBs. However, they may perhaps be regarded as documents of title within the meaning of the Sale of Goods Act 1979.[264]

Article 16—Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.(1)
2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the

262. Variations of the rules have been distinguished from supplementary agreement e.g. on the form in which orders are to be given by the consignor under art. 12; Giemulla, art. 15, para. 8.
263. Giemulla, art. 15, para. 4.
264. According to Fountain, 6.27.

consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.(1)
2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Comment

The consignor is the person best placed to obtain the relevant information and documentation and thus bears the responsibility, if it is incorrect or insufficient. The liability is such that if, for example, loss or destruction of documents is entirely accidental, the consignor is liable nonetheless: liability is thought to be strict,[265] and not limited by article 22 of the air Conventions but determined by national law.[266]

Note to article 16

1. ***Fault*** is the case, for example, of careless loss of customs documents leading to delay in clearance of cargo on arrival.[267] Whether the carrier, who happened to notice a deficiency in information or documents supplied by the consignor and did not notify the consignor, is liable has been the subject of debate.[268]

CHAPTER III

LIABILITY OF THE CARRIER AND EXTENT OF COMPENSATION FOR DAMAGE

Article 17.1—Death and Injury of Passengers—Damage to Baggage

1. The carrier(1) is liable(2) for damage sustained(3) in case of death or bodily injury(4) of a passenger upon condition only that the accident(5) which caused(6) the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.(7)

[Paragraphs 2 to 4 concern damage to baggage: see below.]

CHAPTER III

LIABILITY OF THE CARRIER

Article 17

1. The carrier(1) is liable(2) for damage sustained(3) in the event of the death or wounding of a passenger or any other bodily injury(4) suffered by a passenger, if the accident(5)

265. Giemulla, art. 16, para. 8.
266. Giemulla, art. 16, para. 9.
267. *Nowell v. Qantas*, 22 Avi 18,071 (WD Wash, 1990).
268. Giemulla, art. 16, para. 12 argues that, as the carrier has no duty to check (art. 16.2), it cannot be liable. However, argument by analogy with the case of goods defectively packed suggests otherwise; see e.g. note 4 to art. 11.

which caused[6] the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[7]

Comment

Article 17.1 is the central provision governing the liability of air carriers to passengers for death or injury. The carrier is liable for "accidents". An article 17 accident is death or physical bodily injury caused by an unexpected event external to the passenger.

"Bodily injury" includes neither illness nor "psychic injury". This generally rules out non-bodily injuries such as post-traumatic stress disorder (PTSD). See note 4 below. This was true of WSC and no change in this respect was intended by those who agreed MC.[269] That said, an early draft of MC replaced "bodily injury" with "personal injury". The intention was to include psychic injury.[270] In a later draft, "bodily or mental injury", was more explicit. However, after much discussion the original wording was restored. Clearly no change in the law was intended by a majority of delegates.[271]

In this situation the view has been expressed that the "reintroduction of the word 'bodily injury' and the removal of 'personal and mental injury' could be interpreted either way—that the final draft intended retaining exclusively physical injury with no hint of mental injury, or, that mental injury is imputed to bodily injury, taking into consideration the emergent trend of linking mental injury with a tangible bodily injury".[272] This may have been the position before MC, one which reflected tort law and a trend to discern physical symptoms in essentially psychic injury where medical science had been able to do before; but it is not clear that this is the position since MC came into force.

"Accident" has been interpreted in a way that will be easily recognised by English lawyers. However, courts in the US have analogised with the law of tort. On the one hand, they have taken a restrictive view of accident by requiring that it be in some sense within the carrier's areas of responsibility. The Supreme Court in *Saks*[273] insisted that the accident must involve some malfunction or abnormality in the aircraft's operation. Later courts took a broader view but still the accident had to be an event over which the carrier has the possibility of control.[274] On the other hand, the same tort reasoning referring to control led courts in the US to a wider interpretation than that likely in England and other

269. In this sense: *Kruger v. United Air Lines*, 31 Avi 18,565 (ND Cal, 2007).

270. Bin Cheng, 49 ZLW 287, 297 (2000).

271. It was a case of "better the devil that one knows": Bin Cheng *loc cit*. Note, moreover, that the previous German translation of "bodily injury", which was "*gesundheitlich geschädigt*" and wide enough to take in "psychic injury", was replaced by the narrower "*körperlich verletzt*". Nonetheless certain delegates made an "interpretative statement" to the effect that "jurisprudence" might evolve to permit recovery for psychic damage. The effect of this is doubtful: Whalen, 25 Air & Space L 12, 17 (2000). As was pointed out by Lord Rodger in *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, 100 (Ct Sess), that kind of "interpretation" was disapproved by Lord Diplock in *Fothergill v. Monarch* [1981] AC 251, 283.

272. Abeyratne, 65 J Air L & Com 225, 227 (2000). The view is the personal view of a senior official at ICAO. The view finds some support in the judgment of Lord Hobhouse in *King*: see note 4.2 below.

273. See note 5.2.

274. See note 7.2.3.

countries of the word "transit", i.e., the period of time for which the carrier is liable. Transit was extended into the terminal both before and after the flight, as long as the passengers are the particular carrier's passengers. The relevant decisions concerned WSC but note that where MC provisions are substantially the same as those of WSC, courts in the USA have 'routinely relied' on previous decisions on WSC,[275] and are likely to do so in future.

Notes to article 17.1

1. ***The carrier*** is defined in the way discussed below in note 1 to article 21.

2. ***Liability***, subject to defences and to article 21, is liability in full. There is no provision in the Conventions for apportionment.[276]

3. ***The damage sustained,*** mentioned in line 1 and for which the carrier is liable, is of a kind that is not defined in the Conventions. General guidelines have been deduced from the WSC,[277] which are likely to be applied to MC.[278] In particular, the intention in 1929 was to protect the industry from ruinous claims and this suggests a narrow interpretation of damage. Although before 11 September 2001 it was doubted that the industry still needed protection from large claims, the intention of 1929 has regularly received at least lip service from the courts.[279] Courts have declined,[280] however, to infer an intention that "damage" (*dommage survenu*) should mean what it meant in French law,[281] a more liberal concept than that in many other countries, at the time the WSC was drafted.

The general view is that a clear answer cannot be derived from the Conventions and that the meaning of "damage" must be sought in national law; and that this was the intention of 1929, less as a chosen stratagem than a necessity, if a Convention was to be concluded at all. According to the US Supreme Court in *Zicherman*,[282] for example, the air carrier is liable for "legally cognizable harm", but "Article 17 leaves it to adjudicating courts to specify what harm is cognizable". Questions such as what claimants may be compensated

275. Tompkins 34 Air & Space L 420, 422 (2009).

276. *Piamba Cortes v. American*, 177 F 3d 1272 (11 Cir, 1999).

277. See, e.g. the reasoning in *Thompson v. British Airways*, 21 Avi 18,290 (DC Col, 1989) against awards of punitive damages. This is the "autonomous" method of interpretation advocated by some writers; see above, 4.8.5.

278. See Tompkins (above).

279. E.g. *Carey v. United*, 77 F Supp 2d 1165, 1169 (D Or, 1999).

280. Notably *Zicherman v. Korean Air Lines*, 516 US 217 (1996); 133 L Ed 2d 596.

281. In French law, all kinds of loss can be compensated, provided that it is *certain* and *direct*: (Miller, p. 112, who points out that French law distinguishes, however, between *dommage matériel*, which is any type of financial loss, and *dommage moral*, which embraces "all other forms of damage which do not cause a financial loss, including suffering." She continues (pp. 112–113): "*Dommage corporel* is a composite of *dommage matériel* and *dommage moral*. It is sometimes used as a description of the various forms of damages but it does not constitute a class which would be subject to special rules. It includes all forms of damage which may result from personal injury, e.g. medical expenses, loss of wages, pain and suffering . . . ").

282. *Zicherman v. Korean Air Lines*, 516 US 217 (1996); 133 L Ed 2d 596, 604. The view was reinforced by reference to art. 24. De Juglart, para. 2665; Miller, pp. 111 *ff*. Germany: Koller, art. 18, para. 22.

for are questions "to be answered by the domestic law selected by courts of the contracting states".[283] This opinion was accepted as correct in the UK in *King*[284] and in *Morris*.[285]

3.1 *The kind of damage* according to English law means different things in different contexts. Even in the context of the air Conventions as a whole, damage "is used in more than one sense. Sometimes it means 'monetary loss'—for example in article 17".[286] English courts would probably have agreed with the US Court of Appeals in the *Lockerbie case* that what can be awarded under Article 17 are "full *compensatory* damages".[287]

One corollary of this approach is to rule out awards of punitive damages. In the US, where punitive damages are commonly awarded under state law,[288] the argument, that the words of article 17 (WSC) in French (*dommage survenu*) might be better translated as "damage occurred" and thus allow awards of punitive damages, was rejected.[289] In *Thompson*,[290] for example, the District Court concluded that, as WSC provides a liability limitation which can be broken in accordance with article 25, *expressio unius*: to allow punitive damages in cases outside article 25 would be contrary to the Convention.

Another corollary of this approach (in the US) is that, although the law there allows awards of damages for loss of "society" (companionship of immediate family) such awards were refused under WSC. Such was the decision of the US Supreme Court in *Zicherman*.[291] Justice Scalia observed that, obviously, the word "damage", as well as the French "*dommage*", "can be applied to an extremely wide range of phenomena, from the medical expenses incurred as a result of [the passenger's] injuries (for which every legal system would provide tort compensation), to the mental distress of some stranger who reads about [the passenger's] death in the paper (for which no legal system would provide tort compensation). It cannot seriously be maintained that Article 17 uses the term in this broadest sense, thus exploding liability beyond what any legal system in the world allows, to the farthest reaches of what could be denominated 'harm' ".[292]

3.2 *The measure of damage* is not indicated by the Conventions but, like the kind of damage recoverable (note 3.1, above), left to national law.[293] The carrier's liability is not

283. 516 US 217, 223 *ff*. Canada *idem*: *Surprenant v. Air Canada*, Recueils de Jurisprudence [1973] CA 107, 117–118 *per* Deschenes J (CA Quebec).

284. *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95 (Ct Sess).

285. *Morris v. KLM* [2002] QB 100 (CA). See [71] *per* Lord Phillips, MR, who gave the judgment of the court. *Zicherman* was not referred to on appeal: [2002] UKHL 7.

286. *Fothergill v. Monarch* [1981] AC 251, 273 *per* Lord Wilberforce. The case concerned WSC art. 26.2.

287. *Re Air Disaster at Lockerbie Scotland*, 37 F 3d 804, 829 (2 Cir, 1994) (emphasis added).

288. In England, generally, punitive damages cannot be awarded for breach of contract: Treitel (ed. Peel) *The Law of Contract* (12th edn, 2007) 20–15.

289. *Re Air Disaster at Lockerbie*, 928 F 2d 1267, 1280–1281 (2 Cir, 1991), citing (p. 1281) *inter alia Eastern Airlines v. Floyd*, 499 US 530 (1991) (pp. 1486–1489) and *Fothergill*. *Cf Surprenant* (above).

290. *Thompson v. British Airways*, 21 Avi 18,290 (DC Col, 1989).

291. *Zicherman v. Korean Air Lines*, 516 US 217 (1996); 133 L Ed 2d 596. *Cf* French law: De Juglart, para. 2665.

292. P. 603.

293. That is the view in the US: *Re Air Disaster at Lockerbie Scotland*, 37 F 3d 804, 828 (2 Cir, 1994), although the decision was mainly about the *type* of loss that could be the subject of compensation under WSC.

tortious but contractual. The carrier therefore will be liable for all kinds of loss which, given what the carrier knew or should have known about the claimant at the time of concluding the contract of carriage, should have been in the reasonable contemplation of the carrier as resulting from a breach of duty of the kind that occurred.[294] See also discussion of measure of damage as concerns damage to baggage and cargo (article 17.2 note 2.1 below).

4. *Bodily injury* (article 17.1 line 2) refers not only to deleterious changes in an existing human body but to severance of parts such as arms or legs. It includes also the pain, suffering and distress associated with bodily injury[295] but not the distress alone. Distress has been variously described as "shock", "mental injury",[296] "psychological injury", "psychiatric injury" or, the phrase used commonly in the US and in this book, "psychic injury".[297]

Courts agree that psychic injury is a head of recovery when *closely* associated with purely physical injury. However, the degree of association between (injury to) the body and (injury to) the mind of a claimant (psychic injury), if compensation is to be awarded for the latter, is the subject of debate: see note 4.3.

4.1 *Interpretation* of "bodily injury" is a question to which the general rules of interpretation apply.[298] However, the courts' application of the rules to these words and the question, whether psychic injury was included, merits special mention.[299]

4.1.1 *The Text in French* has been referred to by courts in common law countries. One argument in the past has been that, the authentic text being the French text, "bodily injury" must be given the ordinary meaning it has or once had in French law; and that in 1929 and in years since 1929 the corresponding words ("*lésion corporelle*") have been

294. *Koufos v. Czarnikow, The Heron II* [1969] 1 AC 350. For English law generally see Treitel 20–003 *ff* and 20–083 *ff*. For an example, in the US see *Grimes v. Northwest*, 27 Avi 17,101 (ED Pa, 1999) a person for whose injuries the carrier was liable claimed in respect of investment opportunities lost because he was unable to travel. The claim was dismissed as being too speculative. As regards set off in recourse actions see *Sompo Japan v. Nippon Cargo*, 522 F 3d 776 (7 Cir, 2008).

295. *In Re Flight Explosion*, 778 F Supp 625, 637 *ff* (EDNY, 1991) with reference to statements in *Floyd (Eastern Airlines v. Floyd*, 499 US 530 (1991)) and on the basis that this was the way in which "bodily injury" would have been understood when the Convention was drafted. The decision was reversed on other grounds: 975 F 2d 35 (2 Cir, 1992), *cert denied* 123 L Ed 2d 650 (1993). However, although at the time this was the understanding in France, it was not in other countries: *Jack v. TWA*, 854 F Supp 654, 665 (ND Cal, 1994).

296. This was the term favoured by Lord Hope in *King v. Bristow Helicopters* [2002] UKHL 7, para. 45. It was also, in the words of Lord Hobhouse ([157]) the "corner-stone of the reasoning of the Court of Appeal" in that case. However, he dismissed the phrase ([158]) as being one "devoid of actual meaning" which was "then used to create a false antithesis with a phrase which is used, *bodily injury*", in the Court of Appeal; see also his comments at [182]. See also on this issue Alldredge, 67 JALC 1345, 1355 *ff*; Easton, Trock and Radford 68 JALC 665 (2003); Rushing and Janicki, 70 JALC 429 (2005). As regards what the writer prefers to call "psychological damage" from an Australian perspective see Handford [2006] JBL 408.

297. Dismissed, however, by Lord Hobhouse in *King v. Bristow Helicopters* [2002] UKHL 7, para. 157 as unhelpful.

298. See Part I, Chapter 4.

299. A helpful statement of the rules is given by Lord Hope in *King v. Bristow Helicopters* [2002] UKHL 7, paras 75 *ff*. However, it is striking that only Lord Steyn gives any emphasis to one of the purposes of WSC in 1929: to restrict the liability of air carriers. *Cf* US decisions such as *Carey v. United*, 255 F 3d 1044, 1053 (9 Cir, 2001).

wide enough to include psychic injury ("*dommage psychique*").[300] Outside France a number of objections have been raised against this argument.

The first objection is that it is doubtful, whatever it might have meant in 1929, that the French text would have such a wide meaning today.[301] Moreover the French text has changed more than once since 1929.[302]

The second objection is simply that reference to French domestic law, whether that of the early twentieth century or that of the twenty-first, is incompatible with the nature and development of uniform law. The "interpretation of a particular phrase used in municipal law and the change over the years in that interpretation cannot guide the interpretation of the same phrase that might appear in an international agreement".[303]

The third, the most important as regards MC, is that the French text is no longer as relevant.[304] For MC there are six relevant texts in six different languages, just one of which is French and one of which is English.

4.1.2 *Legislative History* has been influential on the opinion of many senior judges, although rejected out of hand by one, Lord Hobhouse in *King*.[305] More typical is the attitude of Justice Marshall in *Floyd*, a decision given due regard by the House of Lords (as a whole) in *King*, who did indeed seek the lessons of history. One of his findings on "bodily injury" was that in the late 1920s the drafters gave no thought to recovery for psychic injury[306]: "(1) many jurisdictions did not recognise recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury".[307]

300. De Juglart, para. 2670. See also Miller pp. 118 *ff*. Generally, *cf* the rather different presentation of the cases by Abeyratne (2000) 65 J Air L & Com 225, 253 *ff*.

301. This can be inferred, for example, from the authoritative French text of the kindred convention concerning passengers by rail: Uniform Rules Concerning the Contract of International Carriage of Passengers by Rail (CIV).

302. By 1952 the text corresponding to art. 17, read "*de la mort, les blessures et toute autre atteinte à l'intégrité corporelle*". Then in 1961 the text was amended to read "*de la mort, les blessures et toute autre atteinte à l'intégrité corporelle ou mentale*". In the revision of 1999 it became "*dommage resultant de la mort, des blessures ou toute autre atteinte à l'intégrité physique or psychique du voyageur*". Attention was drawn to such points by Lord Reed and Lord Steyn in *King v. Bristow Helicopters* [2002] UKHL 7.

303. *Kotsambasis v. Singapore Airlines* (1997) 140 FLR 318, 320 *per* Meagher JA. The contention that words should be given the meaning they had in French law in 1929 was also rejected in *Zicherman v. Korean Air Lines*, 516 US 217 (1996); 133 L Ed 2d 596, 604 by Justice Scalia: drafters "could not have been ignorant of the fact that the law on this point varies widely from jurisdiction to jurisdiction" so it was unlikely that by using a general term they would intend "to confer a cause of action available under French law but unrecognised in many other nations". The relevance of French domestic law was also rejected by Lord Rodger in *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, para. 22 (Ct Sess) and by the House of Lords in that case: e.g. [2002] UKHL 7, para. 77 *per* Lord Hope, para. 147 *per* Lord Hobhouse. On the *Kotsambasis* decision see Mullany (2002) 118 LQR 523. See also below, note 4.1.3.

304. E.g. Rushing and Janicki, 70 JALC 429, 464 (2005).

305. Above.

306. *Eastern Airlines v. Floyd*, 499 US 530, 544–545 (1991): rare in domestic law, psychic injury without physical injury was unknown to medicine; "the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery". This view of the history was adopted in New South Wales in *Kotsambasis v. Singapore Airlines* (1997) 140 FLR 318, 323 *per* Meagher JA; and *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, paras 34 *ff per* Lord Rodger (Ct Sess), who, however, disputed (p. 108) the view of Justice Marshall that psychic injury was unknown at the time.

307. P. 544 *per* Justice Marshall.

In Scotland Lord Rodger in *King* also considered the history of article 17 and argued that it was not clear that the drafters did not intend to cover psychic injury.[308] Certainly, Justice Marshall's point (2) is unconvincing. In the aftermath of the First World War and the shellshock suffered by many survivors, it is hard to believe that the drafters were unaware of what is now usually called PTSD.[309] However, Lord Rodger went further and argued that they must not only have thought about it but also, although article 17 is silent on the question, have intended to include it.[310]

In England, the Court of Appeal in *Morris* found that it was "highly significant that no mention was made of liability for mental injury in the course of the negotiations that resulted in the Warsaw Convention".[311] Lord Phillips MR, who gave the judgment of the court, observed that the signatories to the Warsaw Convention in 1929 consisted of a wide variety of civil and common law countries in which "claims for mental injury or distress—other than in consequence of the death or physical injury of the claimant or someone related to the claimant" were not encountered.[312] Carrier liability of that kind was a "non-event": "such claims were unknown in 1929. We do not find this surprising. Only a decade or so earlier those suffering severe cases of what we would recognise as post-traumatic stress disorder as a result of trench warfare were being condemned as 'lacking moral fibre', if they were not being shot for desertion."[313] That view had some support on appeal *sub nom King*[314] from Lord Hope. However, it was firmly rejected by Lord Hobhouse as "a descent into unprincipled subjectivism" and "reasoning which speculates about the subjective intentions of the delegates and is not directed to the objective autonomous meaning of the words used".[315] That was a minority view. Whether a wider view of the possible actions was intended by the drafters of MC remains to be seen.[316] However, one case decided in the lower courts in England indicates not,[317] and anyway with the advent of MC the importance of legislative history (concerning WSC) before 1999 recedes with it.

4.1.3 *National Law* of the forum may be considered if there is a gap in a convention, to fill the gap.[318] But is there a gap here? The more widespread view is that there is not;

308. *King* [2002] UKHL 7 [2001] 1 Lloyd's Rep 95, paras 34 *ff* (Ct Sess).

309. Post-traumatic stress disorder. The point was made by Lord Cameron in *King*, para. 18. PTSD was officially classified as a psychiatric disorder (in the US) in 1980; for this and subsequent developments of the kind see Rushing and Janicki, 70 JALC 429, 432 *ff* (2005). Its features are "intense fear, helplessness or horror" (*ibid* p. 434). Courts in the US have rejected argument that it results in changes to the architecture and function of the brain such as amounts itself to physical injury (*ibid* p. 452). See e.g. *Turturro v. Continental*, 27 Avi 18,414 (SDNY, 2001); and *Ligeti v. British Airways* 2001 WL 1356238 (SDNY, 2001).

310. Para. 65.

311. *Morris v. KLM* [2002] QB 100, [96] (CA). The decision was affirmed by the House of Lords *sub nom In Re M* [2002] UKHL 7; *King* was reversed.

312. Para. 97. He thought (para. 96) that it was significant that the first claims for such injury against air carriers first arose in the US in the 1970s.

313. Para. 100. See also para. 102.

314. [2002] UKHL 7, paras 96 and 97, and 123.

315. Para. 148. He also said (*ibid*) that "it is unprincipled to say as the Court of Appeal say also in paragraph 96 that it is 'equally significant' that no claim was made for 'mental injury' until the 1970s". *Contra*: Lord Hope, para. 124.

316. For such a possibility see Cunningham, 41 Vand J Transnat'l L 1043 (2008); *cf* Hunt, 20 Ins L J 113, 121 (2009).

317. *Cowden v. British Airways plc* [2009] 2 Lloyd's Rep 653.

318. In *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, the Court of Session found a gap but the decision was reversed: [2002] UKHL 7.

that, although from the perspective of developing national law post 1950 a gap has appeared about "bodily injury" where it concerns injury to the psyche, in 1929 there was none; and that national law does not assist.[319]

4.2 *The Range of Injuries* that might arise in a claim under article 17 was set out by Lord Hobhouse in *King*[320]:

"(1) . . . a palpable physical injury inflicted during the flight by some physical impact upon the passenger would suffice, e.g. a crash injuring the passenger, a bag falling on the head of the passenger; *the impact test*[321]; (2) The physical infliction of some such physical injury during the flight and palpably in existence at the conclusion of the flight whether or not any actual impact was involved, e.g. anoxia and immediate brain damage caused by the failure of the pressurisation system or carbon monoxide poisoning; *in-flight injury without impact*[322]; (3) Any palpable injury physically caused during the flight, i.e., an injury caused by some direct physical cause, not being an injury caused through the senses like a fatal or non-fatal heart attack or stroke caused by observing a highjacking or experiencing a sudden loss of altitude; the physical *causation* test[323]; (4) A physical injury which does not have any mental aspect or mental manifestations: not a 'mental injury'[324] . . . ; (5) The physical infliction of physical injury during the flight even though not already manifested at the conclusion of the flight, for example, (a) a heart attack suffered after having disembarked, (b) a disease or illness contracted upon the plane say through the contamination of the plane's air supply or on-flight food; *the delayed effect injury*; (6) An injury, even if it was caused through the senses, which has physical consequences or physical manifestations, even if they are not already manifest at the conclusion of the flight.[325] (7) Any injury which could properly be described as a personal injury[326]; (8) Any emotional upset or reaction—distress, fright, mental anguish, anxiety, grief, *etc*."[327]

In *King* itself,[328] each of the two cases on appeal was brought as an instance of category (8): there was "no attempt in either case to demonstrate that the passengers' depressive illnesses had a physical cause or origin"[329] and on that basis the claims failed. Clearly category (8) is not a "bodily injury" within article 17.[330] On that the opinions in the House of Lords were agreed. They also appeared to be in tune on the meaning of "injury",[331] but

319. *King* [2002] UKHL 7, at [77] *per* Lord Hope, and [147] *per* Lord Hobhouse.

320. *Ibid*, at [136]. See also Clarke (in English) in TranspR 2003.436, 440 *ff*.

321. The impact test was rejected in *Rosman v. TWA*, 34 NY 2d 385 (CA NY, 1974) and thus by Lord Hobhouse in *King v. Bristow Helicopters* [2002] UKHL 7, [145] and [180].

322. Rejected in *King* (above) para. 180 by Lord Hobhouse.

323. The causation test was rejected in *Rosman* (above) and thus by Lord Hobhouse in *King* (above) paras 145 and 180.

324. According to Lord Hobhouse (para. 137) this was the position of the Court of Appeal in *Morris*, one of the decisions appealed.

325. According to Lord Hobhouse (para. 137) this was the position of Lord Reed who dissented in the Court of Session in *King*: [2001] 1 Lloyd's Rep 95.

326. According to Lord Hobhouse in *King*, para. 137, this was the position of the majority of the Court of Session in *King*; but he also thought that there was little difference between that category and category (8). He rejected both: para. 179.

327. Category (8) was not compatible with even the broadest view of "bodily injury" advanced in *King*, that of Lord Hobhouse: see paras 143, 145 and 157. In the US since then such cases have not been actionable; see cases discussed by Easton, Trock and Radford, 68 JALC 665, 678 *ff* (2003).

328. *King v. Bristow Helicopters* [2002] UKHL 7.

329. The words of Lord Hope para. 128. See also Lord Hope, para. 50.

330. See e.g. Lord Steyn para. 17 *in fine*; and Lord Hobhouse paras 143 and 144.

331. E.g. Lord Hobhouse, para. 140: "The words *injury* in the context of personal injury involves a condition which departs from the normal, which is not a mere transitory discomfort or inconvenience and which, whilst not permanent or incurable, has, in conjunction with its degree of seriousness, a sufficient duration. It includes a loss of function."

not on the meaning of "*bodily* injury" and to what extent damages might be awared for associated psychic damage.

The view is widespread that "bodily injury" must be read in the context of the sentence *eiusdem generis* the other "damage" mentioned: "death" and "wounding". Thus read, the ordinary meaning of "bodily injury" is non-fatal injury which is physical rather than anything else: "physical injury or physical manifestation of injury". In substance that was also the view of the United States' Supreme Court in *Floyd*,[332] recognised in *King* as a leading case on the interpretation of WSC. In *Floyd* Justice Marshall suggested, on the one hand, that bodily injury "might well refer to a more general category of physical injuries that includes internal injuries caused, for example, by physical impact, smoke or exhaust inhalation, or oxygen deprivation",[333] as well as decompression,[334] and, especially in the early days of flight, air sickness.[335] On the other hand, in *Carey*,[336] a claim in respect of "nausea, cramps, perspiration, sleeplessness, nervousness and tension as physical manifestations of . . . emotional distress" failed. However, unless associated in some way, the implication about psychic injury (the point did not have to be decided), was that it was ruled out.

Evidence of bodily injury was also a matter on which the opinions of the House of Lords in *King* were divided. The more restrictive view was that of Lord Hope, with whom Lord Mackay agreed.[337] He thought that the draftsmen "had in mind injuries which were manifestly physical".[338] He reinforced his view by reference to the French text.[339]

Lord Hope also referred to[340] the particularly restrictive language used in 1971 in the US in *Rosman*,[341] that "the ordinary, natural meaning of 'bodily injury' as used in article 17 connotes *palpable, conspicuous* physical injury, and excludes mental injury with no *observable* 'bodily', as distinguished from 'behavioural', manifestations". Lord Hope thought that such language was too strong[342] but the bodily manifestation of injury was the

332. *Eastern Airlines v. Floyd*, 499 US 530, 553 (1991) *per* Justice Marshall, reversing 872 F 2d 1462 (11 Cir, 1989), which thought a broad construction should be applied. The Supreme Court took a textual approach (p. 534), allowing other canons of interpretation if there was ambiguity, via the dictionary (p. 536). *Floyd* has been applied since e.g. in *Terrafranca v. Virgin Atlantic*, 151 F 3d 108 (3 Cir, 1998); *Asher v. United*, 70 F Supp 2d 614 (D Md, 1999); *Grimes v. Northwest*, 27 Avi 17,102 (ED Pa, 1999); and *In re Air Crash off Point Mugu*, 145 F Supp 2d 1156 (ND Cal, 2001). *Idem* in New South Wales; *Kotsambasis v. Singapore Airlines* (1997) 140 FLR 318. *Contra* in Canada: *Newell v. Canadian Pacific* (1976) 74 DLR (3d) 574 (Ont); and in Israel: *Air France v. Teichner* 39 RFDA 242. In *Newell* the court did not address the arguments that succeeded in *Floyd* but (pp. 584 *ff*) simply applied common law rules of remoteness, in particular those in *Hadley v. Baxendale* (1854) 9 Ex 341 and *Jarvis v. Swan Tours* [1973] QB 233 (CA), to the facts of the case.

333. P. 541. *Idem King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, para. 28 *per* Lord Reed (Ct Sess).

334. *Ibid*.

335. [24] *per* Lord Rodger.

336. *Carey v. United*, 77 F Supp 2d 1165, 1171 (D Or, 1999) and 255 F 3d 1044, 1052 (9 Cir, 2001) with reference to *Floyd* (above).

337. *King v. Bristow Helicopters* [2002] UKHL 7, para. 6.

338. [83]. Although it did not have to decide the matter, that appears to be the view of the US Supreme Court in *Floyd* (above).

339. See at [85]. The French was *lésion corporelle*. In *Le Petit Robert*, to which he also referred, *lésion* is defined as "*une changement grave dans les caractères anatomiques et histologiques d'un organe sous l'influence d'une maladie, d'un accident*".

340. [108] (emphasis added by Lord Hope).

341. *Rosman v. TWA*, 34 NY 2d 385, 397 (CA NY, 1974).

342. Also in this sense, Lord Nicholls, [3], and Lord Hobhouse, [142].

element in *Rosman* that found support in *King*. The precise meaning did not have to be settled, however, in *King* and, said Lord Hope, was "best left over for another occasion", as was also the view of Lord Steyn. He went on, however, to express a provisional view: "For the time being I would venture to suggest that one would expect an injury falling within the expression 'bodily injury' to be capable of being demonstrated by an examination of the body of the passenger, making the best use of the most sophisticated means" available.[343]

All seemed to agree in *King* that the "brain is part of the body" and that injury to a passenger's brain "is an injury to a passenger's body just as much as an injury to any other part of his body".[344] That would be a bodily injury within article 17, if it could be sufficiently demonstrated. The difference in *King* between the restrictive view of Lord Hope and that of Lord Hobhouse is that the former requires injury, including injury to the brain, to be manifest in the body itself whereas Lord Hobhouse, with whom Lord Nicholls agreed,[345] would accept the evidence of the victim's behaviour. In particular, Lord Hobhouse thought that PTSD might be sufficient evidence of damage to the brain.

Lord Hobhouse said[346] that since "the body is a complex organism depending for its functioning and survival upon the interaction of a large number of parts, the injury may be subtle and a matter of inference not direct observation. The medical science of diagnosis exists to enable the appropriate inferences to be drawn from the observed evidence". There may be a bodily injury to an internal organ such as the spleen or an optic nerve, he said,[347] "even though there is no thing palpable, conspicuous or visible". The air passenger must prove his injury but what was impossible in 1929 had become possible in 2002 and the more so today. "What was previously invisible can now be made visible".[348] "The meaning of the phrase *bodily injury* has not changed . . . All that has changed is the ability of certain plaintiffs to bring their cases within it."[349] In particular, today a psychiatric illness "may often be evidence of a *bodily injury* or the description of a condition which includes *bodily injury*".[350]

4.3 *Psychic injury* as a head of damages or ground of recovery *per se* is a controversial question. *Floyd*,[351] the leading case on "bodily injury" in the US, left the question

343. [126].

344. *Per* Lord Nicholls, at [3]. Also in this sense Lord Mackay, [8], and Lord Hobhouse, [141].

345. [5]. Not so the other members (the majority) of the House; see Lord Hope, with whom Lord Mackay agreed (para. 3) at [126] and [127]. It can be readily inferred that Lord Steyn did not agree with Lord Hobhouse either.

346. [141].

347. [142].

348. [152] *per* Lord Hobhouse. On what medical science could do in this regard he took a more optimistic view than the Court of Appeal; see at [153] *ff*. In particular ([154]): "there is respectable medical support for the view that, for example, a major depressive disorder is the expression of physical changes in the brain and its hormonal chemistry. Such physical changes are capable of amounting to an *injury* and, if they do, they are on any ordinary usage of language *bodily* injuries."

349. [156] *per* Lord Hobhouse.

350. [143]. He found ([163] and [176] respectively) support for this view of accidents on aircraft in *Rosman* (above), as well as in certain Australian decisions: see [172].

351. Quoted above, note 4.4.

unanswered.[352] In *King*,[353] the leading case in England, the House of Lords ruled out recovery in the cases on appeal, however, the House did not have to rule on when, if at all, damages for psychic injury would be awarded; yet some inferences can be drawn. There are at least four possible positions on the question.

4.3.1 *No recovery* of damages at all for psychic injury is the first possibility—at least when claimed as a separate head of damages. That was the decision in *King*.[354] That is the result most consistent (not with the decision but) with the reasoning in *Floyd*[355] based, as it was, on the legislative history and the wish in 1929 to protect a financially weak industry.[356] Protection of the industry is also the basis of the concern of Lord Steyn in *King* with the "floodgates" factor. Many "occurrences and consequent mental injuries or illnesses would already have been a reality in 1929", he said, and their relevance to the interpretation of article 17 "is that in 1929 it would already have been appreciated that the imposition of strict liability for mental injury and illness would have opened the door to an avalanche of intangible claims, greatly in excess of the number of claims for physical injuries. For the fledgling aviation industry this would have involved a large exposure to (i) judgments and awards, (ii) the cost of expert evidence to sort out what were cognisable claims, and (iii) the cost of litigation, the latter being irrecoverable in the United States. This might have meant larger liability insurance premiums and a resultant increase in passenger fares".[357]

This kind of argument was rejected in *King* by Lord Hobhouse because, he said, it "has no force if the passenger has to prove by the appropriate expert evidence some actual *bodily injury* in the sense which I have identified",[358] i.e. that the psychic injury in question is a manifestation of physical damage to the brain. Indeed, a no recovery rule was rejected in *Jack*, a leading case in the US, as being too restrictive of the rights of passengers.[359] Nonetheless, although the air industry is a fledgling one no longer, it is still vulnerable. Lord Steyn: "In 1929 the world was not ready to include mental injuries and illnesses within the scope of Art. 17. It is not ready to do so in 2002."[360]

4.3.2 *Psychic injury associated* with bodily injury as a distinct ground of recovery, whether caused by the injury or not, is the second possibility. Advocates of a rule on this basis[361] point to the wording of article 17, that the carrier is liable for damage sustained

352. Chester, 84 Marquette L Rev 227, 237 (2000). Indeed this can be deduced from what was said by Justice Marshall in *Floyd* 499 US 530, 552–553 (1991).

353. *King v. Bristow Helicopters* [2002] UKHL 7.

354. Above.

355. Above Note 4.1.

356. See above, Chapter 4, 4.7.

357. [17]. A narrow reading of bodily injury "is consistent with the primary purpose [of] limiting the liability of air carriers to foster the growth of the fledgling commercial aviation industry": *Eastern Airlines v. Floyd*, 499 US 530, 546 (1991) *per* Justice Marshall.

358. *King v. Bristow Helicopters* [2002] UKHL 7, para. 181.

359. *Jack v. TWA*, 854 F Supp 654, 665 (ND Cal, 1994).

360. *King* (above) at [27]. There is more than a hint of the same concern in the words of Lord Hope, [123]. However, Lord Hobhouse ([149]), came close to rejecting this consideration which, surely, cannot be what he meant.

361. E.g. in *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, [24] *per* Lord Rodger (Ct Sess).

"*in the event of*" (WSC) or "in case of" (MC) bodily injury.[362] Such a rule is the most favourable of the four to passengers.[363] However, it has been roundly rejected as leading to "absurd results",[364] where a claimant might tack psychic injury on to a bruise or two.[365] "The happenstance of getting scratched on the way down the evacuation slide does not enable one passenger to obtain a substantially greater recovery than that of an unscratched co-passenger who was equally terrified by the plane crash."[366] Recovery, say the critics, would become inequitable and unpredictable.[367]

4.3.3 *Psychic injury caused by bodily injury* as a distinct head of recovery is the third possibility. That was the decision in *Jack*.[368] However, the category was rejected in *King* by Lord Hobhouse,[369] with whom Lord Nicholls agreed, and, as read by Lord Hobhouse, by the Court of Appeals of New York in *Rosman*.[370] That view is to be distinguished from the position actually taken by Lord Hobhouse, which is the fourth possibility.

4.3.4 *Psychic injury incidental to bodily injury,* an added element in the damages awarded for the physical injury, is the fourth possibility, as in the case (espoused by Lord Hobhouse) of internal injury to the brain of which the psychic injury is evidence. This was the position on psychic damage that emerged not as the decision but the opinion underlying the debate in the House of Lords in *King*.[371] Thus, Lord Hope, for example, with whom Lord Mackay agreed, said that compensation would be awarded for an "emotional reaction" which has been shown to be a "manifestation of physical injury".[372]

362. See e.g. Lord Reed in *King* (above) at [27]. This view was dismissed by Lord Phillips, MR, in *Morris v. KLM* [2002] QB 100, [85] (CA) as "far-fetched".

363. Such a rule was rejected in *Jack v. TWA*, 854 F Supp 654, 665 (ND Cal, 1994). See further Chester, 84 Marq L Rev 227 (2000).

364. *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, [21] *per* Lord Rodger (Ct Sess), with reference to the judgment in *Jack*.

365. *In Re Flight Explosion*, 778 F Supp 625, 639 (ED NY, 1991). In the instant case the passenger died of his injuries. See also *Longo v. Air France*, 1996 WL 866124 (SDNY, 1996); Rushing and Janicki, 70 JALC 429, 445 (2005).

366. *Jack v. TWA*, 854 F Supp 654, 668 (ND Cal, 1994).

367. *Ibid*.

368. *Jack* (above). See also similar decisions in *Alvarez v. American*, 27 Avi 17,214 (SDNY, 1999); *In Re Air Crash at Little Rock*, 118 F Supp 2d 916 (ED Ark, 2000) and *Georgeopoulos v. American* (CA NSW, 1999): claimant injured in evacuation slide, later suffered PTSD caused by the emergency; damages not awarded. See further *Turturro v. Continental*, 27 Avi 18,414 (SDNY, 2001); and cases discussed by Garcia-Bennett, 26 Air & Space L 49, 51–52 (2001). Semble *Turturro* is a relatively harsh decision based on "fear of floodgates"; see the analysis of Easton, Trock and Radford, 68 JALC 665, 681–683 (2003). In this connection note *Rothschild v. Tower Air* 1995 WL 71053 (ED Pa, 1995); Rushing and Janicki, 70 JALC 429, 444 (2005). Passenger R was injured (pricked) by a hypodermic needle concealed in a magazine rack, but failed to recover in respect of her distress (fear of AIDS and hepatitis). Her distress related not to the injury but to her fear. Also *Ehrlich v. American Airlines*, 360 F 3d 366 (2 Cir, 2004); and *Booker v. BWIA*, 2007 WL 1351927 (EDNY, 2007); DeMay 73 JALC 131, 229 (2008) in which the alleged physical injury (asthma attack) was caused not by the accident (baggage seizure) but by a subsequent event (discovery that valuables were missing from the baggage).

369. *King v. Bristow Helicopters* [2002] UKHL 7, [145].

370. *Rosman v. TWA*, 34 NY 2d 385 (CA NY, 1974). Incidentally, the converse case, bodily injury caused by psychic injury is uncontroversial: "if a relevant accident causes mental injury or illness which in turn causes adverse physical symptoms, such as strokes, miscarriages or peptic ulcers, the threshold requirement of bodily injury under the Convention is also satisfied": Lord Steyn in *King* (above) at [20], with reference to *Rosman v. TWA*, 34 NY 2d 385, 399 (CA NY, 1974). See also *King v. Bristow Helicopters* [2001] 1 Lloyd's Rep 95, 114 *per* Lord Rodger (Ct Sess). *Cf Kotsambasis v. Singapore Airlines* (1997) 42 NSWLR 110, in which the subsequent physical injury was insufficiently connected with the prior fright and anxiety.

371. *King v. Bristow Helicopters* [2002] UKHL 7.

372. At [118].

5. ***Accident*** means "an unexpected or unusual event or happening that is external to the passenger",[373] occurring during and connected with carriage by air.

5.1 *An event external to the passenger* is a requirement of article 17, as interpreted in *Saks* (below), it rules out illness, such as a heart attack,[374] especially where the event is in some degree due to the personal susceptibility or weakness of the passenger.

5.1.1 *Physical weakness. Saks*,[375] the leading case in the US, concerned the effects on a passenger of changes in cabin pressure. The decision was that, if a person suffers injury from a normal change of pressure because of some unanticipated weakness in the person, that may be an accident for other purposes (such as insurance cover) but not for article 17.[376] *Saks* was applied in England in *Chaudhari*[377] where a disabled passenger fell in the cabin but that did not amount to an article 17 accident: "what befell Mr Chaudhari was not caused by any unexpected or unusual event external to him, but by his own personal, particular or peculiar reaction to the normal operation of the aircraft".[378]

The rule is the same even when the passenger displays the "normal" infirmity or weakness of old age and, for example, is unable to withstand prolonged sitting in a cramped position—with consequent back pain[379] or illness.[380] Other such cases include a passenger with a congenital asthmatic condition,[381] or hernia condition[382] which take a turn for the

373. *Air France v. Saks*, 470 US 392, 405 (1985). It must be "a suddenly intruding, damaging event which is external to the passenger": Giemulla, art. 17, para. 8, which reports (para. 11) that no explanation or discussion of "accident" is to be found in the legislative history of the WSC. Generally see e.g. Polkowska, Unif L Rev 2010.109. For the socio-economic background to the concept see Leloudas, *Risk & Liability in Air Law* (London 2009) ch 5. The *Saks* test was applied to art. 17.1 MC in *Ugaz v. American Airlines*, 576 F Supp 2d 1354, 1364 *ff* (SD Fla, 2008); and *Rafailov v. El Al*, 32 Avi 16,372, 2008 US Dist LEXIS 38724 (SDNY, 2008).

374. *McDowell v. Continental*, 54 F Supp 2d 1313 (SD Fla, 1999); *Rajcooar v. Air India*, 89 F Supp 2d 324 (ED NY, 2000). *Idem* in France: *Martignier-Gorecki v. Air Inter, TGI Marseilles 3.9.1997*, (1998) 205 RFDA 146. *Idem* under MC art. 17.1 *Barclay v. British Airways plc* [2008] EWCA Civ 1419; [2009] 1 Lloyd's Rep 297; noted by Starks 7(4) S & TI (2009), Marland 34 Air & Space L 135 (2009) and Chambers [2010] LMCLQ 19; and in *Ugaz v. American Airlines*, 576 F Supp 2d 1354, 1364 *ff* (SD Fla, 2008) in which the claimant slipped and fell on an escalator while proceeding to immigration. See also e.g. *McCauley v. Federal*, 31 Avi 18,173 (ED Mo, 2006). *Barclay* was applied in Australia in *Air Link Pty v. Paterson* [2009] NSWCA 251.

375. *Saks v. Air France*, 724 F 2d 1383 (9 Cir, 1984). *Idem* a tendency to faint: *Delta v. Gibson*, 550 SW 2d 310 (Tex Civ App, 1977). *Cf* "personal injury" which has a wider meaning than "bodily injury": *South Pacific Air v. Magnus* (1998) 157 ALR 443 (FCA). Physical weakness was the inference in *Barclay v. British Airways plc* [2008] EWCA Civ 1419 (above) where the cause of the passenger's accidental injury was not established. In this case Laws LJ acknowledged ([7]) that the leading case on "accident" is *Saks*. For opinion in Australia see Hunt, 20 Ins L J 113 (2009), where *Saks* is also the starting point of court analysis; and where MC came into force in January 2009.

376. In *Chaudhari* (below) Leggatt LJ, giving the judgment of the CA, stated that the interpretation of "accident" in some other context was "of little assistance when construing the word in the Convention".

377. *Chaudhari v. British Airways* [1997] EWCA Civ 1413, 1997 WL 1105796. It was approved in *King v. Bristow Helicopters* [2002] UKHL, [71] by Lord Hope. See also *Barclay v. British Airways plc* [2008] EWCA Civ 1419; [2009] 1 Lloyd's Rep 297, [34] *ff, cf Watts v. American Airlines*, 32 Avi 15,667 (SD Ind, 2007) in which the court took a different view of a heart attack in the aircraft toilet; noted by DeMay, 73 JALC 131, 216 (2008); and noted critically by Tompkins, 33 Air & Space L 473 (2008).

378. *Per* Leggatt LJ.

379. *Margrave v. British Airways*, 643 F Supp 510 (SDNY, 1986). Likewise sciatica from a defective seat: *Malaysian Airlines v. Krum* [2005] VSCA 232. *Cf* the successful claim by an overweight person who injured her knee twisting her body to give another passenger access to the aisle: *Schneider v. Swiss Air*, 21 Avi 17,396 (D Me, 1988).

380. E.g. thrombophlebitis: *Scherer v. Pan Am*, 387 NYS 2d 580 (NY, 1977).

381. E.g. *Walker v. Eastern*, 775 F Supp 111 (SDNY, 1991).

382. E.g. *Abramson v. JAL*, 739 F 2d 130 (3 Cir, 1984), *cert denied* 470 US 1059 (1985).

worse during the flight, and a passenger with an allergy.[383] However, the consequences of the failure by cabin staff to respond (*in casu* to the request of an asthmatic passenger to be moved to a seat further from the smoking section of the aircraft) have been held to be an accident, for the consequences of which the carrier was liable.[384] See further note 5.3.2.

5.1.2 *Emotional sensitivity.* Psychic injury cannot be compensated unless sufficiently associated with physical injury: note 4.2, above. However, the same follows in any event if the psychic injury is a susceptibility of the particular passenger. Examples are fear and panic, with associated trauma, triggered by normal levels of air turbulence or hard landings within a band of what is usual and thus acceptable. On the one hand, for an aircraft to bounce twice within a short period of time, although the subject of negative comment by other passengers, did not cause damage to the aircraft or injuries to other passengers and was held not so unusual as to be an accident.[385] On the other hand, physical injury with associated psychic damage caused by an excessively hard[386] or emergency landing[387] is likely to be held an accident under article 17.

5.1.3 *Self-inflicted injury.* In the case of a passenger who deliberately poisoned himself, the act was declared not to be external to the passenger.[388] That is true insofar as the sequence of events begins in the passenger's state of mind. However, it would surely be more acceptable to say that self-inflicted injury is not accidental in a more general sense. Be that as it may, poisoning caused by food or drink served by the carrier, although it may have its main effects within the passenger, has its cause in the state of the product, its preparation or preservation, and that is external and thus accidental.

5.1.4 *Deep Vein Thrombosis (DVT).* Claims being made against carriers in respect of DVT (referred to sometimes as 'economoy class syndrome')[389] are also likely to be regarded as being cases of passenger (physical) weakness. In 2002[390] a test case, a group action, was brought in England by 55 passengers (or their personal representatives)

383. E.g. an "idiosyncratic" reaction to insecticide spray in the cabin required by the law of the place of arrival, and normal there: *Kleiner v. Qantas*, 22 Avi 18,179 (SDNY, 1990), *affirmed* 970 F 2d 895 (2 Cir, 1991). *Idem OLG Frankfurt 13.2.1997*, TranspR 1998.362.

384. *Husain v. Olympic*, 116 F Supp 1121 (ND Cal, 2000), *affirmed* 316 F 3d 829 (9 Cir, 2002); Cornett 68 JALC 163 (2003). See 26 Air Space Law (2001) September. Special Issue on Health Issues in Air Law. Concerning a passenger with multiple sclerosis see *Waters v. Port Authority of New York*, 158 F Supp (2d) 415 (D NJ, 2001).

385. *Salazar v. Mexicana*, 20 Avi 17,114 (WD Tex, 1986).

386. Accepted in e.g. *Salce v. Aer Lingus*, 19 Avi 17,377 (SDNY, 1985), although in that case the claimant was unable to prove that his (neck) injury was caused by the landing.

387. *Korean Airlines v. Entiope, Cass Civ 15.12.1981*, (1982) 36 RFDA 215, in which the aircraft, having entered Soviet airspace, was forced to land by Soviet fighters in such a way that a sudden reduction in pressure injured the claimant. Also accepted in *In Re Eastern*, 19 Avi 18,136 (SD Fla, 1983), in which passengers were prepared for an emergency landing, when all three engines failed shortly after take-off (but then the crew regained control of the aircraft and landed it normally but on one engine), with reference to *Weintraub v. Capital*, 16 Avi 18,058 (NY, 1981). *Quaere* whether there was sufficient physical injury in this case.

388. *Levy v. American*, 24 Avi 17,581 (SDNY, 1993), in which the passenger slashed his wrists.

389. In the press; see e.g. Hunt, 20 Ins L J 113, 118 (2009). For the socio-economic background to the concept see Leloudas, *Risk & Liability in Air Law* (London 2009), ch 5.

390. [2002] EWHC 2825.

against 21 carriers, which became known as *The DVT case*.[391] The claimants argued that the carriers knew that the usual features of air travel created a risk of DVT, and that the failure by carriers to take the measures that might reasonably have avoided or mitigated the risk amounted to an "accident" in the sense of article 17. The argument was rejected. It was precisely because, said Lord Mance, "the claimants were unable to point to any thing unusual or unexpected about the permanent features of the aircraft or its operation", that the claim emphasised the alleged failure in precautions.[392] However, it was not, he pointed out, airline industry practice at the time to warn passengers of the risk; and the "realistic target of criticism would seem to be not the crew, but senior officers of the airline . . . responsible for safety".[393] Nor could Lord Phillips, MR, see how failure of the kind alleged could be an event,[394] an event external to the passenger as article 17.1 required.[395] In the absence of a relevant event on board passenger health is not the responsibility of air carriers.[396] The decision in *The DVT case* was referred to as one to which 'weight' should be given in the US in *Twardowski*.[397] In *Twardowski* there were suggestions that, if there were an industry standard about warnings that might set a benchmark against which a carrier might be said to 'fail', that failure might then be an event.[398]

Compare *Prescod*,[399] in which the passenger informed the carrier that she needed to keep emergency medical equipment with her in her hand baggage, but the crew removed it (an external and unexpected event), it was lost and the passenger died a few days after the flight. The Court of Appeals held the carrier liable under article 17 (and in breach of article 25) and, incidentally, that her pre-existing medical condition "does not matter".

5.1.5 *Tour Operators*. Viewed post 2000, the interpretation of article 17.1 in UK courts, whereas arguably correct, seems strict—not least to the many who take package tours abroad with tour operators. Article 17.1 was apparently circumvented in *Akehurst*,[400] in which claimants, who had suffered both physical and psychic injury in a crash, recovered damages not from the air carrier under WSC but from the tour operator for breach of its contract. Clearly much turned on the terms of the contract.[401]

391. *Deep Vein Thrombosis and Air Travel Group Litigation* passengers' appeal dismissed: [2003] EWCA Civ 1005, [2004] QB 234, [2004] 1 Lloyd's Rep 316; appeal again dismissed: [2005] UKHL 72, [2006] 1 AC 495, [2006] 1 Lloyd's Rep 231; Clarke, Unif L Rev 2006.187.

392. Lord Mance at [76]. The premise was that the onset of DVT itself could not be an accident for which carriers might be liable under art. 17.1: see *Povey v. Qantas Airways* [2005] HCA 33; Tomkins 34 Air & Space L 346, 347 (2009).

393. Lord Mance, at [80].

394. [2003] EWCA Civ 1005, [29].

395. See Lord Scott [2005] UKHL 72, [7] and Lord Steyn at [33]. A similar conclusion was reached in *Rodriquez v. Ansett Australia*, 383 F 3d 914 (9 Cir, 2004), with reference to *Blansett v. Continental Airlines*, 379 F 3d 177 (5 Cir, 2004); Morse, 70 JALC 123 (2005). See also Dysart (2004) 39 ETL 19.

396. Caplan, 26 Air & Space L 203 (2001).

397. *Twardowski v. American Airlines*, 535 F 3d 952, 961 (9 Cir, 2008). *Twardowski* itself, it has been said, might "prove to be the epitaph of DVT litigation in the US": Tompkins 33 Air & Space L 466 (2008). See also *Caman v. Continental Airlines*, 455 F 3d 1087 (9 Cir, 2006); *Cortez v. Air New Zealand*, 31 Avi 18,134 (9 Cir, 2006); and *Damon v. Air Pacific*, 31 Avi 18,135 (9 Cir, 2006).

398. P. 961; however the claimants in the case did "present substantial evidence" of such.

399. *Prescod v. AMR*, 2004 US App LEXIS 17432 (9 Cir, 2004); noted critically by Tompkins, 29 Air & Space L 313 (2004).

400. *Akehurst v. Thomson Holidays* (unreported), known to many as the Gerona Air Crash Group Litigation; see Rees (2004) 154 NLJ 62.

401. In which the defendant had sought (unsuccessfully) to incorporate the carrier's terms which were based on art. 17 WSC.

5.2 *Connection with carriage by air* implies some degree of physical proximity to the aircraft; see note 7 below. This is expressed by the requirement of article 17 that the accident must have occurred "on board the aircraft or in the course of any of the operations of embarking or disembarking". Any other connection with air travel as such, i.e. connection in a functional sense, should not be necessary. However, in *Saks*,[402] reversing the Court of Appeal,[403] the US Supreme Court held that an "accident must mean something different than an 'occurrence' on the plane".[404] It must involve some "malfunction or abnormality in the aircraft's operation".[405]

This is not the law in the UK and *Saks* marks the narrowest point in the changing interpretation of an article 17 accident in the US. Whereas in the 1930s the cause of air accidents was likely to lie in the equipment, the investment in air technology that went with the 1939–45 war left the world with safer aircraft and the likelihood that accidents would be caused by men rather than machines.[406] Even when *Saks* was decided the notion was not limited to a "peril of the air".[407] In the law of carriage by sea, bad weather is not a "peril of the sea" unless the weather causes damage through the medium of the sea. Direct wind damage is not a peril of the sea alone. "Perils of the air" of any kind may cause an article 17 accident: storms, air turbulence[408] or fog.[409] However, to be accidental, bad weather must nonetheless be unexpected and unusual in its incidence or severity. "Air turbulence itself", for example, "is not unexpected or unusual. Up to some level of severity it is a commonplace of air travel."[410] Fog too, is not uncommon at certain places and certain times. If the occurrence or duration of fog is indeed unusual and unexpected, that could give rise to an article 17 accident. Fog which does not stop buses and trains may still ground aircraft.

402. *Air France v. Saks*, 470 US 392 (1985). Applied in e.g. *Fishman v. Delta*, 132 F 2d 138, 141 by Jacobs CJ (2 Cir, 1998).

403. *Saks v. Air France*, 724 F 2d 1383, 1384–1385 (9 Cir, 1984).

404. *Saks*, p. 403.

405. *Gotz v. Delta*, 12 F Supp 2d 199, 201–202 (D Mass, 1998), applying *Saks*. The argument, that a maritime word such as "embarking" has no necessary relation to the operation of the aircraft, was rejected because the condition of "stairs that are used to provide access to an airplane . . . related directly to the process of embarking on the plane": *Gezzi v. British Airways*, 991 F 2d 603, 605 (9 Cir, 1993). The court also doubted, however, whether "operation of the aircraft" was the right test. As regards embarkation under MC a similar view was taken in *McCarthy v. American Airlines* 2008 US Dist LEXIS 49389 (SD Fla, 2008).

406. De Juglart, para. 2824.

407. *Cf* Giemulla, art. 17, para. 13 which contends with reference to opinion in Germany that it must be limited to "the inherent risk of air traffic" and does not extend to "damage which could also happen in any other sphere of life", citing *inter alia, BGH 28.9.1978*: whereas delay due to bad weather was an aviation risk, delay because the flight had been overbooked was not. *Cf* also *Rullman v. Pan Am*, 471 NYS 2d 478, 480 (NY, 1983): "the Convention is limited to the hazards of flying and was never intended to apply to the traditional risks undertaken by a common carrier", while accepting, however, decisions that acts of terrorism were indeed such hazards (p. 481).

408. *Goldman v. Thai Airways* [1983] 1 WLR 1186 (CA).

409. *Cf Chendrimada v. Air India*, 802 F Supp 1089, 1093 (SDNY, 1992) in which it was claimed that injury caused by delay due to fog was capable of being an accidental injury but the court said: "Meteorological conditions cannot be considered an unusual or unexpected event in plane travel."

410. *Quinn v. Canadian Airlines* (1994) 18 O R (3d) 326, 351. Abeyratne, *Aviation Trends in the New Millennium* (Aldershot 2000), ch. 11. More recently a case-by-case approach has been suggested by *Magan v. Lufthansa*, 339 F 3d 158 (2 Cir, 2003); D'Amico, 69 JALC 493 (2004). The District Court (181 F Supp 2d 396 (SDNY, 2002)) adopted a "bright line" rule based on FAA criteria in the interests of harmonisation whereby only "severe" or "extreme" turbulence would qualify as an "accident". The Second Circuit reversed, noting that the claimant was a tall man and that the cabin of the aircraft (BAA 146) was relatively low at the point of impact.

Saks was decided in 1985. Since then it has been interpreted "broadly".[411] Even in the US air accidents now include almost anything, including the consequences of human behaviour which is (not necessarily linked to but merely) facilitated or even "occasioned" by carriage by air. One example is sexual assault during flight at night.[412] Another is the violent reaction of the passenger behind when the claimant reclined his seat.[413] Nonetheless courts in the US have been at pains to show that their decision accords with *Saks* where possible. In England the *Saks* "malfunction" requirement was noted in *Morris*[414] but rejected.

5.3 *Connection with the carrier* in the sense the carrier's capacity to control the situation has been required by courts in the US. Connection with carriage by air as such is required in theory but relaxed in practice: note 5.2, above. None the less, there is a distinct requirement that the accident occurs within the carrier's sphere of responsibility; that the situation is one within the carrier's capacity to control. In *Maxwell v. Aer Lingus*,[415] for example, the court held that it was an article 17 accident when a passenger was injured by liquor bottles which fell from an overhead bin opened by another passenger. The court first found that her injury was caused by a risk attendant on air travel,[416] and continued: "Airlines have the authority, and most, including Aer Lingus, exert it, to regulate the number and size of personal articles that passengers are permitted to carry on board the plane. While passengers are permitted, and in most instances required, to place these items in the overhead bins, this is done under the supervision of the cabin crew who are responsible for securing them before takeoff."[417]

The same rule, but a different assessment of the situation, is found in *Gotz*.[418] The passenger who strained his shoulders while seeking to place a heavy bag in the overhead bin, because of the sudden rise of another passenger from his seat, did not suffer an article 17 accident *inter alia* because "an event cannot fall within the operation of the aircraft if that event is not within the airline's purview or control".[419]

Reference to potential supervision and control comes from tort thinking and, it is submitted, has no basis in article 17. Under article 17, if the damage is accidental, in the ordinary sense of "unexpected and unusual" and was caused by an event on board etc.,

411. Noted e.g. in *Tsevas v. Delta*, (ND Ill, 1997) LEXIS 19539.

412. *Wallace v. Korean Air*, 214 F 3d 293 (2 Cir, 2000).

413. *Mahey v. Singapore Airlines*, 115 F Supp 2d 464 (SDNY, 2000).

414. *Morris v. KLM* [2002] QB 100, [22] *ff per* Lord Phillips MR (CA). However, the court also noted that in the case before it it did not need to decide the point, as the accident was clearly characteristic of carriage by air.

415. 122 F Supp 2d 210.

416. See note 5.2, above.

417. P. 213. Note that there was no explicit finding that the crew had failed in this duty in the particular case.

418. *Gotz v. Delta*, 12 F Supp 2d 199, 201–202 (D Mass, 1998). Other reasons were that the movement of the other passenger before take-off was not even unusual: p. 202. His "injuries stemmed from his own reaction to the passenger's rise" and "the precipitating event was internal": pp. 204–205.

419. P. 204, citing cases of violence between passengers. *Cf* also *Charpin v. Quaranta, Aix-en-Provence 9.10.1986*, (1986) 40 RFDA 538, in which the carrier was liable because it failed to bring evidence that it had taken all necessary measures to avoid the damage, as required for a defence under art. 20. Of course, the airline may be excused liability for the accident under art. 20 by giving sufficient warning to passengers, e.g. to remain seated until the aircraft is at a standstill: in the same "case" see *Sté Air Inter v. Quaranta, Aix 23.6.1988* (1988) 42 RFDA 384; and *Bessis v. Air France, TGI Paris 2.6.1993* (1994).

prima facie, the carrier should be liable—subject to the carrier's defences, notably that in article 20: the carrier is exonerated under certain circumstances there stated. The issue of carrier fault and associated control impacts not when the *prima facie* case is made out under article 17 by the claimant but when the carrier defends.

The correct approach is illustrated by a case in 2000 of sexual assault: *Wallace*.[420] The court observed of the facts of the case that "it is plain that the characteristics of air travel increased Ms Wallace's vulnerability to Mr Park's assault. When Ms Wallace took her seat in economy class on the KAL flight, she was cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark". This was enough to meet the requirement that the accident be connected with carriage by air: note 5.2, above. That was also enough for the court to decide that this "constituted an 'accident' for purpose of Article 17 of the Warsaw Convention".[421] Although it was "undisputed that for the entire duration of the flight not a single flight attendant noticed a problem", there was no finding that the crew should have done, or could or should have prevented the assault; or that such a finding was necessary for an article 17 accident.

5.3.1 *Cases concerning the cabin* include *Schneider*,[422] in which an injury sustained because the passenger did not have enough leg room was held to be capable of being an article 17 accident; and *Maxwell*,[423] in which a passenger was injured by liquor bottles which fell from an overhead bin opened by another passenger; as well as *Kruger*[424] in which the claimant was injured by a falling backpack belonging to another passenger. But in an earlier decision a bag protruding into the aisle during boarding was held to be so commonplace that to trip over it was not an accident.[425] Perhaps the "last straw" is *Waxman*,[426] in which a hypodermic needle protruding from the seat in front stuck in the claimant's leg. The airline's "failure to remove the hypodermic needle" was "an unusual, unexpected departure from ordinary procedures"[427] and, therefore, the injury was held to be an article 17 accident. Contrast *Saks*, the leading case, in which the passenger experienced pressure and pain in her left ear, when the aircraft was descending to land, and lost her hearing. Insofar as she suffered an "injury . . . caused by the *normal* operation

420. *Wallace v. Korean Air*, 214 F 3d 293, 299 (2 Cir, 2000); petition for writ of certiorari denied: 531 US 1144, 121 S Ct 1079, 148 L Ed 2d 955. The decision has been criticised (incorrectly it is submitted) in view of the "court's failure to adopt a definition [of accident] that incorporated a causal link between the airline and the tortious act": Wright 46 Villanova L Rev 453, 474 (2001).

421. P. 200. There was a hint of criticism in the observation (*ibid*) that what occurred "could not have been entirely inconspicuous". It was not suggested, however, that attendants should mount a continuous night patrol of the aisles.

422. *Schneider v. Swiss Air*, 686 F Supp 15 (D Me, 1988). *Cf Potter v. Delta*, 98 F 3d 881 (5 Cir, 1996). Such cases also raise issues of whether the injury was caused by the state of the seats and cabin or by the state (age, unfitness, inebriation) of the passenger.

423. *Maxwell v. Aer Lingus*, 122 F Supp 2d 210 (D Mass, 2000).

424. *Kruger v. United Airlines*, 481 F Supp 2d 1005 (ND Cal, 2007); decided under MC art. 17.

425. *Sethy v. Malev*, 27 Avi 18,050 (SDNY, 2000).

426. *Waxman v. CIS Mexicana*, 13 F Supp 2d 508 (SDNY, 1998). *Idem* an encounter with a contaminated air sickness bag: *Croucher v. Worldwise Flight*, 27 Avi 18,062 (D NJ, 2000). See also *Rothschild v. Tower Air* 1995 WL 71053 (ED Pa, 1995), as analysed by Rushing and Janicki, 70 JALC 429, 444–445 (2005).

427. P. 512.

of the aircraft pressurisation system", she did not suffer an article 17 accident.[428] It would be otherwise if the pressure were abnormal.

5.3.2 *Cases concerning cabin service* include spillage of hot drinks,[429] food poisoning[430] and poisoned whisky,[431] as well as being struck by a drinks trolley.[432] Another concerned the passenger who broke a tooth eating an in-flight meal.[433] All these events were held to be article 17 accidents. The development of an argument with a flight attendant over seating was also an article 17 accident,[434] as was the public humiliation of a passenger by cabin staff.[435]

A controversial case concerns the response of cabin staff to a passenger who was taken ill on board. In *Fishman*,[436] whether or not (as argued by the airline) the child had a predisposition to earache or the ache might have been caused by a normal change of pressure (not themselves accidental factors) the scalding of the child when an air stewardess applied a compress to the ear was held to be an article 17 accident.[437] In contrast, when it appeared that the aircraft lacked adequate medical supplies to cope with emergencies,[438] the passenger being attended by another passenger (a doctor), and the aircraft did not seek to land at available airports *en route* and the victim's condition was aggravated by the prolongation of the flight, this was held not to be an article 17 accident.[439] Evidently, a line has been drawn between malfeasance and non-feasance. Given that the Conventions are exclusive,[440] the unfortunate result is that "if the crew completely ignores the passenger [taken ill] and continues the flight as if nothing had happened, the airline is

428. *Air France v. Saks*, 470 US 392, 405 (1985) (emphasis added). France *idem*: *Sté Camat v. Dubosq, Cass 6.12.1988* (1988) 42 RFDA 381. See also *Pironneau v. Air Inter, Pau 3.7.1986* (1986) 40 RFDA 440: however, the ground for the decision was that of causation—that the injury was due to a previous condition and the negligence of the injured person (art. 21) who should have been aware of the risk that he took by travelling by air.

429. *Lugo v. American*, 686 F Supp 373 (D Puerto Rico, 1988); *Wipranik v. Air Canada*, 2007 WL 2441066 (CD Cal, 2007); DeMay, 73 JALC 131, 214 (2008).

430. *Re Alleged Food Poisoning Incident*, 770 F 2d 3 (2 Cir, 1985).

431. *Chaudhari v. British Airways* [1997] EWCA Civ 1413, 1997 WL 1105796; *idem* serving an alcoholic drink instead of the non-alcoholic version ordered: *Scala v. American Airlines*, 249 F Supp 2d 176 (ED Conn, 2003).

432. *Price v. KLM*, 107 F Supp 2d 1365 (ND Ga, 2000).

433. *Bousso v. Iberia*, 26 Avi 15, 528 (SDNY, 1998).

434. *Grimes v. Northwest*, 27 Avi 17,102 (ED Pa, 1999), *affirmed*: 255 F 3d 1044 (9 Cir, 2001). See also *Husain v. Olympic*, 116 F Supp 2d 1121 (ND Cal, 2000), *affirmed* 316 F 3d 829 (9 Cir, 2002); Cornett, 68 JALC 163 (2003).

435. *Carey v. United*, 77 F Supp 2d 1165 (D Or, 1999). However, the claim was outside the Convention as it did not cause bodily injury.

436. *Fishman v. Delta*, 938 F Supp 228 (SDNY, 1996).

437. *Fishman* (above). See also *Krys v. Lufthansa*, 119 F 3d 1515 (11 Cir, 1997) and *McDowell v. Continental*, 54 F Supp 2d 1313 (SD Fla, 1999) in which the response of the carrier's captain, not to make an emergency landing but to continue to the next scheduled stopping place, was not an "accident".

438. See the review of earlier decisions in *Tandon v. United*, 926 F Supp 366 (SDNY, 1996); and in *Walker v. Eastern*, 785 F Supp 1168 (SDNY, 1992) concerning an alleged failure to respond adequately to a passenger's asthma attack. The rule is the same in France, e.g. *Zenbou v. Air France, TGI Lyon 13.1.1994* (1994) 47 RFDA 46. Moreover, in *Gerhardstein v. Amex*, 27 Avi 17,326 (10 Cir, 1999) it was held that lack of in-flight medical supplies or equipment was not "an unexpected event" under the terms of an accident insurance policy.

439. *Krys v. Lufthansa*, 119 F 3d 1515 (11 Cir, 1997); ULR 1998.888. The result of the decision was that the claimant could recover from the carrier in an action based on local tort law. See also *Ronai v. Delta*, 27 Avi 18,344 (ED NY, 2000). *Cf Fulop v. Malev*, 175 F Supp 2d 651, 666ff (SDNY 2001).

440. See Chapter 2, 2.2.

completely immune from liability"; and that "complete inaction is acceptable even if in doing nothing the airline aggravates the passenger's injury".[441]

5.3.3 *Cases of passenger misconduct (air rage)*, for example, that of one passenger assaulting another,[442] may be article 17 accidents, not least but not only when the aggressor is fuelled by alcohol served on board.[443] The position in the US in 2000 was stated in *Langadinos*[444]: "Serving alcohol to an intoxicated passenger may in some instances, create a foreseeable risk that the passenger will cause injury to others."[445] Statements like this reflect the gloss put on article 17 that the case must be within the carrier's sphere of responsibility and control: note 5.3, above. Thus it was held that, when flight attendants failed to protect a lady from unsolicited advances by a drunken fellow passenger on a long flight, that was an article 17 accident; and it was part of the reasoning that she had complained to the attendants but they had taken no action until it was too late.[446]

Arguably,[447] a similar decision might now be reached in England—certainly if article 17 is interpreted literally but also if the English courts take the American line and require the possibility of control. If, like the courts in the US, English courts draw analogies with tort in cases under article 17, the courts will find tort law which imposes a duty when the defendant has assumed responsibility, and for which a major factor in that is the degree to which the situation is within the actual or potential control of the defendant.[448] When "the defendant has control of both the plaintiff and the wrongdoer . . . the case for the imposition of a duty is particularly strong".[449] The Court of Appeal once held the Army liable for the injuries sustained by a drunken soldier while in its sphere of responsibility and control.[450] Why not also an air carrier for the safety of passengers on board for "air rage" by other passengers?

441. *McDowell v. Continental*, 54 F Supp 2d 1313, 1320 (SD Fla, 1999).

442. *Gezzi v. British Airways*, 991 F 2d 603, 605 (9 Cir, 1993); *Lahey v. Singapore Airlines*, 27 Avi 18,124 (SDNY, 2000). Not, however, as a matter of law: *O'Grady v. British Airways*, 134 F Supp 2d 407 (ED Pa, 2001).

443. *Oliver v. SAS*, 17 Avi 18,283 (D Md, 1983): it was sufficient for an art. 17 accident that a drunken passenger fell on the claimant without any enquiry by the court about the role of flight attendants. *Cf Padilla v. Olympic*, 765 F Supp 835, 838 (SDNY, 1991).

444. *Langadinos v. American*, 199 F 3d 68, 71 (1 Cir, 2000), with reference to a statement by the Supreme Court in *Air France v. Saks*, 84 L Ed 2d 289, 300 (1985).

445. See *Oliver v. SAS*, 17 Avi 18,283 (D Md, 1983) in which there was an art. 17 accident when the cabin staff served alcohol to a drunken passenger, who then fell and injured a fellow passenger.

446. *Tsevas v. Delta*, (ND Ill, 1997) LEXIS 19539. The court was referred to *Stone v. Continental*, 905 F Supp 823 (D Haw, 1995) holding, incorrectly it is submitted, that a drunken assault on board was not an art. 17 accident. The courts in *Tsevas* distinguished *Stone* because in the latter there was "no indication that the defendant's flight attendants failed to provide any service to the plaintiff which would have defused the situation" or prevented the assault. *Cf Wallace v. Korean Air*, 214 F 3d 293 (2 Cir, 2000) in which a lady who was molested by a fellow passenger, suffered an accident, although the attendants had not served him alcohol or been alerted to his behaviour. Karp, 66 J Air L & Com 1551 (2001).

447. See Clarke [2001] LMCLQ 369.

448. E.g. *Curran v. NIC* [1987] AC 718; *Yuen Kun Yeu v. A-G for Hong Kong* [1988] AC 175 (PC); *Smith v. Littlewoods* [1987] 1 AC 241.

449. *Winfield & Jolowicz on Tort*, 15th edn (London, 1998) p. 124.

450. *Jebson v. Ministry of Defence* [2000] 1 WLR 2055 (CA), distinguishing *Barrett v. Ministry of Defence* [1995] 1 WLR 1217 (CA). See also McIvor [2001] CLJ 109.

Public perception of risk and responsibility on board passenger aircraft has moved against carriers. Public concern about air rage fuelled by alcohol has been raised by newspapers. The degree of control that is impracticable in a restaurant or at a private party is practicable over passengers on modern aircraft. The power of the carrier to "control" that kind of situation is reinforced by standard contract terms along lines recommended by IATA, giving the carrier a right to refuse carriage to a passenger if the passenger's "mental or physical state, including impairment from alcohol or drugs, presents a hazard to yourself, to other passengers, to crew or property"[451]; and by the powers of the commander of an aircraft to combat offences on board under international law. So, if the element of potential control determines the existence of a duty, it seems that a case of injury sustained through liquor-fuelled air rage is within article 17.

5.3.4 *Cases of third party violence* other than air rage, such as terrorism and hijacking, have been held to be article 17 accidents.[452] The possibility of such events has led carriers to take extra security precautions. The unexpected (over)reaction of a passenger to a routine operation (security check) is not an accident,[453] unless the operation is carried out in an unreasonable (and thus unexpected) manner.[454]

6. ***Causation*** is determined by the law of the forum.[455] In England a distinction has been drawn in other branches of the law between accidental causes and accidental effects. Article 17.1 refers to the "accident which caused the death or injury", with the focus on the former[456] and thus, when the damage is caused by human agency, on the state of mind of the human agent. However, it is clear that the deliberate non-accidental conduct of third parties, such as theft, robbery or terrorism, may nonetheless be an accident from the point of view of the victim.[457] In the context of article 17 also, it is clear that the carrier may be liable for wilful misconduct by its employees and agents. So the reference to cause in article 17 does not imply a requirement that the person, if any, who initiated the chain of events leading to damage must have done so unintentionally. What counts is the accidental external impact on the claimant victim.

The "accident" must none the less cause rather than merely occasion the damage. Thus the passenger, who suffered a heart attack during a terrorist attack,[458] might succeed but only if the passenger can show that the heart attack was caused by the stress of the occasion.[459] It is not enough merely to show that it happened during the event. However,

451. See e.g. *Grimes v. Northwest*, 27 Avi 17,102 (ED Pa, 1999). However, in the US there is a constitutional right to travel which poses difficulties for those who seek to deplane passengers; see Mann, 65 JALC 857 (2000). Also Abeyratne, *Aviation Trends in the New Millennium* (Aldershot 2000), ch. 16.

452. Accepted in Israel: *Air-France v. Teichner, Sup Ct 22.10.1984* (1985) 39 RFDA 232, 239–240 with reference to decisions in the US: see note 7.2. Silets, 53 J Air L & Com 321, 359 *ff* (1987); also Gam [1988] LMCLQ 217.

453. *Tseng v. El Al*, 122 F 3d 99 (2 Cir, 1997).

454. *Fishman v. Delta*, 132 F 2d 138, 143 *per* Jacobs CJ (2 Cir, 1998).

455. In England the classic study is Hart and Honoré, *Causation in the Law* (2nd edn, 1985); see also Stapleton 73 Miss L Rev 433–480 (2008).

456. Pointed out in *Chaudhari v. British Airways* [1997] EWCA Civ 1413, 1997 WL 1105796.

457. *Stone v. Continental*, 905 F Supp 823, 827 (D Hawaii, 1995); *Carey v. United*, 255 F 3d 1044 (9 Cir, 2001).

458. A heart attack is not normally an art. 17 accident: note 5.1, above.

459. *Sakaria v. TWA*, 8 F 3d 164 (4 Cir, 1993).

the precise connection is not clear. In *Margrave*,[460] the District Court said that the cause must be the proximate cause, ordinarily a question of fact in the US and one for the court only "where there are active and efficient intervening causes or where reasonable jurors could reach only one conclusion regarding the issue of proximate cause". The latter was the case before it in which a bomb threat led to delay while passengers remained seated on the aircraft and, according to the claim, back injury. Summary judgment was granted to the carrier. However, later the Court of Appeals said in *Potter* that article 17 is to be "applied flexibly" and injury is "the product of a chain of causes", so "we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected *event* external to the passenger".[461] Nonetheless the chain must end somewhere. It is worthy of note perhaps that the French courts have rejected the contention that the consequential loss recoverable includes legal fees.[462]

7. *Embarking or disembarking* are the outer limits of transit, the period of carrier liability under article 17.[463] The words are likely to be literally construed in England (below 7.1); but have been given a more extended interpretation in the US in accordance with the "tripartite test" applied there. However, in both jurisdictions many if not most cases are now uncontroversial.

On the one hand, (dis)embarking includes use of stairs between terminal and tarmac and between tarmac and aircraft,[464] as well as the more modern moveable air bridge (or "walkway") between gate and aircraft.[465] When the aircraft is some distance from the terminal on a "remote stand", the principle is the same as regards buses taking the passenger from aircraft to terminal or vice versa.[466] Under WSC the process of (dis)embarking normally extended to or from the gate in the terminal.[467]

On the other hand, accidents in the terminal outside the customs and immigration area on arrival[468] or landside of departure security checks are outside article 17.[469] A proposal that

460. *Margrave v. British Airways*, 643 F Supp 510, 513 (SDNY, 1986). See also *Cush v. BWI*, 175 F Supp 2d 483 (ED NY, 2001). *Cf* Giemulla, art. 17, para. 17, which adopts the civil law formula of "adequate" causation.

461. *Potter v. Delta*, 98 F 3d 881, 884 (5 Cir, 1996), quoting partly from *Saks* p. 406 but with emphasis added.

462. *Consorts Pénègre v. Swissair, Cass Civ 15.4.1986* (1986) 40 RFDA 241.

463. The words have their origin in shipping and the word for a kind of ship (*barque*): *Sweis v. TWA*, 681 F Supp 501, 504 (ND Ill, 1988).

464. *Gezzi v. British Airways*, 991 F 2d 603 (9 Cir, 1993). E.g. passenger killed by a propeller: *Legal-Kerjean v. Pichon, Cass Civ 4.6.1973*, (1973) 27 RFDA 316; *Benjamin v. Air Guyane, Fort-de-France 13.9.1993*, (1994) RFDA 348.

465. *Mansoor v. Air France KLM*, 2008 US Dist LEXIS 12606 (SDNY, 2008). Previously: *Lyons v. American Trans Air*, 647 NYS 2d 845 (1986); ULR 1998.886. *Cf* Giemulla, art. 17, para. 23 that, unlike the tarmac traverse to and from the aircraft, this is not an aviation risk.

466. *Ricotta v. Iberia*, 482 F Supp 497 (ED NY, 1979), affirmed 633 F 2d 206 (2 Cir, 1980).

467. *Day v. TWA*, 528 F 2d 31 (2 Cir, 1975), *cert denied* 429 US 890 (1976). See also *Evangelinos v. TWA*, 550 F 2d 152 (3 Cir, 1977). *Idem* a stairway between gate and customs checkpoint: *Gabra v. Egyptair*, 27 Avi 18,119 (SDNY, 2000).

468. E.g. *MacDonald v. Air Canada*, 430 F 2d 1403 (1 Cir, 1971); *Stagi v. Delta*, 24 Avi 18,475 (2 Cir, 1995). Re travelators see *Stiegler-Duque v. Avianca, Paris 5.3.1999*, (1999) 53 RFDA 225. Defective escalators will be regarded in a similar way e.g. under MC: *Ugaz v. American Airlines* 32 Avi 17,710 (SD Fla, 2008); Tompkins, 34 Air & Space L 421, 422 (2009).

469. E.g. the collapse of the terminal roof in *Upton v. Iran Air*, 450 F Supp 176 (SDNY, 1978); a terrorist attack in the public shopping area of the airport at Rome: *Buonocore v. TWA*, 900 F 2d 8 (2 Cir, 1990). Accidents at check-in are not art. 17 accidents; see note 7.2.3, below.

transportation (and carrier liability) should commence from the time passengers "enter the airport of departure until the time when they exit from the airport of arrival" inspired heated debate among delegates prior to 1929 but was not adopted.[470]

7.1 *Literal interpretation*, of the words "on board . . . or embarking or disembarking" indicates the means of access to or from the aircraft. According to accepted rules of interpretation,[471] the word "embarking" must be read in the context. This was the view at one time of some courts in the US.[472] Indeed, a literal interpretation, allied with a (non-literal but purposive) view of article 17, that an article 17 accident must concern an aviation risk,[473] suggests a narrow interpretation.

For example, in *MacDonald*,[474] the court concluded that, if the "words are given their ordinary meaning, it would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal". Something of this spirit emerges also from the decision of the English Court of Appeal in 1992 in *Adatio*.[475] Having left the aircraft, the passenger was hurt on a travelator while being escorted by an employee of the carrier towards the immigration and transit areas of the airport.[476] This was not, held the Court, an accident "in the course of disembarking". The leading judgment of Sir Christopher Slade surveyed cases in other jurisdictions, especially the US, and observed that courts "should be cautious before placing a gloss on the words of Article 17 and that in any case such as the present, the ultimate question is whether, on the wording of that Article, the passenger's movements through airport procedures (including his physical location) indicates that he was at the relevant time engaged upon the operation of embarking upon (or disembarking from) the particular flight in question". The gloss in the mind of the judge is the interpretation according to the tripartite test then (and apparently still) applied in the US.

7.2 *The tripartite test*, based partly on the purpose or rationale of WSC by courts in the US, is the product of a particular time and place. It was developed to justify the courts'

470. *McCarthy v. Northwest*, 56 F 3d 313, 316 (1 Cir, 1995).
471. See Chapter 4, 4.4.
472. E.g. *Sweis v. TWA*, 681 F Supp 501, 504 (ND Ill, 1988).
473. See note 5.2, above.
474. *MacDonald v. Air Canada*, 430 F 2d 1403, 1405 (1 Cir, 1971).
475. *Adatio v. Air Canada*, CA 21 May 1992. The result favoured the claimant whose action was in time under the Limitation Act but not under the WSC. See also *Knoll v. TWA*, 610 F Supp 844 (D Colo, 1985), discussed in *Adatio*, in which the passenger left the aircraft at Heathrow and was 300 yards from it in an area which, as the court pointed out, was not leased to the air carrier but to the airport authority, when she fell (point also made in *De La Cruz v. Dominicana Aviacion*, 22 Avi 16,639 (SDNY, 1989)). Although being escorted by a carrier employee to the immigration office, she was not under carrier control and the case was not governed by WSC. See also *Curran v. Aer Lingus*, 17 Avi 17,560 (SDNY, 1982). Similarly outside the sterile area the passenger who slipped on a public escalator in the terminal building between check-in and the customs clearance area because *inter alia* she had not "isolated herself from the throng of other passengers flying to other destinations"; moreover it made no difference that she was being led at the time by an airline representative "at a fast trot" because the flight was about to close its doors, because she was not under the airline's control: she could have changed her mind about catching the flight: *McCarthy v. Northwest*, 56 F 3d 313, 317–318 (1 Cir, 1995). See also *Rolnick v. El Al*, 551 F Supp 261 (EDNY, 1982); and *Philips v. Air New Zealand* [2002] 2 Lloyd's Rep 408 in which a disabled passenger was injured when being pushed in a wheelchair on an escalator heading for the departure area (at Nadi, Fiji). Morison J held ([14]) that WSC applied from the time P had completed the check-in procedure.
476. Because she was with her mother who was in a wheelchair.

response to terrorism in the 1970s at air terminals in Europe, which the courts were resolved to treat as an aviation risk[477] and thus within the scope of WSC. The effect was to extend the period of carrier responsibility under article 17 and limitation under article 22 to what occurred in terminals just before embarkation or just after disembarkation, in the literal sense preferred in some other jurisdictions (see 7.1 above).

In *Day*[478] the passengers were attacked by terrorists when they were being searched by security guards prior to boarding. *Prima facie* the search was not part of embarkation but a prerequisite of embarkation.[479] However, the search was being conducted not, as is now more common, prior to entry to the departure area,[480] but between there and the aircraft; and the passengers "belonging" to the particular carrier were together in a group. The Court of Appeals (of the Second Circuit) brought the case within article 17 by a purposive approach but one which owed less to the rationale of WSC[481] than to points of then current "tort theory": in particular, that the carrier was best placed to bear or prevent risks of that kind (terrorism) not only in the aircraft itself but also in certain parts of the terminal.[482] Be that as it may, the tripartite test became known as "the *Day* test" and it was applied in 2008 to the corresponding words (in article 17.1) of MC.[483]

Subsequently, in *Evangelinos*,[484] the Court of Appeals (of the Third Circuit) politely acknowledged the "thorough and scholarly opinion" of the court in *Day* but stated that, while it agreed with the result in *Day* and much of the reasoning, "our reasoning differs slightly".[485] An easily predictable rule was indeed desirable but "we cannot accede to the notion that a line can be drawn at a particular point, such as the exit door of an air terminal that leads to the airfield. This is because a test that relies upon location alone is both too arbitrary and too specific to have broad application, since almost every situation and every airport is different." At the very least this is a rejection of the literal approach (7.1, above) standing alone. Not one but "three factors are primarily relevant" said the court "location of the accident, the activity in which the injured person was engaged, and the control by the defendant of such injured person at the location and during the activity".[486]

477. In truth, the victims were targeted less because they were air passengers than because most of the group were (believed by the terrorists to be) American and easy to target; and because, the carrier being registered in the US, the blow dealt more easily in Europe than in the US would be felt in the US. The tripartite test is still to be seen, e.g. *Bowe v. Worldwide Flight Services*, 979 So 2d 423 (Fla Dist Ct App, 2008).

478. *Day v. TWA*, 528 F 2d 31 (2 Cir, 1975). For how such decisions might apply to terrorist attacks post 2000, see Moore, 68 JALC 699, 707 *ff* (2003).

479. Not embarkation but a "preparation" for embarkation; it was imminent but had not actually commenced: *Buonocore v. TWA*, 900 F 2d 8, 10 (2 Cir, 1990).

480. There is general agreement that that is not part of the process of embarkation, however, *cf Baker v. Lansdell*, 590 F Supp 165 (SDNY, 1984).

481. Reference to that is likely to restrict rather than expand the scope of art. 17: *MacDonald v. Air Canada*, 439 F 2d 1402, 1405 (1 Cir, 1971).

482. P. 34 with reference to the work of Guido Calabresi (formerly Dean of Yale Law School). *Cf Hernandez* (above p. 43): having referred to discussion of this in *Day*, the court said: "We are not unsympathetic to this approach. But, if its application is not to do violence to the history and language of the Warsaw Convention, there should, it seems to us, be a close logical nexus between the injury and air travel *per se*." The *Day* approach in this respect has been rejected by later courts, e.g. *Sweis v. TWA*, 681 F Supp 501, 503 (ND Ill, 1988).

483. In *Ugaz v. American Airlines*, 576 F Supp 2d 1354, 1363 (SD Fla, 2008).

484. *Evangelinos v. TWA*, 550 F 2d 152 (3 Cir, 1977).

485. P. 155.

486. *Ibid*. This view was repeated in *McCarthy v. Northwest*, 56 F 3d 313, 316 (1 Cir, 1995). The *McCarthy* statement was adopted in New South Wales in *Kotsambasis v. Singapore Airlines* (1997) 140 FLR 318, 326, with the qualification (*ibid*) that they "may not be the only factors and, in the end, the answer will lie in the facts of the particular case".

Moreover, control, said the *Evangelinos* court, "is an integral factor in evaluating both location and activity".[487] Indeed, the three factors came to be regarded as inextricably intertwined. In *McCarthy* the Court of Appeals (First Circuit) said that "for Article 17 to attach, the passenger must not only do something that, at the particular time, constitutes a necessary step in the boarding process, but also must do it in a place not too remote from the location at which he or she is slated actually to enter the designated aircraft".[488] The weight given to each factor varied from court to court and case to case but one factor seems to have been more influential than the others: control.

In the leading case of *Day* (above), for example, it was part of the ratio that the "plaintiff's injuries were sustained while they were acting under the explicit direction of TWA, and while they were performing the final act prerequisite to boarding buses employed by TWA to take the [passengers] to the aircraft. More significantly, at the time these operations had commenced, Flight 881 had already been called for final boarding. As a result, TWA passengers were no longer mingling over a broad area with passengers of other airlines. Instead, acting pursuant to instructions, they were congregated in a specific geographical area designated by TWA and were identifiable as group associated with Flight 881 . . . TWA, by announcing the flight and *taking control of the passengers as a group, had assumed responsibility for the plaintiffs'* protection."[489]

7.3 *Public areas* are not subject to article 17. In particular, although check-in is a procedure conducted by the carrier involving certain constraints for passengers, it is not a procedure to which article 17 applies. In *Sage*,[490] the French court held that the accident to a passenger, who slipped at check-in on whisky spilled by a previous passenger, was not governed by the WSC.[491] It reached that decision less by reference to location than to (lack of) control. At check-in the carrier has no more control over passengers than a bank or post office over customers who queue for services. The passenger is free to leave the line before check-in; and to head off to the shops or the bar prior to proceeding to the departure area. It would be bizarre to "have passengers 'wandering' in and out of the Convention's coverage".[492]

Whether or not essential to the decision (probably not) the same point was made in England in *Adatio*[493]: "the stewardess had the *de facto* control of the plaintiff's mother because she was wheeling her but the lady had no control whatsoever either factually or legally or in any other circumstance of the plaintiff . . . [T]here is no evidence that the

487. *Evangelinos* p. 155.
488. P. 317.
489. P. 515.
490. *Air-Inter v. Sage, Lyon 10.2.1976*, (1976) 30 RFDA 266.
491. The main reason given by the court (p. 268) was lack of "control": "*le hall de l'aéroport est public, est soumis au contrôle et la gestion du concessionnaire et non des Compagnies aériennes . . . Sage n'etait pas, au moment de sa chute, pris en charge par la Compagnie de transport*."
492. *Sweis v. TWA*, 681 F Supp 501, 505 (ND Ill, 1988). See also in this sense *Kalantar v. Lufthansa*, 276 F Supp 2d 5 (DDC, 2003).
493. *Adatio v. Air Canada*, (CA 21 May 1992, unreported). The carrier's employee was wheeling the claimant's mother towards the immigration and transit areas of the airport and in that sense "in charge of" the claimant. The judge of fact found that enough for control. The Court of Appeal did not agree. However, a number of European commentators have taken the view that it is enough that the passenger "puts himself in the hands" of the carrier; see Giemulla, art. 17, para. 21. For a survey of European opinion, see also Godfroid (1984) 38 RFDA 26.

defendants had *any right whatever to instruct the plaintiff* to use the travelator on which the accident occurred."[494] The carrier (like a tourist guide) may direct passengers between one part of the terminal and another but does not control them, not even passengers in transit who are confined to a route between certain points. They proceed "at their own pace and under their own control" and can still "roam at will within the terminal".[495] Directions do not amount to control.[496] Nor is it control if the carrier indicates that to check-in the passenger must line up at a particular desk or to collect luggage on arrival wait and get it from a certain carousel.[497] The consensus is general that embarkation begins at some point later than check-in[498] and after the passenger has left the public access area[499] and moved into the "sterile" area of the terminal, most likely when they pass the first security control.

Article 17.2—Damage to Baggage

2. The carrier is liable(1) for damage sustained(2) in case of destruction(3) or loss(4) of, or of damage(5) to, checked baggage(6) upon condition only that the event(8) which caused(9) the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.(15) However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

Article 18—Damage to Cargo

1. The carrier is liable(1) for damage sustained(2) in the event of the destruction(3) or loss(4) of, or damage(5) to, cargo(7) upon condition only that the event which caused the damage so sustained took place during the carriage by air.(10)
2. However, the carrier is not liable if and to the extent it proves that the destruction or loss of, or damage to, the cargo resulted from one or more of the following:

- **(a) inherent defect,(11) quality or vice(12) of that cargo;**
- **(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents(13);**
- **(c) an act of war or an armed conflict(14);**
- **(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.**

494. Emphasis added. See also *Alleyn v. Port Authority of New York*, 27 Avi 17,130 (ED NY, 1999); and *Zaoui v. Aéroport de Paris, Cass Civ 18.5. 1976* (1976) 30 RFDA 353. In a note to *Baum v. Austrian Airlines, Brussels 5.2.1986*, (1987) 22 ETL 161, 168, Muller advocates a test similar to that indicated in *Adatio*.

495. *Rabinowitz v. SAS*, 741 F Supp 441, 446 (SDNY, 1990).

496. *Ibid* p. 447.

497. *De La Cruz v. Dominicana Aviacion*, 22 Avi 16,639, 16,642 (SDNY, 1989). Moreover, retrieval is not a necessary step in disembarkation because some passengers have only cabin luggage and nothing to retrieve.

498. E.g. in the US: *Sweis v. TWA*, 681 F Supp 501 (ND Ill, 1988); *Buonocore v. TWA*, 900 F 2d 8 (2 Cir, 1990). *Cf*, however, Giemulla, art. 17, para. 26, which contends (without citation in support) that if, "during this procedure the passenger is injured by an act of the check-in personnel, the carrier is liable under art. 17", even when carriers provide a check-in facility in a hotel, unless "the damage could just as well have happened to anybody else inside the hotel", i.e. it seems, it was a hotel risk rather than an aviation risk.

499. That was the location, for example, in *Shinn v. El Al*, 21 Avi 18,331 (D Colo, 1989), when a terrorist attack occurred: WSC inapplicable. Bin Cheng, 49 ZLW 287, 297 (2000).

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.[15]
4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport.[16] If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment,[17] any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 18

1. The carrier is liable[1] for damage sustained[2] in the event of the destruction[3] or loss[4] of, or damage[5] to, any registered baggage[6] if the occurrence[8] which caused[9] the damage so sustained took place during the carriage by air.[10]
2. The carrier is liable[1] for damage sustained[2] in the event of the destruction[3] or loss[4] of, or damage[5] to, cargo[7] upon condition only that the occurrence[8] which caused[9] the damage so sustained took place during the carriage by air.[10]
3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

- *(a) inherent defect,[11] quality or vice[12] of that cargo;*
- *(b) defective packing of that cargo performed by a person other than the carrier or his servants or agents[13];*
- *(c) an act of war or an armed conflict[14];*
- *(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.*

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier,[15] whether in an airport or on board an aircraft, or in the case of a landing outside an airport, in any place whatsoever.
5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport.[16] If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment,[17] any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Comment

(a) *Accidents*. Under article 17.1 MC the carrier is liable for injury or death to passengers only in the event of an "accident". The difference with articles 17.2 and 18.1 is of a kind said to be justified because the carrier has a greater degree of control over baggage and cargo than over passengers.[500] The carrier is liable for baggage and cargo

500. Giemulla, art. 18, para. 22.

"regardless" (whatever the circumstances) unless the carrier can establish one of the relevant defences. If the carrier is able to establish a defence then, from the carrier's point of view, it might be said that the loss was accidental and has been shown to have been so—but in a sense different from that of article 17.1. On this point, however, the main difference between the rule for passengers and the rules for cargo and baggage concerns the onus proof.

(b) *Damage*. The damage for which the carrier is liable lies in the financial consequences flowing from the loss of or damage to baggage or cargo. The damage itself may be sustained during the carriage itself, or later. For example, "suppose that a particular package had a preservative seal on it and that during the flight that seal somehow was punctured. Suppose that the goods arrive in good condition and were delivered and that the spoilage occurred afterwards, but the spoilage resulted from the occurrence during the flight . . . [The] carrier would be liable because the occurrence which caused the damage took place during the transportation by air".[501] It is for the claimant to establish[502] the carrier's liability and, therefore, that the occurrence that caused the damage took place during the carriage by air.[503]

(c) *Carriage*. "Carriage by air" has connotations of both time and space. It is "the period during which" the checked baggage (MC article 17.2) "was in the charge of the carrier" or "the period during which" the cargo (MC article 18.3) "is in the charge of the carrier" but is subject to the important albeit qualified restriction in article 18.4 that "the period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport".

(d) *Feeder Services*. Aside from the exceptional case of landing outside an airport, the corollary of article 18.4 is spelled out by the first sentence of article 18.4 (quoted above (c)). This narrow rule reflects the practices of the early years of carriage by air and is ill adapted to much modern practice and the intermodal carriage of unit loads. It is not obvious now why an air carrier, who may routinely operate road vehicles in an integrated intermodal movement, should move from one liability regime to another when the vehicle crosses the airport perimeter.[504] However, the first sentence is clear. If the air carrier contracts to carry "door to door", the feeder service (usually by road) at each end is not governed by the Conventions.[505]

In the second and longer sentence of MC, article 18.4, however, is an exception of a kind which functions to extend the scope of the air regime outside the airport. In each case and especially air carriage with ancillary feeder movements, unless it is proved (by either

501. *Nowell v. Qantas*, 22 Avi 18,071 (WD Wash, 1990). However, for the purposes of art. 26, which requires notice of damage, a distinction has to be drawn between damaged goods and destroyed goods, and the point is tested when the carrier hands over the goods: the carrier may be justifiably unaware of whether the goods are suffering damage which will later lead to their destruction: *Stud v. Trans International*, 727 F 2d 880 (9 Cir, 1984), in which a racehorse suffered pneumonia caused by the stress of the flight and died 10 days later.

502. As to mode of proof, see art. 11.

503. E.g. *OLG Frankfurt 15.11.1983*, RIW 1984.69. See also *BGH 1.10.1986*, NJW 1987.590.

504. A rule that is nearly as narrow is found for carriage by sea. Relatively recently, courts in the US have taken a more flexible view and extended the landside application of the maritime regime: *The OOCL Bravery* [2000] 1 Lloyd's Rep 394 (SDNY).

505. See Clarke (2005) 40 ETL 293.

claimant or carrier) that the occurrence causing damage was outside the airport concerned,[506] there is a presumption that it was during the carriage by air and thus that the Convention applies—wherever it happened in fact.[507] Moreover, the carriage period subject to the Convention may also be extended by contract and frequently is.[508] The IATA Conditions of Carriage[509] apply (the relevant version of) the Convention to carriage by air as defined (more extensively) in the applicable Conditions.[510] However, if another compulsory regime such as CMR applies outside the airport fence, the IATA extension is impossible in English law.[511]

(e) *Proof and Presumptions*. MC is significantly more favourable to the carrier than WSC[512] in that the MC article 18.3 defences are available to the carrier to the extent that the loss or damage is *partly* the consequence of the specified causes. Thus, evidence that the carrier was or should have been aware, for example of defective packing (a defence under article 18.2(b)), does not defeat the defence altogether.[513] Moreover, whereas WSC states that contributory negligence exonerates the carrier in accordance with the *lex fori*, MC states its own rule concerning contributory negligence, a defence under article 20.

Notes to articles 17.2 and 18

1. ***The carrier is liable*** but to whom? In the case of baggage the carrier's liability is to the passenger. In the case of cargo the identity of the person entitled to claim is less obvious—except as regards successive carriage for which the answer is found in MC article 36.3.

506. As, for example, when cargo was damaged in the carrier's warehouse outside the destination airport: *Victoria Sales v. Emery,* 917 F 2d 705 (2 Cir, 1990); or on the road to London Heathrow: *Read-Rite v. Burlington,* 186 F 3d 1190 (9 Cir, 1999).

507. If the occurrence takes place "during any such non-air leg of the carriage, Article 18(3) leaves open to the carrier the possibility of escaping absolute liability under Article 18(1) by proof that someone else was responsible. But that does not limit the defined scope of 'transportation by air'. So long as the goods remain in the air carrier's actual or constructive possession pursuant to the terms of the contract of carriage, the period of 'transportation by air' does not end": *Magnus Electronics v. Royal Bk of Canada,* 611 F Supp 436, 439–440 (ND Ill, 1985).

508. See *Siemens v. Schenker* [2004] HCA 11; (2004) 216 CLR 418.

509. Article 1 and art. 11.1. Note that if the other "means of transport" is an international carriage by road in Europe, CMR, art. 41, makes application of the CMR obligatory: see Clarke, CMR, para. 92.

510. E.g. 1.5 " 'carriage' (which is equivalent to the term 'Transportation'). Carriage of cargo by air or by another means of transport, whether gratuitously or for reward." See Clarke and Yates, paras 3.708 *ff.*

511. *Cf Quantum v. Plane Trucking* [2001] All ER (Comm) 916; reversed [2002] EWCA Civ 350. Clarke (2005) 40 ETL 293. *Idem* in a case of further carriage subject to national law: *Cass Com 18.1.2005,* Unif L Rev 2005.608. See also *Corte di Cassazione 12.11.2004,* Univ L Rev 2005.614.

512. In the context of WSC, Chapter III, the liability of the carrier in respect of the property of his customer is as follows. First, the carrier is liable for hand luggage if the claimant passenger proves that the damage was caused by the carrier's negligence. Second, the carrier is presumed liable for registered baggage (art. 18.1) except insofar as the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage (art. 21.1). Third, the carrier is presumed liable for cargo (art. 18.2), except insofar as the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the claimant or the person from whom he derives his rights (art. 21.2); or proves that the damage resulted *solely* from one of the specified causes (art. 18.3) such as defective packing by someone other than the carrier.

513. *Cf* common law: carriers cannot simply ignore defects of this kind: *LNWR v. Hudson* [1920] AC 324, 330 *per* Lord Atkinson.

1.1 *Successive Carriers.* The consignor has a right of action against the first carrier. The consignee has a right of action against the last carrier. Each has a right of action against the carrier which "performed the carriage during which the destruction, loss, damage of delay took place". In the case of successive carriage, therefore, the Convention has a clear rule which displaces national law, if different; only the consignor and the consignee are entitled to sue.[514]

1.2 *Single carriers.* A US court has applied the same rules to carriage that is not successive, i.e. carriage involving a single carrier.[515] However, most decisions in the US support the English view that the answer for single carriage is not found in WSC,[516] but in the law of the forum.[517] In English common law the owner of the goods is entitled to sue, as such. The importance of the question has grown with time and the capacity of aircraft to carry cargo and the associated tendency for forwarders to consolidate the goods of different owners and then perhaps consign the goods to themselves rather than the owners. However, at the same time the answer in English law has become less clear with the expression of judicial opinion.

In 1990 in *Gatewhite*,[518] the owner of goods, who was not named in the AWB as the consignor or consignee, was nonetheless held entitled to sue the carrier for damage to cargo: he had that right at common law and Gatehouse J. thought that there was "nothing in the Convention which deprives him of the right".[519] He observed that it "would be a curious and unfortunate situation if the right to sue had to depend on the ability and willingness of the consignee alone to take action against the carrier, when the consignee may be—and no doubt frequently is—merely a customs clearing agent, a forwarding agent or the buyer's bank. It would seem artificial in the extreme to require a special contract in the air waybill itself under article 15.2 to provide the goods owner with a remedy in such a normal situation."

In *Sidhu*,[520] however, the decision in *Gatewhite* was doubted by Lord Hope because it "does not sit easily with the idea that the object of the Convention [WSC], in the areas

514. *Johnson v. American*, 834 F 2d 721 (9 Cir, 1987) concerning WSC.

515. *Rank v. Jardine*, 20 Avi 18,325 (ND Ill, 1987). The view also finds favour with Giemulla, art. 18, para. 77.

516. In this sense Kronke, art. 18, para. 55. *Cf* Giemulla (art. 18, paras 73 *ff*) which argues that the answer can be inferred from the Convention, e.g. arts 12 *ff*. However, these provisions are mainly concerned with rights of disposal and rights of enforcement conferred, e.g. by art. 14; and do not apply to the carrier's obligations under arts 17 *ff*. Moreover, arts 12 *ff* "are enabling provisions conferring rights on these parties where none had previously existed. They do not restrict the nature of the plaintiff who may sue a carrier for loss or damage of cargo": *George Straith v. Air Canada* (1991) 59 BCLR 2d 241, 249.

517. In *BRI v. Air Canada*, 725 F Supp 133, 136 (EDNY, 1989), which allowed an action (in subrogation) by the underwriters of an undisclosed principal who had bought the goods in question. The court quoted the New York Court (Appellate Division) as saying: "If it can be established upon the trial that the plaintiff is indeed the undisclosed principal of the consignor named in the air way-bill, and *had title to the goods at the time of the loss*" (emphasis added). The passage was also approved in *Lufthansa v. American*, 797 F Supp 446, 452 (D Vt, 1992).

518. *Gatewhite v. Iberia* [1990] 1 QB 326, 334–335. *Cf* France, where (in actions brought under WSC) the law appears to favour a right of action for the parties to the contract of transportation: *Turbomeca v. Air France, Cass Civ 11.10.2007*, [2008] RFDA 450.

519. P. 165. This statement was quoted with approval in *George Straith v. Air Canada* (1991) 59 BCLR 2d 241, 245.

520. [1997] AC 430, 450.

with which it deals, was to provide uniformity of application internationally". The rule most common in civil law countries is that only a party to a contract of carriage, or a principal for whom he was acting, is regarded as what common lawyers would call the proper plaintiff. In common law countries the proper plaintiff is the owner of the goods, whose right to sue depends on his interest in the goods, not on the fact that he may also be a party to the contract. It would seem to be more consistent with the purpose of the Convention to regard it as providing a uniform rule about who can sue for goods which are lost or damaged during carriage by air, with the result that the owner who is not a party to the contract has no right to sue in his own name.[521]

Subsequently, in *Western Digital v. British Airways*,[522] the claimant argued that the rule for successive carriage (at the time WSC article 30.3) applied only to successive carriage and the judge, having referred to the general guidance to be derived from Lord Hope in *Sidhu*, concluded that "any limitation of rights should not be different in the case of single carriage as contrasted with successive carriage".[523] That would exclude the common law rule based on ownership. Indeed, that is a sensible conclusion and a sensible construction but, unfortunately, not an inevitable construction. It begs the big question of *expressio unius*: why the rules should be stated to apply to successive carriage alone. Why not also to carriage by one carrier throughout?

Delegates to diplomatic conferences do not always agree; and sometimes they accept a regime that is not complete rather than go away without one at all. The fact remains that the air conventions, like other carriage conventions such as CMR, are silent on the point. Under the CMR there seems to be a consensus that, in the absence of an exclusive rule in the convention, national law still applies[524] and, as regards CMR claims brought in the UK, the common law rule referable to ownership survives.[525] The same, it is submitted, seems to be true of the air conventions.[526]

2. *Damage sustained* is not defined but left to national law.[527] As English law recognises that the meaning of "damage" varies according to the context,[528] English courts have deduced a meaning from the Convention text.[529] Sometimes "damage" means "monetary loss" (e.g. in MC article 17, or article 19 in both WSC and MC); sometimes it means "physical damage" (e.g. MC article 22.2); and sometimes it is used in both senses. In the second line of MC article 18 (see note 5 below) "damage" means "physical

521. As regards France, see Miller p. 255. That does indeed seem to be true of civil law countries: Clarke CMR paras 41 *ff*. Rule confirmed as regards the person to notify: no right of suit in Germany: *OLG Düsseldorf 11.11.1993*, TranspR 1995.30.

522. [1999] 2 Lloyd's Rep 380.

523. P. 385 *obiter* as the transport in the case was successive.

524. Among commentators in France, Germany and Holland, as well as the UK; see Clarke, CMR, para. 41.

525. Clarke, CMR, para. 216. As regards WSC, however, *cf* Yates para. 5.1.3.15.2.

526. This is also the view advanced for WSC in the then current edition of SB: Part VII, 581 and 622. It was accepted by Cresswell J without, it seems, discussion in *Thomas Cook v. Air Malta* [1997] 2 Lloyd's Rep 399, 400.

527. Kronke, art. 18, para. 6. See art. 17, note 3.

528. *Swansea v. Harpur* [1912] 3 KB 493, 505 *per* Fletcher Moulton LJ (CA).

529. Within the context of WSC itself the meaning varies: *Fothergill v. Monarch* [1981] AC 251, 273 *per* Lord Wilberforce. The same is true of MC.

damage" but in the first line, the focus of this note, "damage sustained" has the same meaning as the same words in article 17: "monetary loss". Consistently with this, in the case of loss or damage to baggage which spoils a holiday, it has been held in Germany, as regards both articles 18 and 19, that compensation cannot be awarded in respect of disappointment.[530] Whereas English courts would probably agree,[531] it seems that courts in Scotland would not.[532]

2.1 *The Measure of damage* is also left to national law.[533] The rule of English law is that the carrier is liable for all kinds of loss which, given what the carrier knew or should have known at the time of contracting with the claimant about the claimant's situation, should have been in the reasonable contemplation of the carrier as likely to result from a breach of the kind that occurred.[534] In the case of damaged cargo the usual measure is the difference in market value between the cargo as it was when taken over by the carrier and the cargo in its damaged state. If there is no market where such cargo might be replaced and by reference to which its value can be assessed (usually at destination), the normal measure is the "cost of cure" unless that would be so great as to be unreasonable.[535] Moreover, if the carrier knew or should have known that the cargo was to be utilised in the owner's business, the carrier may be liable for loss of business such as loss of production.[536] In the case of lost cargo the carrier is liable for the cargo's market value at destination or the cost of replacement, as appropriate.

3. ***Destruction*** of cargo envisages not only physical disintegration but also the case of cargo which still exists in such a form as to have some monetary value but which, nonetheless, has lost its commercial identity i.e., is commercially valueless, and cannot be used for the purposes intended by the consignee.[537] For example, the case of racing greyhounds consigned live but dead on arrival was treated as one of destruction.[538] Destruction of baggage has been treated in a similar way.[539]

4. ***Loss*** of cargo includes not only the case of cargo missing or mislaid but also that of cargo in a known location but unavailable to the claimant. An example is that of cargo delivered to the wrong person from whom there is no practicable means of recovery in

530. *OLG Frankfurt 25.11.1992*, TranspR 1993.350.

531. *Lucas v. Avro* [1994] CLY 1444: no damages for distress caused by lateness of charter flight. Generally, see *Watt v. Morrow* [1991] 1 WLR 1421, 1445 *per* Bingham LJ (CA); and *Johnson v. Gore Wood* [2002] 2 AC 1, 37, *per* Lord Bingham; also p. 101, *per* Lord Goff and 108, *per* Lord Cooke. *Cf Hobbs v. L & S W Ry* (1875) LR 10 QB 111: damages awarded in respect of physical discomfort caused by rail carrier.

532. *Reid v. Ski Independence* 1999 SLT (Sh Ct) 62.

533. See above art. 17.1, note 3.2. For the measure in German law, see *BGH 3.7.2008*, (2009) 44 ETL 210.

534. *Koufos v. Czarnikow* [1969] 1 AC 350; and *The Achilleas* [2008] UKHL 48, discussed (critically) by McLauchlan in (2009) 9 OUCLJ 109; and by Wee in [2010] LMCLQ 150. As regards its significance for the assumption of risk see Coote (2010) 26 JCL 109.

535. *Ruxley v. Forsyth* [1996] 1 AC 344.

536. *Hadley v. Baxendale* (1859) 9 Ex 341; considered in *The Achilleas* (above).

537. *Dalton v. Delta*, 570 F 2d 1244, 1247 (5 Cir, 1978); *Hughes-Gibb v. Flying Tiger Line*, 504 F Supp 1239 (ND Ill, 1981). Kronke, art. 18, para. 7.

538. *Dalton* (above).

539. *Lg Frankfurt 5.11.1990*, TranspR 1991.143.

good time.[540] In the case of baggage, *mutatis mutandis* the rules are the same. However, computer chips which are undamaged but cannot be extracted from their container because the container is contaminated have been treated as damaged goods.[541]

Whether cargo is lost or diminished and thus damaged is a question of degree. In an early German case in which cargo consigned under a single AWB was packed in four distinct units the disappearance of one package during transit was treated (by the BGH) as a case of loss rather than damage.[542] Whether cargo is lost or merely delayed depends on when (and perhaps where) the point is tested. In another German case[543] carpets were sent in 1990 from Delhi to Germany via Kuwait, where they arrived the day before the invasion of Kuwait by Iraq. They were not sent on to Germany and subsequently disappeared. When they had been due to arrive in Germany they were still in Kuwait, and the claimant argued that the case was one of delay governed by article 19. The court decided, however, that the case was one of loss under article 18 (WSC). On the one hand, at that time the carrier could not yet have been said to be late under the contract. On the other hand, what caused the "damage sustained" by the claimant was not lateness or delay but the invasion.

5. ***Damage*** has different meanings in different contexts,[544] both generally and within the Conventions. Within them the contexts (the provisions) provide some indication of the meaning concerned; see also, note 2. Where, however, the meaning is not apparent from the text or the Conventions at large it must be sought in the law of the forum.[545]

In England, physical damage to goods was once described as "mischief done to property".[546] More recently in 1997, Hobhouse LJ referred to damage to goods as any change in the physical state of the goods which reduces their value[547] to the person concerned. Caviar, for example, which is perfectly fit to be eaten now, may be damaged nonetheless if the consignee is a merchant who planned to sell it on to restaurants for consumption by

540. *Hatzlachh v. Tradewinds*, 738 F Supp 714 (SDNY, 1990). See also *Kologel v. Down in the Village*, 17 Avi 17,104 (SDNY, 1982). *OLG Frankfurt 14.7.1977*, RIW 1978.197. Kronke, art. 18, para. 10. *Cf Dalton v. Delta*, 570 F 2d 1244, 1246 (5 Cir, 1978): "Lost, of course, means that the location, or even the existence of, the goods, is not known or reasonably ascertainable." This is also the meaning of loss in other carriage conventions such as CMR: Clarke, CMR, para. 56.

541. *Fujitsu v. Federal Express*, 247 F 3d 423, 435 (2 Cir, 2001).

542. *BGH 22.4.1982*, NJW 1983.516. *Cf Fothergill v. Monarch* [1981] AC 251. *Cf* decisions discussed by Kronke, art. 18, paras 12 and 13.

543. *OLG Frankfurt 23.12.1992*, TranspR 1993.103. *Cf* CMR which treats partial and total loss differently. However, the case is characterised as one or the other according to the documentation: Clarke, CMR, para. 55. In favour of such a rule for WSC: Kronke, art. 18, para. 14.

544. Very much the view of English common law, e.g. *Swansea v. Harpur* [1912] 3 KB 493, 505 *per* Fletcher Moulton LJ (CA).

545. In *Walz v. Clickair*, Case C-63/09, the ECJ considered the meaning of "damage" in MC art. 22.2. The claim was for both material and non-material damage and together, the amount claimed exceeded the limit then imposed under art. 22. The question for the ECJ (posed in para. 16) was whether the limit applied to both. It noted (para. 21) that MC did not define "damage" and that therefore the aim should be to give the word "a uniform and autonomous interpretation". To this end it applied art. 31 of the Vienna Convention of 1980 and concluded (para. 26) that the "nature of the damage sustained by a passenger is irrelevant in that regard". Accordingly the limit applied to both.

546. *Smith v. Brown* (1871) 40 LJQB 214, 218 *per* Cockburn CJ.

547. E.g. *Promet Engineering v. Sturge* [1997] CLC 966, 971 *per* Hobhouse LJ (CA).

their customers next week but cannot do so because it was carried at the wrong temperature.[548]

Further, a claimant must establish that the change in physical state occurred while the carrier was in charge of the cargo (see Comment (c) above). In practice the claimant must establish either some damaging event during carriage (e.g. a crash) or, if no such event is apparent, that the cargo in question "was in good condition when transportation by air began, i.e. when defendant [carrier] took charge of [it] and that it was damaged when transportation was completed", subject to article 18.4.[549] As regards the state of the cargo at the beginning, see article 11.

In the case of registered baggage, *mutatis mutandis* the rules are the same. In particular, damage to baggage is any change in the physical state of the baggage which reduces its value.

6. ***Checked baggage*** (or "registered" baggage under WSC) is the only baggage for which the carrier is liable under the Conventions. MC deals with it separately from cargo in article 17.2. The carrier's liability, if any, for unchecked (hand) baggage is governed by the law of the forum. MC refers to "fault" which is not defined but, it seems, left to national law.[550]

7. ***Cargo*** is not defined by the Conventions. The inference, however, is that it comprises any physical object that is in fact carried by air, but with certain exceptions. The exceptions are postal items, which are excluded by article 2.2; also checked baggage,[551] hand baggage,[552] and personal items, which are excluded by inference because the Conventions treat them differently from cargo. The original French text (*marchandises*) suggests that, to be cargo, the objects must be merchandise with economic value.[553] However, this is too narrow an interpretation to accommodate actual practice and that, together with the use of words with a wider connotation in the English translation, led to the application of WSC to the carriage of things which have value but are not usually

548. See, e.g. *Ranicar v. Frigmobile* [1983] Tas R 113.

549. *Boehringer v. Pan Am*, 531 F Supp 344, 347 *per* Ely J (SD Tex, 1981), *affirmed on other grounds*: 737 F 2d 456 (5 Cir, 1984). As regards art. 18.5, see comment (d) to art. 18.

550. Apparently the law of tort in common law countries. *Cf Ag Hanover 6.4.2000*, TranspR 2000.313, in which the claimant left her handbag in a bus on the way to the aircraft, reported its loss on arrival in Düsseldorf, and airline staff were successful in recovering it for her. They volunteered to bring it back with them but the bag was then lost (again) at Düsseldorf before being returned to the claimant. The court held that WSC did not apply as it was returned to Düsseldorf as a gesture of goodwill and not under any contract of carriage.

551. See note 6. Passenger belongings carried under an AWB would be cargo: Giemulla, art. 18, para. 7.

552. *BGH 24.6.1969*, NJW 1969.2014; unless taken over from the passenger during carriage: *BGH 28.11.1978*, NJW 1979.496; and *Baker v. Landsell*, 590 F Supp 165 (SDNY, 1984) concerning a bag being security screened during embarkation. *Contra*: *Sedlmayer v. Trans International*, 416 NYS 2d 461 (NY City Civ Ct, 1979); and *Hexter v. Air France*, 563 F Supp 932 (SDNY, 1982), which was not discussed in *Baker.* The effect of *Sedlmayer* and *Hexter* is that the carrier would be liable in full unless he issued a baggage check on the aircraft. *Cf* German decisions which show less concern with the formalities and more with whether the carrier has taken charge of the items: e.g. *Lg Frankfurt 8.12.1989*, TranspR 1991.143; and *Ag Bad Homburg 30.10.1991*, TranspR 1992.222: bag taken from passenger temporarily (during take-off) not taken in charge, so remains hand baggage under WSC.

553. Miller, p. 10.

described as merchandise, such as live animals[554] and dead human beings: the carriage (usually repatriation) of corpses. The same is likely to be true of MC.

In *Johnson*, for example, the court stressed that under article 1 WSC applied "to all international transportation of passengers, baggage and goods". This the court interpreted to indicate that "the Convention applies to *all* cases in which an aircraft is hired to transport someone or something on an international route. To interpret the Convention in any other way would leave airlines unprotected by the Convention when they are hired to transport things that are not readily viewed as 'passengers', 'baggage', or 'goods'. The signatories of the Convention could not have intended such a result."[555]

8. ***The occurrence*** (or event), as regards both cargo and baggage may be an act or it maybe an omission on the part of the carrier, such as failure to deliver luggage[556] or failure to load cargo, and hence includes delay.[557] Deterioration of cargo (such as fruit) is not *per se* an "occurrence", because it is distinguished from "damage" by the text of the Conventions.[558]

9. ***Causation*** is determined by the law of the forum.[559]

10. ***Carriage by air*** is the period during which, according to MC article 17.2 or article 18.3, as the case may be, baggage or cargo is "in the charge of the carrier" and, by clear implication, in the role of air carrier. The meaning *ratione loci* is further explained by MC article 18.4. The Conventions do not apply in the following situations.

First, the Conventions do not apply if the carrier does not even begin the carriage promised: it does not take the cargo in charge.[560]

Second, the Conventions do not apply to ancillary carriage by other modes of transport. However, in modern conditions performance by some other mode of transport in the light of conditions in the air or on the ground at the time might make commercial sense. A liberty to this effect might even be implied.[561] If there is agreement (express or implied) that all or part shall be by another mode, the regime for that mode applies: MC article 38.1. However, if the terms of IATA Resolution 507b had been incorporated in the contract of carriage, under certain circumstances all or part of the route may be covered at the agreed air rates "where routing of such consignment over the service of the air

554. E.g. a race horse: *United Int Stables v. Pacific Western* (1969) 5 DLR 3d 67 (BC); and *Stud v. Trans International*, 727 F 2d 880 (9 Cir, 1984). Generally, see Daniel (1986) 51 J Air L & Com 497, 522 *ff*. Semble the Conventions also apply to unaccompanied pets.

555. *Johnson v. American*, 834 F 2d 721, 723 (9 Cir, 1987); applied as regards human remains in *Onyeanusi v. Pan Am*, 952 F 2d 498 (3 Cir, 1992). *Cf Djedraoui v. Tamisier, Trib Paix Paris 31.3.1952*, (1952) 7 RFDA 494.

556. *Cohen v. Varig*, 405 NYS 2d 44 (App Div, 1978).

557. *Transports Mondiaux v. Air France, Paris 14.3.1960*, (1960) 14 RFDA 317. Koller, art. 18, para. 3.

558. *Winchester Fruit v. American Airlines* [2002] 2 Lloyd's Rep 265 (LCC(BL)).

559. Koller, art. 18, para. 3. *Cf* Kronke, art. 18, para. 15.

560. Kronke, art. 18, para. 4. This is clear from the *travaux préparatoires* of WSC. *CH Basel 12.12.1996*, ULR 1998.884. See discussion in *Wolgel v. Mexicana*, 821 F 2d 442, 444 (7 Cir, 1987). For this purpose, however, long delay does not amount to non-performance: *Duff v. TWA*, 527 NE 2d 498 (Ill App, 1988).

561. See Giemulla, art. 18, paras 53–54, citing *OLG Düsseldorf 18.3.1993* TranspR 1993.287 in which, however, there was no clear party agreement on the mode of transport to be used.

carrier originally entitled to carry the consignment over such sector(s) cannot be accomplished" due to certain stated reasons, such as lack of available cargo space or the size, weight or nature of the consignment. If the air carrier uses an alternative mode in breach of the contract, the air Conventions apply none the less.[562] From 17 March 2008 the corresponding provision was Condition 8 of IATA Resolution 600B(II).[563]

Third, the inference has been drawn that the WSC does not apply to ancillary undertakings that cannot be described as carriage. So, the carrier, who promised not only to carry the cargo but also to insure it, was indeed liable for failing to do so, but not under WSC[564] or, it seems, MC.

11. ***Inherent defect***, as an exception, is discussed in article 23, note 3.

12. ***Inherent vice*** means much the same in the different branches of transport law, as well as the law of insurance.[565] The air Conventions do not define it. Courts apply national law. At common law an inherent vice is some defect in the cargo which by its development through ordinary processes within the cargo itself tends to the injury or destruction of the cargo, to such an extent that it does not survive the normal rigours of the journey in question and remain suitable for use in commerce for a reasonable time after the end of the journey.[566] The concept therefore is relative—to features of the particular cargo (fragility, sensitivity to temperature or humidity),[567] to the journey (length, weather) and mode of transportation (pressurisation, temperature of cargo space, any special care to be expected from the carrier).[568] Examples of inherent vice include overripe fruit, highly-strung animals and leaking containers.[569]

13. ***Defective packing***, like inherent defect, is an exception found in other transport conventions.[570] Packing is defective if its state is such that the particular goods are unable to withstand the dangers of normal transit of the kind contemplated by the particular contract of carriage.

14. ***Act of war***, like armed conflict, refers to armed hostilities between *de iure* or *de facto* states and their governments.[571]

15. ***In the charge of the carrier*** is a phrase with the central word "charge" which reflects a concept (*la garde*) well known in the past in French law.[572] Commentators

562. *OLG Düsseldorf 21.1.1993.* TranspR 1993.246. Giemulla, art. 18, para. 60.
563. See Clarke and Yates, para. 3.771. As regards intermodal carriage see art. 18 Comment (d) above.
564. *OLG Frankfurt 16.4.1996*, TranspR 1998.123; ULR 1998. 878.
565. *Soya v. White* [1982] 1 Lloyd's Rep 136, 149 *per* Donaldson LJ (CA); [1983] 1 Lloyd's Rep 122, 126 *per* Lord Diplock (HL).
566. *Blower v. GWR* (1872) LR 7 CP 655, 662 *per* Willes J; *Noten v. Harding* [1990] 2 Lloyd's Rep 283 (CA).
567. *Ulster-Swift v. Taunton Meat* [1977] 1 Lloyd's Rep 346 (CA).
568. *Albacora v. Westcott & Laurance* [1966] 2 Lloyd's Rep 53, 59 *per* Lord Reid (HL).
569. Kronke, art. 23, para. 20.
570. See CMR, art. 17.4(b) "defective condition of packing": *Tetroc v. Cross-Con* [1981] 1 Lloyd's Rep 192. HVR, art. IV, r. 2(n) "Insufficiency of packing": *Silver v. Ocean* [1930] 1 KB 416 (CA).
571. *Kawasaki v. Bantham (No 2)* [1939] 2 KB 544 (CA). *Pan-Am v. Aetna* [1975] 1 Lloyd's Rep 77 (2 Cir, 1974).
572. Also translated into a word well known in German law (*die Obhut*): Koller, art. 18, para. 4. To the German lawyer "*la garde*" means "*unter anderem die gesetzliche Pflicht für den, der eine fremde Sache in Besitz hat, für ihre Erhaltung zu sorgen*": *OLG Frankfurt 21.5.1975*, NJW 1975.1604, 1605.

agree[573] that the meaning in the air Conventions should be the same as that under CMR,[574] or in other modes of carriage.[575] As with other modes, the inference has been drawn that the air carrier is in charge of the (baggage or) cargo from the time it is taken over for carriage until the time of delivery.[576]

The carrier may still be in charge of goods although its control of the goods or their situation is not exclusive. In *United Stables*,[577] the carrier was liable for injury to a racehorse which escaped during the flight from stalls provided by the carrier, even though the horses were accompanied by handlers provided by the owner of the horse. The court also observed that the carrier's argument, that the claimant's handlers had charge of the horses "might have greater weight if the horse had died of disease or improper handling".[578] However, in such a case it seems that the horse would still be in the charge of the carrier, and the Conventions would apply, although the carrier might have a defence under MC article 18.2(a). What counts is that the carrier is in a position to control the situation and protect the goods.

15.1 *Sub-contractors* employed to carry, handle or care for baggage or cargo, which are answerable to the carrier,[579] represent the carrier in this respect. Clearly, the carrier may be in charge of baggage or cargo although the actual handling of them has been delegated to others.[580] The principle was extended in 1998 to cargo lost while in the actual custody of the airport authority after landing, even where the authority was a monopoly (*in casu* St Petersburg) and the carrier had no choice of custodian.[581] The carrier none the less had a relationship with the authority which the consignor and consignee did not.[582]

15.2 *Customs authorities* are not subcontractors charged with handling or caring for cargo. Most courts consider that delivery to a customs authority ends carriage: the carrier no longer has charge of the cargo; but an exception might arise when the carrier has undertaken to clear the goods through customs.[583] Some courts, however, have stressed that carriage is not over until delivery to the consignee and that any phase before that must be part of carriage at the carrier's risk, regardless of the actual degree of control exercised

573. *Ibid cf* Giemulla, art. 18, para. 30.

574. See Clarke, CMR para. 27.

575. Giemulla, art. 18, para. 37. It is a basic principle of carriage law at large: Kronke, art. 18, para. 19 with reference *inter alia* to CMR.

576. E.g. *Hatz Libanaise v. SAS, Paris 3.2.1977*, (1977) RFDA 282; *OLG Frankfurt 10.1.1978*, RIW 1978.197. *Idem* Koller *loc cit* with reference to the similar rule under CMR.

577. In *United Int Stables v. Pacific Western* (1969) 5 DLR 3d 67 (BC).

578. P. 76.

579. E.g. *Lg Stuttgart 21.1.1992*, TranspR 1993.141.

580. E.g. *OLG Frankfurt 21.5.1975*, NJW 1975.1604; and *UAP v. Air Algérie, TC Paris 18.4.1983*, (1984) 38 RFDA 171.

581. *OLG Frankfurt 21.4.1998*, TranspR 1999.24. Decision affirmed on this point: *BGH 21.9.2000*, TranspR 2001.29. *Idem* as regards Shanghai: *OLG Nürnberg 9.4.1992*, TranspR 1992.276.

582. *OLG Frankfurt 21.4.1998*, p. 25.

583. *Sprinks v. Air France, Paris 27.6.1969* (1969) 23 RFDA 405, 409, in which the court considered that the case was one in which the carrier retained control (*la garde*) while the goods were in the customs area. *Idem*: *Mutuelle Générale v. Sabena, Paris 18.10.1978* (1978) 32 RFDA 456; *Alltransport v. Seaboard*, 349 NYS 2d 277 (1988); and *Bennett v. Continental*, 21 Avi 17, 917 (D Mass, 1988). Koller, art. 18, para. 5 agrees, citing *inter alia* CMR cases to that effect. *Aliter* if the carrier has no control at all because he is denied access to the goods (*in casu* in Iran during the revolution of 1979): *Air France v. Arlab, Aix 29.11.1983* (1985) 39 RFDA 478. See also the (conflicting) decisions cited by Giemulla, art. 18, para. 70.

by the carrier[584]; or that there is a presumption to that effect and that the carrier retains some degree of control during the customs process unless the carrier proves otherwise.[585]

15.3 *Storage of cargo* immediately prior to departure[586] or immediately after arrival at destination[587] may be part of carriage, if the cargo is in the charge of the carrier, even though the cargo is not moving. If the cargo is damaged on the premises of the air carrier, it will be presumed that it was damaged while in the carrier's charge.[588] A borderline case is that of cargo damaged when being lifted from lorries, which had brought them to the airport, by a device operated by the air carrier. The German Supreme Court (BGH) once held in such a case[589] that the carrier had taken it in charge: they had come into the carrier's sphere of influence (*Einwendungsbereich*),[590] which did not necessarily mean in the carrier's physical possession,[591] and that was what decided the matter. In another case, a court in New York held that delivery to the consignee had not occurred until all of the cargo had been delivered, and that until then, the carrier remained in charge of it and was liable.[592]

15.4 *Checked baggage* is usually taken in charge by the carrier at the check-in counter; and on arrival re-delivered to the passenger in the baggage reclaim area. If it remains in the airport because the passenger has failed to collect it, after a reasonable time the carrier's liability under the Conventions ends.[593] In one case in New York, lost baggage had been retrieved by the passenger entitled to it but a representative of the carrier took charge of it again "to enhance its business relationship with its passengers for their convenience". The carrier was held liable for it.[594] However, the court stated that the carrier's charge (control) was not the sole criterion: some regard must be paid to whether it is part of carriage by air.[595]

584. E.g. *Banque Libanaise v. SAS, Paris 3.2.1977* (1977) 31 RFDA 282.

585. *Lg Stuttgart 21.1.1992*, TranspR 1993.141, 142.

586. E.g. gold bars in a strong room at Croydon Airport prior to carriage to Paris: *Westminster Bank v. Imperial Airways* (1936) 55 Ll L Rep 242, 247 *per* Lewis J.

587. *Banque Libanaise v. SAS, Paris 3.2.1977*, (1977) 31 RFDA 282.

588. *Air France v. Air Cat, Cass 28.5.1996* (1997) 32 ETL 129.

589. *BGH 27.10.1978*, NJW 1979.493. See also *Norton McNaughton v. Polar*, 702 NYS 2d 759 (Supp 1999).

590. Even though in fact the lorry driver assisted in the process: he was acting not on behalf of the consignor but of the carrier: p. 494. *A fortiori* if the driver took no part in the process which was entirely conducted by an agent of the carrier: *Rolls Royce v. HVD* [2000] 1 Lloyd's Rep 653.

591. Thus taking a view that differentiated art. 18 from German law. It sufficed under art. 18 that the goods were in the carrier's actual control (*tatsächliche Gewalt*). *Cf* French decisions such as *Air France v. Primel, Cass Com 23.2.1988*, BT 1988.423. As in Germany, however, the supposition (*BGH 27.10.1978*, NJW 1979.493, 494) is that the rule is the same as that applicable to CMR.

592. *Norton McNaughton v. Polar*, 702 NYS 2d 759 (Supp 1999).

593. In this sense: Giemulla, art. 18, para. 66. *Idem* at common law: Clarke, CMR, para. 215. If, however, the passenger does not retrieve it because another passenger has taken it, it has been held in France that the carriage by air has not ended and that the carrier remains liable under the Convention: *Ragi v. Air France, TGI Paris 19.2.1986*, (1986) 40 RFDA 254.

594. Under local law (bailment) and also under the WSC: *Berman v. TWA*, 421 NYS 2d 291, 293 (NY City Civ Ct, 1979).

595. *Berman* pp. 293–294.

15.5 *Hand baggage*, which is not taken over by the carrier at check-in, is not in the charge of the carrier. But if it is taken from the passenger on the aircraft,[596] it is in the charge of the carrier from then on until redelivery. If baggage in the charge of the passenger is left on the aircraft on disembarkation, it is not without more in the carrier's charge.[597] It might be otherwise when it is discovered by the carrier or if, at the request of the passenger, a representative of the carrier agrees to retrieve it.

15.6 *Misdelivery of cargo or baggage* does not terminate carriage by air. The carrier remains liable under the Conventions to the person entitled to it. In *Hatzlachh*[598] undamaged cargo was handed over to the consignee buyer rather than the bank financing the buyer. It was argued that WSC did not apply because "the loss occurred only after the defendant released the goods to the buyer, and that the 'transportation by air' was complete at least by the time defendant released those goods". Indeed, as long as the goods were still in charge of the carrier, it is difficult to see how they could be said to be lost. However, the court in New York rejected the argument, finding that the loss occurred "when they were released".[599] This seems to mean on the moment of release, release being the last act of the carrier as carrier.

16. ***Performance outside an airport*** is mainly ancillary carriage: feeder services[600] undertaken by the air carrier to or from the airport usually by road: see Comment (d) on article 18, above. In principle, the air Conventions do not apply.

16.1 *Performance* The rule is confirmed in part by MC article 38: if the stage to the airport is more than merely ancillary, the operation becomes one of "combined carriage", the air Convention applies "only to the carriage by air". However, even minor movements ancillary to carriage by air are outside the Conventions, whether a feeder service to the airport[601] or one from it to a warehouse outside.[602] So is a movement between two airports

596. E.g. personal effects (wristwatch, sunglasses) handed over to cabin staff in anticipation of an emergency landing: *BGH 28.11.1978*, NJW 1979.496. *Idem*: *Ag Munchen 10.6.1999* TranspR 2000.265.

597. Giemulla, art. 18, para. 64.

598. *Hatzlachh v. Tradewinds*, 738 F Supp 714 (SDNY, 1990). See also in this sense *American Banana Co v. VIASA*, 411 NYS 2d 889 (AD 1979), *affirmed* 404 NE 2d 1330 (NY CA 1980); *Eggink v. TWA*, 22 Avi 17,731 (SDNY, 1990); *Carnisco v. Air China*, 23 Avi 18,491 (SDNY, 1992). *UTA v. Sté Équipement d'Avions, Paris 11.7.1975*, (1976) RFDA 127. *Cf. Railroad Salvage v. JFC*, 556 F Supp 124 (EDNY, 1983), *affirmed* 779 F 2d 38 (2 Cir, 1985), distinguished in *Eggink* as a case in which the court took the view on the facts that loss occurred after release by the carrier. *Idem* in Germany: *OLG Nürnberg 18.4.2001* TranspR 2001.262: delivery against payment of a cheque contrary to instructions.

599. P. 716. *Cf.* the approach to the same kind of question under the HVR: *The Captain Gregos* [1990] LMCLQ 314.

600. *Cf* where substitute services are necessary: M. Clarke (2005) 40 ETL 293. See also above art. 18 Comment (d).

601. As regards feeder services, see Comment (d) on art. 18 (above). But *cf.* Giemulla, art. 18, paras 37, and 49 *ff.*

602. *OLG Hamburg 11.1.1996*, TranspR 1997.267. For more decisions in Germany to this effect, see Giemulla, art. 18, para. 70; and Kronke, art. 18, para. 40. See also *Railroad Salvage v. JFC*, 17 Avi 18,457 (EDNY, 1983); and *General Electric v. Harper Robinson*, 24 Avi 17,541 (EDNY, 1993). While in the carrier's storage at the airport prior to being sent on to the consignee, of course, carriage by air continues; e.g. cases distinguished in *Railroad Salvage* such as *Wing Hang v. JAL*, 357 F Supp 94 (SDNY, 1973). See also *Quantime v. Donovan* 21 Avi 17,367 (D Mass, 1988).

But a number of "rogue" decisions have applied WSC: e.g. *Royal v. Amerford*, 21 Avi 17,482 (SDNY, 1987); and *Jaycees Patou v. Pier Air*, 714 F Supp 81 (SDNY, 1989).

in the same place.[603] The Conventions apply only within the airport, subject to the following exceptions.

First, the effect of article 18.4 is that if loss or damage is discovered which might have occurred during a feeder service but which might also have occurred during carriage by air in the strict sense, there is a presumption that it was the latter; so, until the contrary is established, the Convention applies.[604] Second, if goods are landed at airport A by necessity and then carried on to destination at airport B by some other means, that is part of the carriage by air (the carriage by air contracted for) and the air carrier remains in charge of the goods under the Conventions while en route to airport B[605]; not, however, when the carrier chooses to take that route as a matter of operational convenience.[606]

16.2 *The airport* is the area of land devoted to carriage by air.[607] In *Rolls Royce v. HVD*,[608] the Commercial Court rejected the suggestion that "airport" in US legislation meant something different from "*aérodrome*" used in the French text of WSC.[609] The damage occurred in a cargo shed inside the airport perimeter fence but landside rather than airside. The Court found that the cargo shed "fell within the area commonly known as East Midlands Airport". It was enough that the land where the accident happened was "owned by the airport operating company" and that the cargo shed, next to which the accident occurred, was "used for the carriage by air of freight" and "part of the facilities required for the operation of any airport and for the international carriage by air of cargo".[610]

Contrast the situation, distinguished in *Rolls*,[611] of a building which, while functionally part of the airport, is outside the perimeter fence. Courts in the US have taken a strict view. In *Victoria*,[612] for example, on arrival the air carrier took the goods to its warehouse less than a quarter of a mile outside the airport. The court rejected the functional view of airports "because it has no support in the language of the Convention",[613] and held that an occurrence in the warehouse was not governed by the WSC. Note also *Siemens v.*

603. Kronke, art. 18, para. 37.

604. E.g. (under art. 18.5 WSC) *Galérie Carpentier v. Nordstern, Paris 26.11.1999*, BTL 2000.138. For more decisions on this provision, see Kronke, art. 18, para. 45.

605. E.g. *UTA v. Sté Electro-Entreprise, Paris 6.5.1976* (1977) 31 RFDA 79; *Cass Com 31.1.1978* (1979) 34 RFDA 310: goods consigned to Lome but the DC8 aircraft was too large for the airport there, so it landed at Cotonou and the goods were sent (150 km) to Lome by road. Semble the decision would be the same under MC art. 18.4.

606. *Air France v. Helvétia, Paris 30.4.1997*, BTL 1997.386: goods from Madras, Los Angeles and Tokyo landed at Paris CDG and carried by road to destination at Lyon and Annecy, damage *en route* governed by French domestic law of carriage by road. Generally, see Müller-Rostin, TranspR 1996.217. *Cf OLG Düsseldorf 21.1.1993*. TranspR 1993.246. *Cf* also *BRI v. Air Canada*, 725 F Supp 133 (EDNY, 1989) in which the air carrier, having issued an air waybill for carriage from New York to Toronto, elected, as the contract allowed him to do, to send the goods by road; the court none the less applied WSC.

607. Referred to as the "aerodrome" in early versions of WSC.

608. *Rolls Royce v. HVD* [2000] 1 Lloyd's Rep 653.

609. P. 658 *per* Morison J.

610. P. 659 *per* Morison J.

611. P. 658. *Cf* also *BGH 2.4.2009*, (2009) 44 ETL 604.

612. *Victoria Sales v. Emery*, 917 F 2d 705 (2 Cir, 1990). Opinion in France is similar: Godfroid (1983) 37 RFDA 321, 324; and in New South Wales: *Siemens v. Schenker* [2001] NSWSC 658; (2001) 162 FLR 469.

613. P. 707.

Schenker,[614] in which article 18.5 was applied to a road stage to a bonded warehouse 4 km from Melbourne airport. Nonetheless the HCA thought that a term of the carrier's waybill, which purported to apply the WSC limitation of liability to the road stage, did apply in principle although not in the particular case.[615]

17. ***Transhipment*** means surface transport between two airports and two air stages as part of a single movement of the goods, where the link cannot be made by air.[616] In principle, the Conventions do not apply.[617]

Article 19—Delay

The carrier is liable for damage occasioned[(1)] by delay[(2)] in the transportation[(3)] by air of passengers, baggage or cargo . . . (continued below)

Article 19

The carrier is liable for damage occasioned[(1)] by delay[(2)] in the transportation[(3)] by air of passengers, baggage or cargo.

Comment

The rest of article 19 (WSC article 20) provides that the carrier is excused in certain circumstances (see below). Liability for delay premises that the carrier has undertaken to perform the transportation in a certain time—a specified time or a reasonable time.[618]

In the latter case the issue, whether the carrier is liable for delay, is difficult to separate from circumstances that might justify a defence. None the less the points are seen as distinct. That view affects the onus of proof. The view (found also in English common law) is that article 19 creates a liability for breach of contract. If the carrier's contractual duty is to perform with reasonable dispatch or within a reasonable time, the claimant must establish a case that the carrier did not do so before the carrier is *prima facie* liable under article 19.[619] Only then is the carrier required to adduce evidence, if it can, to show that it had taken all necessary measures to avoid the delay and is therefore excused.[620]

Notes to article 19

1. ***Damage occasioned*** is not defined but, insofar as no conclusion can be drawn from the text of the Conventions, issues of damages are left to national law.[621] English law generally recognises that the meaning of "damage" varies according to the context. In the

614. [2004] HCA 11, (2004) 216 CLR 418.
615. As a matter of construction of the waybill in question. Case noted critically by O'Reilly, 70 J Air Law & Com 393 (2005).
616. *OLG Hamburg 11.1.1996*, TranspR 1997.267, 269.
617. See note 16.1 (above).
618. See note 2.2.
619. See e.g. the *obiter* view of the court in *Jahanger v. Purolator*, 615 F Supp 29, 33 (ED Pa, 1985).
620. This approach is found in cases in the US: e.g. *McMurray v. Capital*, 424 NYS 2d 88 (NY Cty Civ Ct, 1980); and in France: *Jean-Baptiste v. Air Inter, TGI Evry 5.3.1990* (1990) 44 RFDA 219.
621. See above, art. 17, note 3.1.

context of WSC, as Lord Wilberforce observed in *Fothergill*,[622] the word damage "is used in more than one sense. Sometimes it means '*monetary* loss'—for example in article 17, or article 19". The same is true *mutatis mutandis* of MC.

1.1 *Distress or disappointment* are not generally "damage" for which compensation is recoverable under the Conventions.[623] For example, in a case of lost or damaged baggage, a court in Germany refused a claim for compensation in respect of (disappointment caused by) wasted holiday time.[624] However, some courts in the US have reached a different result by adopting a tort analogy. In *Daniel*[625] the claimant succeeded in the argument that article 19 damages included damages for what the claimant called false imprisonment in an aircraft awaiting take-off.[626] The court neither adopted nor rejected that description of the situation, however, noting that national law (of tort) awarded damages for "inconvenience", the court awarded the claimant damages under WSC article 19.[627] An English court was always unlikely to agree,[628] and this was confirmed in 2009 in respect of MC.[629]

1.2 *The measure of the damage* is largely a matter for national law.[630] In common law countries, the damage usually includes consequential damage.[631] In England, the carriers are liable for all kinds of loss which, given what the carrier knew or should have known about the claimant, should have been in the reasonable contemplation of the carrier at the time of contracting as resulting from a breach of the kind that occurred.[632] In the case of delayed cargo, this might include a lost market at the place of destination,[633] perhaps a particularly lucrative market, if the carrier knew or should have been aware of the salient facts.[634] If the carrier knew or should have known that cargo comprised parts or materials needed for the owner's business, the carrier may be liable for loss of business such as loss of production.[635] In the case of delayed air baggage, it might include reliance loss such as

622. *Fothergill v. Monarch* [1981] AC 251, 273 (emphasis added). The case was concerned with article 26.2.

623. See above art. 17, note 4.1.

624. *OLG Frankfurt 25.11.1992*, TranspR 1993.350.

625. *Daniel v. Virgin Atlantic*, 59 F Supp 2d 986 (ND Cal, 1998). See also *Cowden* (above) in which the court supported its decision (unnecessarily) by reference to similar rules (of contract law) in English domestic law.

626. I.e., *in casu*, "detaining them on the tarmac and in a transport at the Vancouver airport for a total of two hours and twenty-five minutes, without access to telephones, thus preventing plaintiffs from making other travel plans": p. 991.

627. P. 994. *Cf*, however, *Lee v. American Airlines*, 2002 WL 1461920, discussed by Rushing and Janicki, 70 JALC 429, 442–443 (2005).

628. See *Farley v. Skinner* [2001] UKHL 49; [2002] AC 732.

629. *Cowden v. British Airways plc* [2009] 2 Lloyd's Rep 653. *Idem* in Canada concerning a claim by an academic for the inconvenience and "anguish" of missing a conference: *Lukács v. United Airlines*, 2009 MBCA 111.

630. See art. 17, note 3.1.

631. *Cohen v. Varig*, 405 NYS 2d 44, 49 (1978); *Int Contenair v. CFE, Cass 23.5.1989* (1990) 25 ETL 89; *Friesen v. Air Canada* 1982 ULR II 146.

632. *Koufos v. Czarnikow* [1969] 1 AC 350.

633. *Koufos* (above). Also *Lacey's Footwear v. Bowler* [1997] 2 Lloyd's Rep 369, 377 *per* Brooke LJ (CA); *Cosar v. LPS* 1999 SLT 259 (Ct Sess). Such a case under WSC was *Saiyed v. Transmediterranean*, 509 F Supp 1167 (WD Mich, 1981).

634. E.g. the Christmas market: *Panalpina v. Densil Underwear* [1981] 1 Lloyd's Rep 187.

635. *Hadley v. Baxendale* (1859) 9 Ex 341. See also *The Achilleas* [2008] UKHL 48.

accommodation expenses caused by delay in delivering a passenger's suitcase,[636] or where the delay was such that a passenger missed a connecting flight.[637]

Legal costs in sustaining a claim against the carrier may be included[638] as well as pre-judgment interest.[639] Measure being a matter for national law, a contract term limiting the carrier's liability in these matters does not infringe article 23 of WSC[640] or MC article 26, although, of course, the term might be invalid under the national law applicable to the case.[641]

2. ***Delay*** is delay,[642] not just in the flight,[643] but "in the transportation": delay in any stage of what the carrier has undertaken to perform.[644]

Nowell,[645] for example, concerned carrier's negligence during carriage (misplacing documents) the effect of which manifested itself later when, in the absence of the documents, the cargo could not be cleared through customs and thus could not be delivered. The court might have resolved the issue by finding that, as the cargo was still in the charge of the carrier while clearing customs,[646] carriage by air had not ended at the time of the delay. However, assuming that the carriage by air had indeed ended, the court concluded from the wording (of article 18.1 WSC) that "the time of the occurrence governs, so that even if the damage were to appear only after the end of the transportation by air, the carrier would still be liable under the Convention if the damage resulted from" such an occurrence. However, in *Brunwasser*,[647] which concerned unilateral flight rescheduling by the carrier, the court concluded that the claimant "has not demonstrated the type of close logical nexus between her injury and an international air flight necessary to liability under article 19". The acts complained of "occurred long before she was to engage in air travel *per se*".[648]

636. *Friesen v. Air Canada* 1982 ULR II 146.

637. *Harpalini v. Air India*, 622 F Supp 69 (D Ill, 1985).

638. As incidental and consequential loss: *Treitel*, 20–34. Recoverable consequential loss may include legal costs according to *McGregor on Damages* 18th edn (2009) 2–031 *ff*. *Cf* France: the Court of Cassation has rejected the contention that the consequential loss recoverable includes legal fees because they were not a direct or necessary result of the accident. Loss is recoverable only "*à la condition de résulter directement et nécessairement de l'accident*": *Consorts Pénègre v. Swissair, Cass Civ 15.4.1986* (1986) 40 RFDA 241, 242.

639. *Republic National Bk v. Delta*, 27 Avi 18,174 (SDNY, 2000).

640. Koller, art. 19, para. 9.

641. Concerning the application of the Unfair Terms in Consumer Contracts Regs 1999 (SI 1999 No 2083) to the contract terms of air carriers, see Wilkinson, (2000) 150 NLJ 1778.

642. Generally, see Diederiks-Verschoor, 26 Air & Space L 300 (2001).

643. The view advanced in the 1930s that art. 19 was confined to delay in the flight itself has been rejected in most jurisdictions e.g. France *Air France v. Arlab, Aix 29.12.1983* (1985) 39 RFDA 478, 483, note Légier; Guyana: *Bart v. BWIA* [1967] 1 Lloyd's Rep 239. However delay was defined in neither WSC or MC. For a French view of the concept see *Paris 28.6.2002*, reported and discussed by Job and Odier [2004] RFDA 3. They raise the question whether a carrier with insuperable "technical problems" is obliged to seek seats on aircraft operated by other carriers.

644. *Air France v. Arlab, Aix 29.12.1983* (1985) 39 RFDA 478, 483, note Légier. For discussion of the notion of delay under MC in connection with *Malek v. Air France*, 31 Avi 18,096 (NYC Civ Ct, 2006), see Tompkins, 32 Air & Space L 71 (2007).

645. *Nowell v. Qantas*, 22 Avi 18,071 (WD Wash, 1990).

646. Some courts have taken this view; see art. 18, note 15.2.

647. *Brunwasser v. TWA*, 541 F Supp 1338 (WD Penn, 1982).

648. P. 1345. The "injury" was alleged inconvenience.

2.1 *The immediate cause of the delay* must be in some sense "operational" and associated with aviation, such as bad weather[649] or mechanical failure[650] during transportation even though, in the case of mechanical failure, the ultimate cause of the failure can be traced back to poor maintenance prior to the transportation.[651] The intervention of immigration authorities to detain passengers and thus delay the flight also counts,[652] as would some latent defect in cargo which necessitated remedial action and thus delay.

In contrast, delay caused by management "failure" is not subject to article 19. Nor is delay in commencing the flight because of staff shortages[653]—that is not article 19 delay but a matter subject to national law.[654] The same is true of a power failure ("outage") at the airport. While that is still the kind of risk assumed by a business such as a carrier, that is no less true of most other kinds of business. Not being a risk associated with aviation, it is, it has been held,[655] a situation governed by national law.

2.2 *Liability for delay* premises a breach of duty on the part of the carrier, i.e. that the delay is a breach of the terms of the contract of carriage. The air Conventions do not regulate this,[656] however, if the carrier promises to get cargo to destination by date X and does not do so, there is delay for which it is *prima facie* liable.[657] More likely, however, especially where passengers are concerned, is that the carrier will seek to avoid any time commitment at all.

For example, a statement by the carrier that "times shown in timetables or elsewhere are not guaranteed and form no part of this contract"[658] seek to evade contractual liability. For this to work for the carrier, the term must itself be part of the contract of carriage and the passenger must be bound by it. A person is bound by all terms the existence of which and, in certain circumstances, the nature of which he has notice, actual or constructive, at the time of making the contract. Generally, the rule of English law is that passengers have constructive notice (both as a matter of common knowledge and common sense) that carriers have contracts with terms (of some kind) in their contracts.[659] This being so, the general rule is that the passenger is bound by those terms including one about delay.

649. *OLG Düsseldorf 13.6.1996* TranspR 1997.150, 151. *Lg Bonn 14.1.1998*, TranspR 1999.109; *Foulon v. Air Malta, T Rennes 11.10.1999*, (2000) 54 RFDA 45.

650. *Daniel v. Virgin Atlantic*, 59 F Supp 2d 986 (ND Cal, 1998); *Ag Baden-Baden 5.2.1999*, TranspR 1999.402.

651. P. 991: alleged negligent maintenance and failure to devise a contingency plan.

652. *Lg Frankfurt 14.11.1990*, TranspR 1991.146 (77 passengers seeking asylum).

653. *Lg Bonn 14.1.1998*, TranspR 1999.109.

654. Hence the general law of contract, including the Misrepresentation Act 1967. Compensation is also recoverable under EC Reg 295/91 of 4.2.1991. A bumping carrier has also been prosecuted under trade description legislation; see, e.g., *British Airways Board v. Taylor* [1976] 1 WLR 13 (HL).

655. *OLG Düsseldorf 13.6.1996* TranspR 1997.150.

656. The question was controversial when the 1929 text was drafted: Kronke, art. 19, para. 3. However, today delay is dealt with by EC Regulations; see Chapter 2.

657. E.g. *Duaygues v. UTA, Paris 25.2.1986*, BT 1986.480.

658. Applied in *Brunwasser v. TWA*, 541 F Supp 1338 (WD Penn, 1982), where the effect of other terms was to oblige the carrier to offer a reasonable alternative flight to those originally advertised. Another more current example is that the carrier "undertakes to complete the carriage hereunder with reasonable dispatch. Carrier may use alternative carriers or aircraft and may without notice and with due regard to the interest of the shipper use other means of transportation": IATA Air Waybill (Resolution 600a).

659. Passengers by sea: *Essery v. General* (1937) 58 Ll L Rep 307; passengers by rail: *Thompson v. LMS* [1930] 1 KB 41 (CA). Commercial consignors of goods by road: *Circle Freight v. Medeast* [1988] 2 Lloyd's Rep 427 (CA); by air: *Victoria Fur v. Roadline* [1981] 1 Lloyd's Rep 570.

The general rule does not apply in certain situations. One is when the actual terms were not available to be looked at.[660] Another is when the term is so "unusual" (unlikely in this case) that it is not part of the contract unless (as hardly ever happens) it is expressly brought to the attention the passenger.[661] A third is when it is so unreasonable that it can be struck out under the Unfair Contract Terms Act 1977 or, if the passenger is a "consumer", under the Unfair Terms in Consumer Contracts Regulations 1999.[662] Lastly, if it can be implied that the carrier is obliged to perform the contract in a reasonable time or without unreasonable delay, such a term might be seen as a "provision tending to relieve the carrier of liability" under MC article 26 and for that reason "null and void"[663] or not a term of the contract after all.

In the absence of a specific contract term,[664] delay in transportation occurs when the carrier takes an unreasonable time to perform the transportation promised,[665] for example, three days to get passenger luggage from Calgary to Baghdad,[666] on the assumption that a passenger's luggage is likely to contain things needed on or soon after the passenger's arrival. In the case of cargo, what is a reasonable time could be affected by the carrier's awareness, if any, that the consignment is urgent.[667] Sometimes courts have been willing to infer urgency from the very fact that the goods were consigned by air.[668] Courts also take account of risks of delay of which both parties were aware when they contracted.[669] Note that a "passenger cannot convert mere delay into contractual non-performance by choosing to obtain more punctual conveyance",[670] and then bring an action against the original carrier under article 19 for the cost of an alternative flight. However, the line between mere delay and contractual non-performance may be difficult to draw except where a passenger simply does not arrive.

660. E.g. the cargo case *Papet v. Air France, Paris 7.12.1994*, BTL 1996.23.

661. *Interfoto v. Stiletto* [1989] QB 433 (CA); and onerous: *O'Brien v. MGN* [2001] EWCA Civ 1279.

662. SI 1999 No 2083. As regards both pieces of legislation, see Macdonald, in Butterworths, *The Law of Contract* (3rd edn, London, 2007) ch. 3.

663. E.g. *OLG Frankfurt 23.12.1992*, TranspR 1993.103, 106. Giemulla, art. 19, para. 5. The rest of the contract remains in force.

664. *Cf.* also a term such as one that the carrier "undertakes to use its best endeavours to carry the passenger and his or her baggage with reasonable dispatch and to adhere to published schedules in effect on the date of travel" (IATA Recommended Practice 1724 (1998) cl. 10.1 (1998)). *Idem* for cargo: IATA Recommended Practice 1601 (1998).

665. *DC Sendai (Japan) 25.2.2003*, 2005 Unif L Rev 616. It must be some "untoward" extension of the period of carriage: *Winchester Fruit v. American Airlines* [2002] 2 Lloyd's Rep 265, [57] (LCC(BL)). E.g. *Cass Civ 22.6.2004*, Unif L Rev 2005.606, in spite of the carrier's "no guarantee" clause, the validity of which can (now) be questioned under the EC Reg 261/2004 (C-344/04) treated above in Chapter 2.

This is also the rule for other modes of carriage. See Clarke, CMR, para. 58b.

666. *Friesen v. Air Canada* 1982 ULR II 146, 156.

667. *Air France v. Arlab, Aix 29.12.1983* (1985) 39 RFDA 478, 480, note Légier; *OLG Düsseldorf 13.12.1990*, TranspR 1991.106. E.g. to arrive in time for the Christmas market: *Panalpina v. Densil Underwear* [1981] 1 Lloyd's Rep 187.

668. P. 190 *per* Judge Fay.

669. E.g. priority given to military flights to Saigon: *Général Air Fret v. TWA, TC Seine 23.2.1956* (1956) RFDA 324; and weather conditions at destination at the time of year: *Dumenil v. Air France, TC Seine 18.4.1956*, JCP 1956.2.9348, note De Juglart.

670. *Paradis v. Ghana Airways*, 348 F Supp 2d 106 (SDNY, 2004); applied in *Oparaji v. Virgin Atlantic Airways* (EDNY, 2006); Beiersdorf and Guidea, 72 JALC 207, 215 *ff*. Nor can what is essentially a claim for not being given the seats booked be brought under (MC) art. 19 because the flight happened to be delayed: *Onwuteaka v. Northwest Airlines*, 32 Avi 15,159 (SD Tex, 2007).

3. ***Non-arrival at destination*** is not delay. Delay implies that (some part of) transportation is carried out later than it should have been, but carried out none the less; and that the passenger, baggage or cargo concerned does arrive at destination.[671] The case of cargo that disappears altogether is not therefore one of delay under article 19 but of destruction or loss under article 18.[672] Similarly the case of the passenger, who never reaches the agreed destination[673] but some other destination, is not one of delay. Delay means delay in the carriage contracted for.

In Germany, it has been held that, if the contract is for carriage on a particular flight, which is then cancelled, but transportation to the same destination is carried out later by another flight or mode of transport, it is a case not of delay but of non-performance.[674] *A fortiori* if transportation does not occur at all. That view leads to difficulties. The applicability of article 19 may turn on secondary factors such as whether the later flight has the same flight number as that contracted for it.[675] More significant to many passengers is the identity of the performing carrier, and the substitution of another carrier for the contracting carrier is regarded by the balance of opinion as non-performance unless the passenger consents.[676]

Nonetheless the same line was followed more recently in the *Nigeria Charter Flights Litigation case*,[677] a class action was brought against World Airways (WW) either under WSC or MC for failure to transport a group from Nigeria to the US. WW simply refused to fly them and did not offer alternative performance of any kind. WW defended by arguing that the group were not "in privity" of contract with WW and that failure to transport (or non-performance) did not amount to delay or any other actionable cause under the Conventions. The court distinguished other decisions which had construed "refusal to fly passengers" as delay within the scope of article 19.[678] It followed *Wolgel*[679] in which the Court of Appeals in 1987 had determined that to the extent that claimants

671. *Cf Abnett v. BA* 1996 SLT 529 (Ct Sess): contract to carry to London but passenger never got beyond Kuwait: held not a case of delay.

672. *OLG Frankfurt 23.12.1992*, TranspR 1993.103, 105. *Idem* Kronke, art. 19, paras 39 *ff*; and Koller, art. 19, para. 4, who also debates whether "designation" is the agreed airport or, if the carrier is obliged to deliver there, the consignee's place of business outside the airport.

673. *Abnett v. BA* 1996 SLT 529 (Ct Sess), appeal on other grounds dismissed: 1997 SLT 492 (HL).

674. *OLG Frankfurt 20.2.1997*, TranspR 1997.373; but *cf Ag Baden-Baden 5.2.1999*, TranspR 1999.402. *Cf* France: "liability for delay exists whenever passengers or goods do not arrive on time at the point of destination, irrespective of the cause": Miller, p. 158. On that basis non-performance of the contract, e.g. to carry on a particular flight, but with the passenger or cargo arriving on a later flight, is delay and subject to art. 19. E.g. *Papet v. Air France, Paris 7.12.1994*, BTL 1996.23; *Foulon v. Air Malta, T Rennes 11.10.1999*, (2000) 54 RFDA 45.

Cf. also cases in which the carrier did not promise that the passenger or cargo would be put on a particular flight, e.g., *Brunwasser v. TWA*, 541 F Supp 1338 (WD Penn, 1982); *Audran v. American, Paris 10.12.1993*, D.1994.JR.225. Depending on the terms of the particular contract (see above) there may be no breach of contract at all.

675. See Giemulla, art. 19, paras 31 *ff*. If, however, the parties have agreed a flight number but not a date, that is a case of delay rather than non-performance: *OLG Düsseldorf 29.3.1990*, TranspR 1991.106.

676. See MC arts 39 *ff*.

677. 520 F Supp 2d 447 (EDNY, 2007); DeMay, 73 JALC 131, 223 (2008).

678. On various grounds including that claimants in the other decisions had not actually alleged non-performance: p. 453.

679. *Wolgel v. Mexicana*, 821 F 2d 442 (7 Cir, 1987). In Sweden it has been held that cancellation is not delay actionable under MC art. 19: *Brännströms v. Ryanair*, Svea Court of Appeal (26.5.2010), case T 3320-09. Also in this sense are earlier decisions such as *BGH 28.9.1978*, 1979 ULR II. 265; *OLG München 20.9.1982*, RIW 1983. 127; *Audran v. American, Paris 10.12.1993*, D.1994.JR.225.

were basing their action on article 19 they would fail, because the delegates to the WSC had "agreed that [it] should not apply to a case of non-performance of a contract".[680]

A borderline case is "bumping" (overbooking the flight). In many cases in the US it was treated as non-performance of the contract of carriage, to which WSC article 19 did not apply.[681] The point arose again in 2007 under MC in *Igwe*.[682] The court opined that authority was divided on whether bumping was delay and, following the decision in *Paradis*,[683] that it was delay if the carrier had offered substitute transport. This the claimant had indeed been offered (for the following day) but had refused, and later claimed non-performance by the carrier. The *Igwe* court decided nonetheless that the claim was a delay claim within article 19 MC, and that therefore state claims were pre-empted.[684]

Article 19—Delay[685]
(continued)

. . . Nevertheless, the carrier shall not be liable for damage occasioned by delay(3) if it proves that it and its servants and agents(1) took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.(2)

Article 20

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents(1) have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.(2)

Comment

A number of different interpretations are possible according to the degree of difficulty required. These are discussed in an *excursus* appended to the notes that follow.

Notes to article 19 (continued)

1. ***Servants or agents*** are necessary instruments in the performance of the carriage. The carrier's liability for what they do or do not do depends on whether the persons concerned

680. P. 444. This being so the claims were not pre-empted and the court went on to consider state law claims, including one based on breach of contract; noting that the claimants did not apparently purchase their tickets from WW or its agents, the court declined to grant them summary judgment.

681. *Wolgel v. Mexicana*, 821 F 2d 442 (7 Cir, 1987); *Lathigra v. BA*, 41 F 3d 535 (9 Cir, 1994); but *cf Sassouni v. Olympic*, 769 F Supp 537 (SDNY, 1991); *Malik v. Butta*, 24 Avi 17,737 (SDNY, 1993); and *King v. American*, 146 F Supp 2d 159 (ND NY, 2001).

682. *Igwe v. Northwest Airlines*, 2007 WL 43811 (SD Tex, 2007); DeMay 73 JALC 131, 226 (2008).

683. *Paradis v. Ghana Airways*, 348 F Supp 2d 106, 114 (SDNY, 2005).

684. The court was unsympathetic to the claim it seems *inter alia* because the claimant (with 4-year old child) had not followed carrier instructions about boarding procedure. However, that under MC art. 19 carriers are liable is also the view of Tompkins, 34 Air & Space L 420, 423 (2009).

685. The first sentence of this provision is discussed above.

were indeed the carrier's servants or agents and, if so, whether those persons were acting as such when they were instrumental in the damage. Servants are those with whom the carrier has entered a contract of employment. Agents are those with whom the carrier has contracted for the performance of a specified task. Persons are identified as servants or agents in accordance with national law. Relevant rules of national law tend to differ from country to country, in particular, as regards agents.

1.1 *Agents* in the US include not only a person who does something "essential" to the operation but any person whose act is in furtherance of the contract of carriage. This was the decision in *Johnson*[686] as regards a "skycap" pushing a passenger in a wheelchair onto the boarding ramp of the aircraft. The court stressed[687] that, to ensure uniform liability, the test of agency should be functional rather than depend on whether the activity was performed by the carrier through its own staff or outsourced to independent contractors. Other examples include firms employed to maintain and repair aircraft,[688] to clean the cabin of the aircraft and remove debris,[689] or to transfer baggage.[690] The functional test is also likely to be applied in England. However, there is some doubt that this was the intention of the drafters of WSC.[691]

1.2 *Scope of employment.* That the person concerned be acting within the scope of his or her employment is a condition of liability for "wilful misconduct" under article 22.5 but is not a specified condition of the carrier's liability for the acts or omissions of servants or agents under MC article 19. None the less the requirement has been assumed. The drafters were aware of divergence between national laws on the concept of vicarious liability and, feeling unable to resolve the differences, deliberately left the matter to national law.[692]

2. *All necessary measures* was intended by the drafters to require something like the application of reasonable care and skill; but since then the phrase has been interpreted more strictly to require what has been described as "utmost care": see Excursus para. 3 below. Past decisions of the courts should be read in the context of this development. In practice the focus of enquiry has also varied. Two lines of approach to identifying necessary measures have been mapped, the second leading to a stricter duty than the first.

The first is an *a priori* approach which tends to decisions close to (or not much stricter than) a rule requiring (no more than) reasonable care and skill. The carrier is required to prove that it took all reasonable measures that could be expected in the circumstances

686. *Johnson v. Allied Eastern*, 19 Avi 17,847 (DC Cir, 1985). See also *Carroll v. United*, 739 A 2d 442 (NJ Super AD, 1999).
687. P. 17,850.
688. *Lear v. New York Helicopter*, 597 NYS 2d 411 (1993).
689. *Croucher v. Worldwide*, 111 F Supp 2d 501 (D NJ, 2000).
690. *Julius Young v. Delta*, 414 NYS 2d 528 (1979).
691. See Schmid (1986) 40 RFDA 165 and the first edition of this book p. 126.
692. *Brinks v. SAA*, 93 F 3d 1022, 1028 (2 Cir, 1996).

without particular regard to what actually went wrong later.[693] Broadly speaking that means proving that it provided an airworthy aircraft and competent personnel.[694]

The second is an *a posteriori* approach in which the court focuses attention on the particular damage that occurred and asks what could or should the carrier have done to prevent that damage or something similar.[695] In practice, the court is likely to suggest that to assist the inquiry the claimant should suggest what the carrier could and should have done to avoid it—an exercise in reasonable speculation rather than proof. Then it is for the carrier to rebut the claimant's suggestion: to prove that the measure suggested by the claimant would not have avoided what occurred.[696] This is not a reversal of the onus of proof: the claimant's role is one of speculation rather than of proof. Moreover, the carrier must first give evidence of facts sufficient to bring the defence into play.

If the cause of the loss is unknown the two approaches lead to different results. On the second approach the carrier will not be excused.[697] The *a posteriori* approach can only be taken at all if the cause is known and consideration can be given to the specific measures that the carrier might be expected to take against it.[698] The *a priori* approach generally leads to a different result. However, there have been cases in which the carrier was not excused because, without sufficient knowledge of the cause, the court could not determine the range of (general) measures that should have been taken.[699] Such a case, in which the one approach is barely distinguishable from the other, is likely to be that of cargo theft. Whichever approach a court prefers, if goods simply disappear, the carrier is unlikely to be excused.[700]

2.1 *Factors influencing the courts* when assessing what the carrier should or should not have done are not unlike those used to determine whether a defendant has committed the

693. This means "*toutes les mesures raisonnables compte-tenu des circonstances . . . .[La] détermination des mesures à prendre se fait a priori et de la façon la plus abstraite possible. [Il faut] dresser un tableau, une liste exhaustive de toutes les mesures qu'un bon professional de transport doit prendre pour assurer la sécurité des passagers et des marchandises*": Sériaux, para. 47.

694. Sériaux *ibid*. E.g. *Cie Jugoslovenski Aéro-transport v. Gati, CA Paris 12.12.1961* (1962) 26 RFDA 93.

695. Sériaux para. 47. In this respect it is like the approach to the defence of *force majeure*: Sériaux D.1982.I.111. It can also be seen in the corresponding defence under the CMR: *Silber v. Islander Trucking* [1985] 2 Lloyd's Rep 243, 247; *OLG Köln 11.8.1998*, TranspR 1999.107.

696. The corollary is that the carrier is not required to list all the steps which could conceivably have been thought appropriate, and then methodically demonstrate, one by one, that they were not called for in order to perform his duty, or that, if they had been taken, they would not have prevented or reduced the loss or damage.

697. Sériaux, paras 48 *ff*; Giemulla, art. 20, para. 18. E.g. *UTA v. Blain, Paris 6.1.1977* (1977) 31 RFDA 181; *Panalpina v. Densil Underwear* [1981] 1 Lloyd's Rep 187, 190–191 *per* Judge Fay; *Friesen v. Air Canada* 1982 ULR II 146, 156; *Amsellem v. TWA, CA Paris 14.2.83* (1983) 37 RFDA 138.

Cf a priori cases in which the cause was unknown but the carrier was none the less exonerated: e.g. *Fratani-Bassaler v. Air France, CA Aix-en-Provence 14.11.67* (1968) 22 RFDA 201; *Preyval v. Air France, TC Nice 7.5.1973* (1973) 27 RFDA 345.

698. Sériaux, para. 55.

699. E.g. *Cie Jugoslovenski Aéro-transport v. Gati, CA Paris 12.12.1961* (1962) 26 RFDA 93.

700. E.g. *Air-Liban v. Cie Parisienne de Réescompte, CA Paris 31.5.1956* (1956) 10 RFDA 320. A parallel can be drawn with the defence in art. IV rule 2(q) of the HR and HVR: loss, damage or delay "without the actual fault or privity of the carrier". See *The City of Baroda* (1926) 25 Ll L Rep 437; and *Leesh River Tea v. BISN* [1967] 2 QB 250 (CA).

tort of negligence. The court assumes a carrier with the standard of knowledge and skill of a competent professional carrier,[701] and asks what measures are to be expected of such a carrier in the light of certain factors in the actual case.

(i) The greater the likelihood of loss, damage or delay the more that will be expected of the carrier by way of measures of prevention.[702] In cases of theft,[703] for example, account will be taken of location[704] and of the desirability of the goods.[705]

(ii) The more serious the potential loss the more that will be expected of the carrier by way of measures of prevention.

(iii) A third factor is the practicality of the measures which, in the contention of the claimant, the carrier should have taken to avoid the loss in question.[706] The easier (and perhaps cheaper) it would have been to take a particular measure that would have prevented the damage, the greater the likelihood that it will be required of the carrier.

(iv) A fourth factor is legality. Carriers will not be required to break the law, notably regulations governing hours of work.[707] Nor will carriers be required to seek to exercise legal powers which they do not have. Obviously, there is nothing that the carrier's staff can be expected to do to prevent customs authorities, apparently acting within their powers, detaining goods or baggage for inspection.[708]

(v) The standard of care expected of a carrier is affected by the state of knowledge in the air industry at the time. Insurers and others, directly or indirectly through trade associations, have offered information to carriers, for example, on security.[709] This process of "education" has been reinforced here as in other contexts by insurance warranties, whereby the carrier loses liability cover, unless certain procedures are observed.[710] Specifically, as regards current practice (based on the state of knowledge at the time), when the particular question is whether the carrier has observed safety procedures or checks, reference has been made by courts to the established practices of the industry.[711] This kind of standard was

701. Sériaux, *loc cit*, above.

702. See *Pasinato v. American*, 24 Avi 18,081 (ND Ill, 1994) concerning articles falling from overhead luggage bins.

703. If stolen goods are recovered, there might still be "damage" to the owner "occasioned by delay" subject to MC art. 19.

704. E.g. *Norton McNaughton v. Polar*, 702 NYS 2d 759, 761 (NY Sup, 1999). CMR cases: *BGH 16.2.1984*, VersR 1984.551; *OLG München 31.3.1998*, TranspR 1998.353, 356. *Cass 20.1.1990*, B.T. 1990.778.

705. E.g. gold bars: *Cie Le Languedoc v. Sté Hernu-Peron, Paris 17.11.1975* (1976) 30 RFDA 109 (WSC): jeans: *BGH 16.2.1984*, VersR 1984.551; and *OLG München 31.3.1998*, TranspR 1998.353, 356 (CMR); stereo equipment: *Silber v. Islander Trucking* [1985] 2 Lloyd's Rep 243 (CMR). Koller, art. 20, para. 2.

706. *Silber* (above) p. 249 *per* Mustill J.

707. Pilots will not be expected to exceed the hours permitted—any more than drivers of road vehicles: *Silber loc cit*.

708. *Najjar v. Swissair, TGI Bobigny 27.10.1987* (1987) 41 RFDA 323.

709. E.g. under CMR the location of secure parking.

710. See Margo, *Aviation Insurance* 3rd edn (2000) 10.74 *ff*.

711. E.g. as to whether an aircraft should be routinely searched for bombs: *Ospina v. TWA*, 24 Avi 17,109 (2 Cir, 1992). There is more than an echo here of the common law court charged with an inquiry in a tort case into whether the defendant has been negligent: see e.g. *Bolitho v. City* [1998] AC 232.

applied, for example, in *Thomas Cook v. Air Malta*,[712] to a case of robbery but is likely to be applied in other cases.

2.2 *Examples of measures necessary* are grouped here according to the cause of the damage (personal injury subject to WSC as well as delay subject to MC) and hence the type of precaution that might be expected of a carrier.[713]

(i) Embarking and disembarking must be under conditions that are reasonably safe for passengers. In one case decided back in 1977,[714] in which a passenger (escorted by a hostess with an umbrella on tarmac treated with anti-freeze) was blown over by a sudden and violent snow flurry, the carrier was not liable. Moreover, in another case,[715] the carrier was not liable in 1983 to the lady who slipped on ice on the tarmac, because the carrier was entitled to assume that a combination of care on the part of the passenger and measures taken by the airport would be sufficient to avoid such accidents. Courts today may be less tolerant of such conditions.

(ii) Careless conduct on board aircraft is not uncommon and carriers must take some account of the weaknesses of human nature among passengers. On the one hand, for example, a stewardess, who is passing a hot drink to a passenger beyond her reach, must not depend too much on the passenger in between and the carrier may be liable if a passenger is scalded.[716] On the other hand, it is enough that a luggage bin is well designed, passengers warned about the hazards of falling luggage, and initial loading security is checked. The cabin staff cannot be expected to supervise passengers opening bins on landing.[717] Moreover, it has been contended,[718] given the considerable cost of retrofitting overhead bins with netting or any other adequate protection and the low incidence of injury from falling baggage,[719] that the carrier which does not take such measures is not liable.

(iii) Air navigation is the responsibility of the carrier. The "pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of the aircraft" and has "a duty to see what can be seen, and to separate his aircraft from obstructions and hazards".[720] The case in which this was said concerned the hazard posed by birds.[721] The carrier cannot simply rely on the

712. [1997] 2 Lloyd's Rep 399.

713. For more examples see Koller, art. 20, paras 3 *ff*; and Kronke, art. 20, paras 16 *ff*.

714. *Rivière-Giret v. Air-Inter, TGI Toulouse 16.11.1977* (1978) 32 RFDA 214. The court did not enquire whether a shuttle vehicle could or should have been available.

715. *Adler v. Austrian, Brussels 5.2.1986* (1987) 22 ETL 168, 171.

716. *Amsellem v. TWA, Paris 14.2.1983* (1983) 37 RFDA 138.

717. *Air Inter v. Quaranta, Aix-en Provence 23.6.1988* (1988) 42 RFDA 384.

718. Giemulla, art. 20, para. 15, with reference also to decisions of courts in the US governed by local law.

719. On the evidence before it one court concluded that "the incidents of objects falling from overhead bins are rare and generally harmless": *Pasinato v. American*, 24 Avi 18,081 (ND Ill, 1994). In that case the carrier accepted liability, the issue for the court being whether (no), the bin having been opened by a stewardess, there was wilful misconduct within the meaning of (the original) art. 25.

720. *Safeco v. City of Watertown*, 529 F Supp 1220, 1230–1231 (ND S Dakota, 1981). This was not under WSC but in tort (negligence), however, it is the view likely to be taken under art. 20: Giemulla, art. 20, para. 8.

721. However, usually in cases of birds (and e.g. ingestion) in the vicinity of an airport, recourse will be sought against the airport authority and/or the body that certified the airport as safe for flight. See Michael, 51 J Air L & Com 1007, 1012 *ff* (1986); and more generally, Langewiesche, *Fly by Wire* (London, 2010) part 1.

airport to ensure that there are no such hazards but must at least make enquiries.[722] A concern in Europe in 2010 was the level of volcanic ash in the air and the threat it posed to aircraft in flight. In certain respects it was and still is carriers that assume responsibility for assessing the threat.

(iv) Adverse weather is a contingency for which the carrier must be prepared.[723] The primary responsibility remains with the pilot. A pilot is obliged to ignore the instructions or advice of ATC if compliance would leave the aircraft in a storm which endangers it.[724] In any event, passengers must be given sufficient warning of air turbulence.[725] In *Chisholm*[726] for example, a case of passenger injury, the judge concluded that "having regard to the form of warning that had been given—both the preliminary warning over the public address system and the follow-up warning from the stewardess as she checked the belts—they would reasonably suppose that no adult would be so unwise as to leave his seat",[727] even to go to the toilet compartment.

(v) Functional failure in aircraft, although not necessarily "foreseeable" in any particular aircraft or at any particular time,[728] will occur sooner or later. So, at the very least, the carrier must have a contingency plan. As regards failure which causes cancellation of the flight, the carrier must be ready to book passengers and their baggage, or cargo on the next available flight, albeit that of another carrier.[729]

(vi) Third party interference, such as the loss of luggage detained for inspection, is something for which the carrier may be excused.[730] "Interference" includes hijacking.[731]

(vii) Delay due to congestion is becoming commonplace in certain parts of the world. Such is the case at holiday periods which presumably carriers should expect. Although the carrier's aircraft is part of that congestion, its aircraft are unlikely

722. Michael *op cit*.

723. On the ground as well as in the air. In *SCAC v. Sté Generali, Versailles 18.10.2001* a defence based on art. 20 in respect of storm damage to cargo in the carrier's airport warehouse failed because it was *prévisible* and did not, therefore, said the court, amount to *force majeure*.

724. *Air Inter v. Simon, Paris 19.3.1968*, (1968) 22 RFDA 198, 200.

725. If the pilot is unaware of turbulence, such as clear air turbulence (CAT), of course, he cannot be expected to warn the passengers: *Karuba v. Delta*, 23 Avi 17,470 (SDNY, 1991).

726. *Chisholm v. BEA* [1963] 1 Lloyd's Rep 626.

727. P. 634 *per* Atkinson J. The "seat-belt on" sign was illuminated. *Cf Goldman v. Thai Airways* (1981) 125 Sol J 413, in which Chapman J held that the pilot had not switched on the sign in anticipation of clear air turbulence and could not rely on art. 20. On appeal ([1983] 1 WLR 1186, (CA)) the only question was whether (no) that amounted to wilful misconduct under art. 25.

728. Not surprisingly the carrier will not be liable for an unforeseeable and unusual failure in the aircraft: *Messeaud v. Air Inter, T Longjumeau 9.6.1994* (1995) 48 RFDA 95.

729. *McMurry v. Capitol*, 424 NYS 2d 88 (1980). See also *Cenci v. Mall*, 531 NYS 2d 743 (Albany 1988) and *Tello v. Eastern* 1990 II ULR 390 (SC Puerto Rico, 1987) in which the carrier, which provided an alternative flight, was *ipso facto* excused without enquiry whether it was at fault in respect of the aircraft failure which gave rise to the contingency. A similar approach has been taken to human "failure" in the form of a strike by pilots: *Alitalia v. Serres, CA Paris 7.7.1978* (1979) 33 RFDA 181. See also *Paris 28.6.2002*, reported and discussed by Job and Odier [2004] RFDA 3, who raise the question whether the carrier (Air France) with insuperable "technical problems" should have been obliged to seek seats on aircraft operated by other carriers. *Cf* the EC Regulations discussed in Chapter 2.

730. E.g. unlawful export of currency: *Najjar v. Swissair, TGI Bobigny 27.10.1987* (1987) 41 RFDA 323.

731. Given that the general standard required of a carrier under art. 20 is that of reasonable care in the circumstances, it is likely that courts, where the national rule is the same, will be influenced by national law. As to the US, see Kizzia, 46 J Air L & Com 147 (1980).

to be a large or determining part of it and carriers have been excused.[732] Nor is a carrier responsible for delay in a connecting flight.[733]

3. ***Delay***: see article 19 (first sentence), note 2.

EXCURSUS

The concept of all necessary measures

A rule such as that of the common law of carriage, whereby the carrier is strictly liable for what occurs, is incompatible with a purposive interpretation of the air Conventions for which, at least as regards WSC, a rule of absolute liability has been rejected.[734] However, a literal reading might suggest that any active steps which the carrier could have taken with the object of forestalling the occurrence in question are necessary measures and therefore must be taken. This, however, is a test capable of being pushed in the direction of absolute liability to a point of absurdity. There are "many perils which a carrier could avoid, if endowed with unlimited foresight and resources. An armed robbery can be prevented, if the carrier employs an armoured vehicle, surrounded by scores of armed guards."[735] This may conceivably be what is required while an aircraft carrying bullion is on the ground but it is most unlikely that it was intended to require the carrier even of valuable goods to take such extreme measures in all cases.[736] If the words were taken literally, "there could scarcely be a loss of goods—and consequently no call for the operation of Article 20—were a carrier to have taken every precaution literally necessary to the prevention of loss".[737] A test of this kind is unlikely to be applied to the air Conventions.

1. Force majeure

A second possibility, that the carrier is not excused unless the occurrence amounted to *force majeure*, has also been rejected.[738] If those drafting the original and authentic text in French had intended *force majeure*, there is no apparent reason why they should not have said so.[739] On the contrary they seem to have set out to avoid concepts established in national law.[740]

732. E.g. *Jean-Baptiste v. Air Inter, TGI Evry 5.3.1990* (1990) 44 RFDA 219.

733. *OLG Frankfurt 14.6.1989*, 1990 ULR I.390; TranspR 1990.21: the carrier was not obliged to investigate why a (delayed) passenger had not checked in for the flight. The inference is that to wait for one passenger may lead to liability for delay to others on the same flight.

734. *Grein v. Imperial Airways* [1937] 1 KB 50, 69 *per* Greer LJ (CA); *Chisholm v. BEA* [1963] 1 Lloyd's Rep 626, 628, Atkinson J; *Goldman v. Thai Airways* (1981) 125 Sol J 413 (*affirmed on other grounds* [1983] 1 WLR 1186, CA), in which Chapman J approved a *dictum* to this effect in *Manufacturers Hanover Trust v. Alitalia*, 429 F Supp 964, 967 (SDNY, 1977), *affirmed* 573 F 2d 1292 (2 Cir, 1977), *cert denied* 435 US 971 (1978). Also in this sense: *OLG Köln 11.8.1998*, TranspR 1999.107. Giemulla, art. 20, para. 6; Sériaux, para. 57.

735. *Silber v. Islander Trucking* [1985] 2 Lloyd's Rep 243, 246 *per* Mustill J concerning carriage by road.

736. *Ibid*.

737. *Manufacturers Hanover Trust v. Alitalia* (above) *loc cit*.

738. WSC: *Sté Pool Esli v. Danzas, TC Paris 24.2.1994* (1994) 47 RFDA 470, 476. Sériaux, para. 45. *Idem* for CMR: *Silber* [1985] 2 Lloyd's Rep 243, 245, *per* Mustill J.

739. To a lesser extent the same is true of the corresponding defence in German law: *die höhere Gewalt*. In this sense for CMR: *BGH 28.2.1975*, N.J.W. 1975.1597. This defence excuses the defendant only in respect of extraordinary events, and the theft of goods, for example, is not extraordinary: *OGH 16.3.1977*, SZ 50 no. 40, TranspR 1979.46, 1978 ULR I 370. Also in this sense: *BGH 28.2.1975* (above).

740. *Idem* for CMR: *OGH 16.3.1977* (above).

2. Reasonable care

A more plausible interpretation is that the carrier is required to exercise (no more than) reasonable care in accordance with current practice in the air transportation industry. This means a standard of skill and care much like that which underlies the ordinary common law tort of negligence. Indeed there is considerable evidence that this was the original intention for WSC. A delegate to the conference of 1926 has been quoted[741] as saying that the draftsmen were conscious of the risks posed by travel by air, which had not reached the level of "perfection" achieved by railways after a century or more and could not be expected to do so. Moreover, it was a primary purpose in 1929 to limit "the liability of air carriers to foster the growth of the fledgling commercial aviation industry".[742] In French eyes it is "*une obligation de moyens ou de simple diligence*".[743] That kind of obligation has been equated with the English duty of reasonable care.[744] Similarly, in Germany, courts have required the air carrier to adopt the "*Massnahmen ein sorgfältiger und vernünftiger frachführer-zum Schutz des ihm anvertrauten Gutes*".[745] Something of this seems to be reflected in the formula of MC article 19: "all measures that could reasonably be required".

At a late stage in the negotiations of WSC, however, the phrase "*mesures nécessaires*" replaced "mesures raisonnables".[746] Miller states that the change of wording was not intended to be a change of substance but only one of form: to employ a phrase in French which approximated to "due diligence" in English.[747] This should be no surprise as "due diligence" was a keystone of the Hague Rules adopted only a few years earlier for carriage by sea; but, if so, it is not obvious why the French phrase was translated into English not as "due diligence" but as "all necessary measures". Nonetheless, early statements in the English courts appear to support the "no change in substance" view. The duty of the air carrier was treated as one of reasonable care and skill.[748] This was also true of leading English commentators and judges in the years that followed.[749]

As with *force majeure*, however, subsequent courts began to wonder why, if the drafters had really intended a standard of reasonable care or of due diligence, those words had not been used. There are corresponding concepts in French law too, and "necessary measures" does not appear to reflect those either. So eventually courts drew back from any such

741. Sériaux, para. 45.

742. *Eastern v. Floyd* 499 US 530, 546 *per* Justice Marshall (1991).

743. Sériaux, para. 45. See also in this sense Said-Alary in "Mélanges Maury" (Paris 1960) Vol. 2, p. 539, who considered the level of liability out of date and too lenient. Sériaux also quotes Pittard as saying: "*Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger d'un bon père de famille*."

744. B. Nicholas, *The French Law of Contract* 2nd edn, (Oxford, 1992), p. 51.

745. *OLG Frankfurt 23.12.1992*, TranspR 1993.103, 106, with reference to *BGH 9.10.1964*, NJW 1964.2348.

746. Koller, art. 20, para. 2.

747. Miller, p. 167.

748. Only much later was it decided in England that "due diligence" (under HR and HVR) differs on one point from reasonable care and skill; see *The Muncaster Castle* [1961] AC 807.

749. E.g. McNair, *The Law of the Air* 3rd edn, (Stevens, London 1964) pp. 184 *ff*. See also *Grein v. Imperial Airways* [1937] 1 KB 50, 69 Greer LJ (CA). Applied in Canada in *Johnson Estate v. Pischke* [1989] 3 WWR 207, 218–219 (Sask). USA: *Boehringer Mannheim v. Pan Am*, 531 F Supp 344 (SD Tex, 1981). Doubted however by Atkinson J in *Chisholm v. BEA* [1963] 1 Lloyd's Rep 626, 628.

assumption of equivalence. At the same time courts became less sympathetic to the commercial vulnerability of the air carrier. The fledgling industry of the 1920s had taken off. Today people commute by aircraft and, until 11 September 2001 at least, expected no more danger or delay than was once demanded of buses and trains—an expectation which air carriers did little to discourage.[750]

3. Utmost care

In recent years a tradition of more literal interpretation has prevailed in English and US courts resulting in a stricter interpretation of "all necessary measures".[751] The corresponding interpretation of CMR (international carriage by road) has been called the requirement of "utmost care". Indeed, whatever the intention of the original drafters, a literal view can be supported. If "all necessary measures" are assessed in advance of the transportation in question, it can be argued that "necessary" is a reference to the normal precautions to be expected of a careful and competent professional carrier: essentially a requirement of no more than reasonable care (above). If, however, they are assessed *ex post*—necessary to avoid the event which actually occurred and caused the damage—a stricter interpretation is possible.

If indeed, the rule is a stricter rule, what exactly is it to be? As regards CMR (article 17) Mustill J concluded in *Silber* that the provision "sets a standard which is somewhere between, on the one hand, a requirement to take every conceivable precaution, however extreme, within the limits of the law, and on the other hand a duty to do no more than act reasonably in accordance with prudent current practice".[752] He concluded that the expression "could not avoid" in CMR means "could not avoid even with the utmost care"; and that utmost care is not, in any literal sense, extreme care but imports some notion of what is "practical" and "short of the absurd".[753] Utmost care is (lawful) conduct that says "better safe than sorry" and takes a "worst scenario" view of what might happen but one that falls a degree or two short of the absurd and obsessive while paying minimal attention to the cost of the precaution.

Article 20—Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence(1) or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission(3) caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a

750. See e.g. *Swiss Bank Corp v. Brinks-MAT Ltd* [1986] 2 Lloyd's Rep 79, 97 *per* Bingham J.

751. Miller, p. 167. In France also *Rivière-Giret v. Air-Inter, TGI Toulouse 16.11.1977* (1978) 32 RFDA 214. French courts have moved in the direction of the stricter *obligation de résultat* of domestic law, which excuses the carrier only if there is *cause étrangère*: Sériaux, para. 61.

752. [1985] 2 Lloyd's Rep 243, 247.

753. *Ibid*. The judge echoed the view on CMR in Austria: *OGH 29.6.1983*, (1984) 19 ETL 526, 1986 ULR II 602. It is also found (for CMR) in Germany: *BGH 21.12.1966*, N.J.W. 1967.499, 500. Later decisions to the same effect include: *BGH 5.6.1981* (1982) 17 ETL 301, 309; *OLG München 10.1.1977*, TranspR 1997.277, 279.

person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission(3) of that passenger. This article applies to all the liability provisions in this Convention, including paragraph 1 of article 21.

Article 21

1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence(1) of the person suffering the damage(2) the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.
2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence(1) or other wrongful act or omission(3) of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.

Comment

These provisions concern contributory negligence by the claimant; being a defence for the carrier, such negligence must be proved by the carrier.[754] On the one hand, it is not a prerequisite of the defence that the carrier has been negligent or otherwise at fault.[755] On the other hand, the carrier was allowed to plead article 21 even when the carrier's own fault was so great as to trigger WSC article 25,[756] and the same may be true of MC article 22.5.

In WSC article 21.1 is a reference to the *lex fori*.[757] MC article 20 replaced this reference to the *lex fori* with a rule of its own, albeit one not unlike that found in the *lex fori*.

Notes to article 20

1. ***Contributory negligence*** is a question of fact.[758] Passenger negligence was pleaded in the early 1980s in *Goldman v. Thai Airways*,[759] however, unsuccessfully: in the absence of any warning from the pilot or cabin staff, the passenger injured by turbulence when he had left his seatbelt undone was not negligent. Successful pleas of contributory negligence by passengers have included that of a passenger who fell ill but did not alert the cabin

754. *Feibelmann v. Air France*, 334 NYS 2d 492 (NY Civ Ct, 1992).
755. Giemulla, art. 21, para. 1.
756. E.g. *Rophe v. Ministère Public, Paris 20.12.1968* (1970) 24 RFDA 95, 98.
757. In England, the Law Reform (Contributory Negligence) Act 1945 s. 1(1) states that if "any person suffers damage as a result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the persons suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." In the US this meant federal law rather than state law: *Eichler v. Lufthansa*, 794 F Supp 127, 130 (SDNY, 1992).
758. *Eichler v. Lufthansa*, 794 F Supp 127 (SDNY, 1992).
759. (1981) 125 Sol J 413. Affirmed on other grounds: [1983] 1 WLR 1186 (CA).

staff[760]; a passenger who packed essential heart medication[761] or important documents[762] not in his cabin bag but in his checked luggage (which was lost); and a passenger who did not check in and was consequently not allowed to board the aircraft before it left.[763] In contrast, when passengers were required to cross the tarmac to or from the aircraft, the dangers are more apparent to the carrier than the passenger and the carrier is likely to find it difficult to establish a case under article 21.[764]

Negligence by consignors of cargo includes failure to store goods at an appropriate temperature prior to their being handed over for carriage[765]; and inadequate packing[766] and labelling[767] for the transportation in prospect. This is a matter of concern for consignors because standard insurance clauses may exclude cover for loss thus caused.[768] In contrast, if delivery by a certain time has been expressly agreed, the carrier has not been exonerated at all on the ground that the schedule agreed was too tight: the responsibility is entirely that of the carrier.[769] See also note 3 below concerning "wrongful act or omission".

2. ***Person suffering damage*** in WSC article 21 is a phrase that replaced "person injured" in earlier versions of WSC. The reference to the "person claiming compensation" in MC article 20 is intended to remove any remaining doubt that the relevant person means any person, individual or juristic, who has suffered damage of the kind for which the carrier is liable under articles 17–19.

3. ***Other wrongful act or omission*** is not mentioned in texts before 1955. A reference to "negligence or other wrongful act or omission" of the claimant echoes "wrongful act or neglect" found in CMR, article 17.2. CMR decisions suggest that "wrongful act" covers for example false declarations (of weight or contents) giving rise to delay in customs clearance: it covers acts which are deliberate rather than negligent.[770] Another example might be knowing failure to provide documents essential if the cargo is not to be seized on arrival by customs.[771]

760. The claimant, aware of his asthmatic condition, embarked on a long flight, had an acute attack but refused to disembark and get attention at an intermediate stop, as suggested by the captain, and died on board: *Araluce v. Air France, CA Paris 18.12.1987*, (1987) 41 RFDA 465. When passengers travel by air knowing that they have a condition which might be adversely affected, e.g. by loss of pressure, the carrier may be excused under art. 21: De Juglart, para. 2787 with reference to *Pionneau v. Air Inter, Pau 3.7.1986* (1986) 44 RFDA 440, as well as *Araluce* (above).

761. *Friesen v. Air Canada* 1982 ULR II 146, 157.

762. Subject to the limits of weight and volume applied to hand luggage: see Giemulla, art. 21, para. 10.

763. *Bellanger Jamet v. Air Inter, TC Seine 5.11.1962* (1963) 17 RFDA 106. An unusual case is that in which it was held to be contributory negligence for the victim to persuade the pilot to undertake the (dangerous) manoeuvre that caused the accident: *Rophe v. Ministère Public, Paris 20.12.1968* (1970) 24 RFDA 95, 98.

764. E.g. *Air France v. Nicoli, Paris 2.4.1971* (1971) 25 RFDA 173: passenger struck by tractor, although not looking where she was going.

765. E.g. pigs: *AG World Exports v. Arrow Air,* 22 Avi 18,221 (SD Fla, 1990).

766. *Lg Hamburg 3.12.1992* TranspR 1995.76.

767. E.g. *Webert Ricoeur v. Air France, TC Paris 9.11.1988* (1988) 42 RFDA 391.

768. Institute Cargo Clauses (Air). Margo Ch 14.14.

769. *Duaygues v. UTA, Paris 25.2.1986,* BT 1986.480. The carrier did not allow enough time for transhipment at the Paris airport concerned.

770. Clarke, CMR, para. 70.

771. *KLM v. Tannerie des Cuirs, Paris 6.6.2001,* BTL 2001.664.

Article 21—Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier(1) shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22

1. In the carriage of persons the liability of the carrier(1) for each passenger is limited to the sum of two hundred and fifty thousand francs.(2) Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract,(3) the carrier and the passenger may agree(4) to a higher limit of liability.

Comment

These provisions[772] limit the liability of the carrier—not to fixed levels or tariffs but limits: none the less, to recover against a carrier every claimant must prove the actual amount of loss suffered. MC article 21 applies to the kinds of liability stated in article 17.1 (death or bodily injury), whether the action is based in contract or in tort. It is central to the regime for carriage by air. On the one hand, every passenger[773] can be assured that any contract term tending to relieve the carrier of liability or fix lower limits of compensation is null and void: MC article 26 (WSC article 24). On the other hand, a carrier can predict its exposure. The limits on the amount of compensation recoverable against the carrier[774] can be exceeded in only two (formerly three) situations.

The first situation is when a carrier "stipulates" in favour of higher limits: MC article 25 (*cf* the higher limit "agreed" in WSC article 22.1). The second is when the death or bodily injury has been caused intentionally or recklessly: MC article 22.5 (WSC article 25 and article 25A).[775]

772. Concerning these provisions generally, see Bin Cheng, 49 ZLW 484, 489 *ff* (2000); and Koning, 33 Air & Space Law 318, 323 *ff* (2008).

773. In Ontario in *ACE v. Holden* (2008) 296 DLR (4th) 233, 236 *ff* "passenger" was interpreted as meaning a person who had checked in baggage for the flight in question. With effect from 30 December 2009 the limits were raised (under Art. 24) to 113,100.

774. Concerning whether such provisions might violate the constitution of states such as the US, see Giemulla, art. 22, para. 2.

775. Earlier texts of WSC provided for a third situation: when the passenger ticket had not been made out or, if made out, did not contain the Hague Notice.

MC limits differ markedly from those of WSC. Essentially MC limits are those of the 1992 Japanese Initiative, which waived all limits for passenger death and injury on a two-tier basis: absolute liability for the first tier and presumed fault for the second above 100,000 SDRs.[776] Moreover, because it has been a feature of the regime in the past that monetary limits have been surpassed by the expectations of customers as well as inflation, a procedure has been introduced for review of limits by the Depository (ICAO), the "escalator" clause, referable to a measure of inflation: MC article 24. It is less than clear that States Parties will be bound by escalations in the monetary limits but that is the expectation.[777]

Notes to article 21

1. ***The carrier*** means not only the corporate legal entity contracting the carriage but also its employees who, in practice, insist that the employer provides indemnity protection. To allow claimants to recover (in full) from the employees, and thus trigger the indemnity, would bypass the limits of article 21 and subvert its purpose.[778] For the same reason the meaning of "carrier" has been extended to agents employed by the air carrier to execute the transportation, as well as agents, of those agents. In *Waxman* the US District Court stated that the category includes all "agents who perform services fundamental to, or in furtherance of, the carriage enterprise, and which the carrier itself would be bound to perform . . . pursuant to its contract with its customers", although not in direct contractual relation with the carrier.[779] For the meaning of "agent" in this connection see article 19, note 1.

In the US, federal aviation law has recognised two classes of carrier, direct and indirect. Direct carriers perform the actual transportation, whereas indirect carriers provide support services, including procuring and assembling cargo for shipment, consolidating multiple shipments into single shipments for carriage, and arranging transportation with the direct carrier. Thus a freight forwarder is considered an indirect carrier and is entitled to invoke the limited liability protection afforded by WSC to direct carriers.

2. ***The monetary limit.*** As regards carriage to, from or within the US, the WSC limit did not come into force *ex lege* until 1999.[780] Before that, courts applied the Intercarrier Agreement on Passenger Liability 1996, to which most major carriers were party.[781]

As regards carriage to, from or within the EC, Council Regulation (EC) No 2027/97[782] was implemented in the UK by the Air Carrier Liability Order 1998.[783] This purported to

776. See Bin Cheng, 49 ZLW 287, 298 (2000).

777. Bin Cheng (above) pp. 300 *ff*, who points out, for example (p. 302) that it is not specified which organ of ICAO is to activate and operate the procedure.

778. *Reed v. Wiser*, 555 F 2d 1079, 1089 (2 Cir, 1977), *cert denied* 434 US 922 (1977).

779. *Waxman v. CIS Mexicana de Aviacion*, 13 F Supp 2d 508, 515 (SDNY, 1998) and cases cited. Add *Bowe v. Worldwide Flight Services*, 979 So 2d 423 (Fla Dist Ct App, 2008). For the effect of MC art. 21.2 defences in cases of terrorist attacks post 2000, see Moore, 68 JALC 699, 711 *ff* (2003).

780. As part of the Montreal Protocol No 4, which was ratified by the Senate on 28 September 1998 and came into force on 4 March 1999.

781. For more detail, see Pickelman [1998] J Air L & Com 273, 289 *ff*.

782. OJ 1997 L285/1.

783. SI 1998 No 1751, made under the Carriage by Air Act 1961, s. 10, as applied by the Carriage by Air (Supplementary Provisions) Act 1962, s. 5(2) and the EEC Act 1972, s. 2(2).

give effect to the main provisions of IATA's Intercarrier Agreement on Passenger Liability. However, the Regulation (and Order) also provided for advance payments to claimants and criminal penalties for carriers if, for example, they did not include certain terms in their conditions of carriage. A challenge by IATA to the validity of the Order, on the ground that the Regulation violated Member States' obligations to non-Member States under WSC, failed in *R v. Secretary of State, ex parte IATA.*[784]

3. ***Special contracts***, referred to in WSC, refer to agreements between a particular carrier and a passenger. Moreover, "contract" does not mean a contract distinct from, or collateral to, the contract of carriage but a term of it which, not being found in most other such contracts of carriage concluded by the carrier, makes the contract special.

According to MC article 41.2 (for WSC article III of GSC[785]) a "special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it". Such agreement may be found in the IATA Conditions.

4. ***The form of special contracts*** or agreements is not specified. In respect of WSC the prevailing view was that writing was required.[786] However, that was in 1936. It is clear that one of the objects of MC is to facilitate electronic records and means of communication.[787] This suggests that today agreements may be recorded in an electronic form.

Article 22—Limits of Liability in Relation to Delay, Baggage or Cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of provisions, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.[788]

2. In the carriage of baggage,(1) the liability of the carrier in the case of destruction, loss, damage[789] **or delay is limited(2) to 1,000 Special Drawing Rights for each passenger**[790] **unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration(3) of interest in delivery at destination and has paid a supplementary sum(4) if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum,(5) unless it**

784. [2000] 1 Lloyd's Rep 242. See Grief [2000] JBL 92.

785. GSC: Carriage by Air (Supplementary Provisions) 1962 Act. GSC is set out in Appendix 3.

786. *Westminster Bank v. Imperial Airways* [1936] 2 All ER 890, 897–898 *per* Lewis J: *in casu* a consignment note.

787. See above Chapter 3, 3.3.2.

788. With effect from 30 December 2009 the limits were raised (under art. 24) to 4694.

789. In *Walz v. Clickair*, Case C-63/09, the ECJ considered the meaning of "damage" in art. 22.2. The claim was for both material and non-material damage and together, the amount claimed exceeded the limit then imposed under art. 22. The question for the ECJ (posed in para. 16) was whether the limit applied to both. It noted (para. 21) that MC did not define "damage" and that therefore the aim should be to give the word "a uniform and autonomous interpretation". To this end it applied VC art. 31 and concluded (para. 26) that the "nature of the damage sustained by a passenger is irrelevant in that regard". Accordingly the limit applied to both.

790. With effect from 30 December 2009 the limits were raised (under art. 24) to 1131.

proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited[(2)] to a sum of 17 Special Drawing Rights per kilogramme,[791] unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration[(3)] of interest in delivery at destination and has paid a supplementary sum[(4)] if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum,[(5)] unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight[(6)] to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned.[(7)] Nevertheless, when the destruction, loss, damage or delay of a part[(8)] of the cargo, or of an object contained therein, affects the value of other packages[(9)] covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

[WSC Article 22 continued]

2.—(a) In the carriage of registered baggage,[(1)] the liability of the carrier is limited to a sum[(2)] of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration[(3)] of interest in delivery at destination and has paid[(4)] a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum,[(5)] unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(b) In the carriage of cargo,[(1)] the liability of the carrier is limited to a sum[(2)] of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration[(3)] of interest in delivery at destination and has paid[(4)] a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum,[(5)] unless he proves that the sum is greater than the consignor's actual interest in delivery at destination.

(c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight[(6)] to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned.[(7)] Nevertheless, when the loss, damage or delay of a part[(8)] of the registered baggage or cargo, or of an object contained therein, affects the value of other packages[(9)] covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

791. With effect from 30 December 2009 the limits were raised (under art. 24) to 19.

Comment

MC article 21 is new except insofar as delay to passengers is covered by WSC, article 21.1.[792]

Notes to article 22

1. ***Checked baggage*** alone is governed by MC article 22. Limits on liability, if any, for unregistered (hand) baggage was governed by national law, until the entry into force in the UK in 1998 of WSC article 22.3, however, the wording of MC article 22.2 indicates that the limit is now confined to checked baggage, for which alone the carrier is liable under MC article 17.

2. ***The sum that can be awarded,*** the key word being "sum", referred to in WSC article 22.2, is a notion the generality of which has allowed differing interpretations. In *O'Rourke*,[793] the court refused to order payment of pre-judgment interest on the sum awarded: the sum alone was recoverable. The court stressed "the basic principle that . . . air carriers should be protected from having to pay out more than a fixed and definite sum"; and that, in the interests of uniformity, nothing should be read into the Convention which was not clearly implied.[794] On the other hand, in the same year a court with passengers most in mind in *Domangue*,[795] without reference to *O'Rourke*, held[796] that "allowing victims a more adequate recovery and ensuring disposition of claims were important objectives leading to the modification of the Warsaw Convention" in 1966 and ruled accordingly. For the same reasons the court also awarded post-judgment interest.

The word "sum" is also used in MC article 22 and the objectives remain similar. Be that as it may, MC envisages only actions for *financial* loss, so where a claim was brought for distress caused by loss of (religious artefacts in) registered baggage, the New York court held in 2006 that this was outside the scope of MC and applied state law.[797]

3. ***Special declarations*** were originally expected to be in writing.[798] As with liability to passengers,[799] there is force in the view that the interest in delivery must be made absolutely clear to the carrier in one way or another,[800] and that the value of the goods stated in the declaration is the value for the purpose of the level of liability to be assumed

792. As regards the efficacy of the limitation of liability under MC art. 22.3, see Koller, TranspR 2005.177. As regards the effect of MC in cases of jewellery theft, see Rodriguez-Dod, 69 J Air Law & Com 743, 756 *ff* (2004).

793. *O'Rourke v. Eastern*, 730 F 2d 842 (2 Cir, 1984).

794. Pp. 852 and 853.

795. *Domangue v. Eastern*, 722 F 2d 256 (5 Cir, 1984).

796. P. 263. *Idem Eli Lilly v. Aerolineas Argentinas*, 508 NYS 2d 865 (NY City Civ Ct, 1986). Much more recently courts in the US have held under MC art. 22 that the limit of 17 SDRs is "unbreakable": Tompkins, 34 Air & Space L 421, 423 (2009).

797. *Mohammed v. Air France*, 816 NYS 2d 697, 2006 WL 777076.

798. *Cf KLM v. Hamman, Witwatersrand 5.2.2002*, Unif L Rev 2002.924 concerning an oral declaration. The effect of an electronic declaration, presumably effective under MC, has not been the subject of reported decision.

799. See art. 21.1, note 4.

800. As regards the need for writing see: *OLG Köln 16.2.1990*, TranspR 1990.199. *Cf KLM v. Hamman* (above).

by the carrier.[801] In any event the onus is on the claimant to prove that a declaration was made.[802]

4. ***Actual payment*** of a supplementary sum is unnecessary. Where the sum to be paid has been agreed but not yet paid, that has been enough.[803]

5. ***Declared sums*** are the "true" value declared by consignors not content with the limit stated in article 22. The carrier is likely to respond by demanding an appropriately higher carriage charge. If, however, the goods are lost or damaged, the amount recoverable reflects the value declared. It is not, however, an agreed value: it is open to the carrier to prove that the actual value was less than the declared value, and if so, the claimant recovers no more than the actual loss assessed on the basis of the actual value. The supposition, of course, is that the sum declared is such that the potential liability of the carrier is greater than that for which the carrier would have been liable (under article 22) in the absence of a declaration.[804]

Sometimes, however, a consignor's declaration may contain a value *below* the true value in order to obtain a lower carriage charge. Such a consignor is "gambling that the goods will not be lost through someone's negligence" and is unlikely to attract the sympathy of the court, if such loss occurs.[805] In *Perera*,[806] for example, the actual value of the gold shipped was $150,000 but the value declared was $22,500. It was the latter sum that was recoverable. However, later in *BRI*, the court took the view that "special declaration" should be interpreted "to mean a declaration of value *greater* than the liability limitation . . . set forth in Article 22" WSC; and that the carrier could not point to a lower declaration as lowering the liability limitation already provided in that provision.[807]

If the damage is intentional or reckless on the part of the carrier and thus falls under article 22.5 (WSC article 25), probably the claimant may recover actual loss in excess of the declared value. Most considered that the reference in article 25 to the "limits of liability specified in article 22" was sufficiently general to include declarations of value,[808] and the same is likely to be true of MC article 22.

6. ***The weight of baggage or cargo*** is not something that is now required to be stated in the baggage check.[809] This opens the way to argument about how a limit (referable to

801. *Cf* a declaration of value for customs: *Corocraft v. Pan Am* [1969] 1 QB 616 (CA). In a case in which the customs declaration was much greater than the special declaration, the latter was given effect as such: *Piano Remittance v. Varig*, 18 Avi 18, 381 (SDNY, 1984). *Idem* as regards value for insurance purposes: *Alpina v. TWA, Geneva 16.3.1962* (1964) 18 RFDA 234. 245.

802. *Chowdhury v. Singapore Airlines*, 23 Avi 18,208 (EDNY, 1991).

803. *Mayers v. KLM*, 108 NYS 2d 251, 256 (1951); *Vildex v. United*, 25 Avi 17,886, 17,891 (EDNY, 1996) with reference to *Orlove v. Philippine Airlines*, 257 F 2d 384, 388 (2 Cir), *cert denied* 358 US 909 (1958); in *Vildex* the implication arose from past practice between carrier and consignor, so that the consignors believed reasonably that once they had made the declaration they "would acquire the desired protection".

804. E.g. works of art: *Paris 19.6.2003*, Univ L Rev 2004.1008.

805. See *Perera v. Varig*, 775 F 2d 21, 24 (2 Cir, 1985).

806. Above.

807. *BRI v. Air Canada*, 725 F Supp 133, 138–139 (EDNY, 1989).

808. Giemulla, art. 22, para. 9 with reference *inter alia* to *BGH 16.2.1979*, NJW 1979.2474.

809. The 1929 text of WSC did make such a requirement. As regards cargo and the AWB, however, this is required by art. 5.

weight) is to be applied. In the case of passengers, however, if the actual weight is disputed, some courts have favoured the passenger by assuming a weight that allows them to award the highest amount possible under article 22.[810]

7. ***The package or packages concerned*** refers to either cargo or registered baggage in WSC or to cargo alone in MC. In the case of cargo consolidated in a container and an AWB stating only the total weight of the container unit and the packages as a whole, however, it has been held that it is the total weight that counts.[811] The decision is attractive when the container is stuffed by the consignor because the carrier is entitled to an indication of its maximum liability. It is less attractive when the container is stuffed by the carrier and the AWB made out by the carrier. Be that as it may, if there is sufficient evidence[812] of the weight of the packages inside the container, it is that weight that counts.[813] In the past there has been a tendency to shadow the law and practice of the maritime trade.[814]

8. ***The weight of parts*** is for the carrier to prove "by any evidence which is available for the purpose".[815] No particular method or system is required; for example, under WSC the carrier was not obliged to weigh and record each of a passenger's items of baggage separately.[816] Indeed, the carrier might simply agree a likely weight with the claimant.[817]

9. ***Affecting the value of other packages*** is something that occurs not only between packages independent of each other but also, for example, when damage to one package (one component) renders other related packages (the rest of a machine) useless.[818] It also occurs when damage is found to some of the package and so it becomes necessary to examine or test the contents of other packages, such as those in the same container. Whether or not the other cargo has been damaged, its *value* has been affected by the need for (and the cost of) examination or testing.[819]

The effect on value is assessed when the packages arrive at destination. In *Applied Implants*,[820] for example, one part of a machine was damaged in transit with the result that the machine was largely useless when delivered in Japan. The carrier argued, none the less, that the limit should be fixed (under WSC article 22.2(a)) by reference only to the part (£X) rather than the whole (nearly £4X) (under article 22.2(b)) because a replacement part arrived in Japan only 5 days after the rest of the machine. The difficulty with that kind

810. E.g. *Ag Düsseldorf 20.3.1998*, TranspR 1998.474. In this sense: Giemulla, art. 4, para. 9. Unless the carrier can prove otherwise: *Lg Frankfurt 21.8.1990*, TranspR 1991.32, adopting the view of Giemulla. See also *McPherson v. Qantas*, 23 Avi 17,577 (D NJ, 1991). UK in this sense: *Reid v. Ski Independence* 1999 SLT (Sh Ct) 62 and *Bland v. British Airways* [1981] 1 Lloyd's Rep 289 (CA).

811. *Lg Frankfurt 12.3.1991*, TranspR 1991.241. Koller, art. 22, para. 8.

812. The sufficiency of the evidence is a matter for the *lex fori*: Koller, art. 22, para. 5.

813. *UTA v. Groupe Concorde, CA Paris, 24.5.1991*, BTL 1991.474. Koller, art. 22, para. 8.

814. Giemulla, art. 22, para. 8.

815. *Bland v. British Airways* [1981] 1 Lloyd's Rep 289, 290 *per* Lord Denning, MR (CA).

816. *Ibid*.

817. *Collins v. British Airways* [1982] 2 QB 734, 751 *per* Kerr LJ (CA); see also *Bland* (above).

818. E.g. part of a mainframe computer: *Deere v. Lufthansa*, 621 F Supp 721 (ND Ill, 1985), affirmed on other grounds: 855 F 2d 385 (7 Cir, 1988). See also *Applied Implants v. Lufthansa* [2000] 2 Lloyd's Rep 46.

819. E.g. hard disk drives: *Kalok v. Circle Freight*, 24 Avi 17,768 (ND Cal, 1993).

820. Above.

of argument is that no clear line is discernible between 5 days, 15 days and 50 days. The implication of the argument, said the court, was that "only a permanent depreciation in value of the remaining packages . . . will give rise to the enhanced limitation figure"; and that the court must "read the phrase 'affects the value' as 'renders valueless' ", which is not the ordinary meaning of the phrase.[821] Moreover, it would mean that the enhanced limitation figure would never apply to the delay of a part, which was contrary to the actual wording of article 22.2(b). The court concluded that the argument confused two separate matters: the appropriate limit and the measure of actual loss. "The limit of liability must be assessed by reference to the state of affairs as at the end of the carriage by air in which the damage was sustained. If at that stage the value of the remaining packages has been affected (i.e. diminished) then the enhanced limit applies. If, thereafter the claimants are able to eliminate or mitigate" the damage that will have a bearing on *quantum* but not on limitation.[822]

Article 22.5—[Damage Done Intentionally or Recklessly]

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply(1) if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly(3) and with knowledge that damage would probably result;(6) provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply(1) if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent(2) to cause damage or recklessly(3) and with knowledge(4) that damage would probably(5) result;(6) provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.(7)

Comment

According to a late draft of the 1929 text, this provision (then article 25) was to be triggered by an "intentional illegal act" (*acte illicite intentionelle*). However, in search of greater precision, the drafters adopted a British suggestion to replace that phrase with "wilful misconduct", a concept known to the common law but not to civil law systems. The text then provided that the carrier would be deprived of liability limits "if the damage is caused by his wilful misconduct or by such default on his part as [in accordance with the *lex fori*] is considered to be equivalent to wilful misconduct".[823] However, the unintended effect in many civil law countries was to extend article 25 from *acte illicite intentionelle* to *faute lourde*.[824] This was partly because the drafters' intention was misunderstood and partly because wilful misconduct in the strict sense was so hard to

821. P. 48 *per* David Steel J.
822. P. 49 *per* David Steel J.
823. This corresponds to the Roman law formula *culpa lata dolo aequiparatur*: Matte, para. 141.
824. See e.g. Kronke, art. 25, paras 17 *ff*.

prove that it did not serve its purpose, to deprive the carrier of liability limits in serious cases, often enough to satisfy courts.[825]

To restore the situation, the 1955 version of WSC replaced "wilful misconduct" with the current wording. The current wording of the rule underlines "the requirement of knowledge as to both intentional damage and recklessness",[826] referring, as it does, to damage done with "intent to cause damage *or* recklessly *and* with knowledge that damage would probably result".[827] The assumption, of course, is that a person knows that, where intending to cause damage, damage will probably result. As in 1929, something more than intent to cause damage was required, something akin to recklessness and the 1955 amendment was to spell out what was meant by that.[828] Indeed, courts in the US have used the amended version to clarify the meaning of the original version, which remained in force there until 1999, and have thus in effect applied the amendment to cases in the US before 1999.[829] The amendment embodies a subjective rule of a kind intended to make the liability limit harder to break than before[830] but a rule nonetheless close to the intention of 1929.[831]

At the same time, the 1955 amendment doubled the normal liability limit, so that claimants would be less inclined to go to court because (a) they were satisfied with the level of compensation awarded and (b) courts would be less inclined to seek to break the limit and award more. This seems to have been largely achieved in the years after 1955 except in the US, where the higher 1955 limit was not considered high enough and was not adopted, and litigation on WSC article 25 continued to flourish.[832] Litigation did not dry up entirely even in countries where the 1955 amendment was in force.

Whether the rule applies "must inevitably be determined by reference to the data of practical experience . . . Assessment of state of mind is essentially a factual inquiry."[833] Assessment has proved difficult, a difficulty which can only be fully appreciated by seeing how courts have handled the factual inquiry. Hence the whole issue has been accurately

825. Matte, para. 142, with reference to Chauveau (1952) 6 RFDA 239, 245.

826. Strock (1966) 32 J AL & Com 291, 294. On the history of art. 25, see Bin Cheng, 11 Annals of Air and Space Law (1977).

827. Emphasis added.

828. *Nugent v. Goss* [2000] 2 Lloyd's Rep 222, 226 *per* Auld LJ (CA).

829. *Cortes v. American*, 177 F 3d 1272, 1287 *ff* (11 Cir, 1999). Note also a tendency in the US to resort to domestic law to find guidance on the meaning of art. 25: e.g. *D'Alessandro v. American Airlines*, 139 F Supp 2d 305 (EDNY, 2001); *Bernardi v. Apple Vacations*, 236 F Supp 2d 465, 471 (ED Pa, 2002).

830. Godfroid (1982) 36 RFDA 467, 471 *ff* and references given. Also in this sense the Swiss Federal Court in *Claudio v. Avianca*, 29.6.1987 (1988) 23 ETL 498, 503.

831. Thus cases on the original text of 1929 have been cited in connection with the 1955 amendment. e.g. in *Nugent v. Goss* [2000] 2 Lloyd's Rep 222, 226 (CA) Auld LJ referred to *Horabin v. BOAC* [1952] 2 All ER 1016.

832. As has been pointed out by courts (e.g. in *Olympic v. Manqal/Manzal Qalimi* (Sup Ct Israel 1982) ULR 1984.II 387, 396) the consignor of cargo or baggage has the opportunity to make a special declaration of value which exceeds the limit set by art. 22. However, declarations are not common and, anyway, do not apply to the carriage of passengers.

833. *Koirala v. Thai Airways*, 126 F 3d 1205, 1210 (9 Cir, 1997). But *cf Butler v. Aeromexico*, 774 F 2d 429 (11 Cir 1985), where the court affirmed the decision of the court below, which gave more weight to "an objective analysis of the recorded data, the exhibits and the opinion of experts . . . than on subjective evaluation of the credibility of the crew based on observation of their demeanour".

described as a mixed question of law and fact,[834] and reports of decisions are published.

The onus of proof, that the rule applies to the case, is on the claimant.[835] That is a clear implication of the wording. Proof must be brought that, on the balance of probabilities, the person concerned was actually aware that damage would probably result. That is evidently difficult when the person concerned has died in the accident, such as the pilot in *Tondriau*,[836] when his night flight from Bombay to London struck Mont Blanc just below the summit. Other aspects of proof, however, are not regulated by the Conventions but by the *lex fori*, and some divergence in results is inevitable. In Austria and Germany the difficulty of meeting the onus of proof is eased by courts applying rules of German law that require the carrier to assist the claimant by adducing evidence to show what occurred.[837] But in one American case, the court refused to apply the *res ipsa* rule of national law to assist the claimant.[838]

When the claimant does succeed in proving intention or recklessness, the effect is that the limits in article 22 do not apply. As is made clearer by MC article 22.5, the provision affects only the limits of monetary liability regulated by article 22 and not, for example, the notice requirement in article 31.6,[839] or the time limit of article 35.[840] Moreover, under MC proof of intention or recklessness has less impact on carrier liability (under MC) than it did under WSC, affecting only claims for delay in the carriage of passengers and claims for destruction, loss, damage or delay of their baggage,[841] i.e. the limits set by article 22.1 and article 22.2

Notes to article 22.5

1. ***The liability affected*** is that of article 22.1 and 2. The implication of that is, first, that the rule is triggered only when the limits would have applied, i.e. when the claimant's

834. *Koirala* (above) *loc cit*. This book approaches the issue broadly in the way taken by Cresswell J in *Thomas Cook Group v. Air Malta* [1997] 2 Lloyd's Rep 399, 407–408.

835. E.g. German decisions: *OLG Düsseldorf 21.1.1993*, TranspR 1993.246, 247; *OLG München 30.12.1994*, TranspR 1995.300, 302; *OLG Frankfurt 30.6.1999*, TranspR 1999.399; *OLG München 13.12.2001*, TranspR 2004.35.

836. *Tondriau v. Air India, Brussels 17.9.75* (1976) 11 ETL 907, 913–914. The Court declined to apply a leading French decision (*Cass 5.12.1967*, JCP 1968, 15350) in favour of an objective test, stressed the requirement of actual awareness, and found that *in casu* it had not been established.

837. *BGH 21.9.2000*, TranspR 2001.29; *OLG Köln 27.6.1995*, TranspR 1996.26; *OLG München 13.12.2001*, TranspR 2004.35; *OLG Frankfurt 28.5.2002*, TranspR 2003.169; *OLG Köln 26.3.2002*, TranspR 2003.111. In Austria see *OGH 29.11.2001*, TranspR 2004.36, (2002) 37 ETL 825. For a decision equating the notion of art. 25 WSC with corresponding concepts in other carriage conventions such as CMR, see *OGH 29.11.2001*, TranspR 2004.36. For a comparable decision in a common law jurisdiction see *Connaught Laboratories v. British Airways* (CA Ont, 2005) ULR 2006.428, 77 OR (3d) 34. *Cf Johnson v. American*, 834 F 2d 721 (9 Cir, 1987).

838. *Johnson v. American*, 834 F 2d 721 (9 Cir, 1987).

839. *Highlands v. BWIA*, 739 F 2d 536, 539 (11 Cir, 1984); applied in *Onyeanusi v. Pan Am*, 952 F 2d 788, 794 (3 Cir, 1992).

840. *Amazon Coffee Co v. TWA*, 18 Avi 17,264 (NY Sup Ct, 1983); *British Airways v. Safi* (1998) 205 RFDA 166 (Quebec) with reference to *Sidhu v. BA* [1997] AC 430*; Asher v. United*, 70 F Supp 2d 614 (D Md, 1999). *OLG Frankfurt 15.9.1999*, TranspR 2000.183.

841. See *Booker v. BWIA*, 32 Avi 16,436 (EDNY, 2007).

actual loss exceeds the relevant limit.[842] Second, the nature of the award is one made under article 22: an award of money to compensate the claimant in respect of a cause of action under articles 17 *ff* and nothing else.[843] In particular, however objectionable the conduct of the carrier or its agents, the rule does not authorise or allow an award of punitive damages.[844]

Awards of punitive damages, as was remarked in 1991, "might well also defeat the goal of making airlines insurable. First, airlines might not be able to obtain such insurance because a number of states have traditionally barred insurance coverage of punitive damages . . . Second, even if the airline industry could obtain such insurance, the cost of a ticket would skyrocket in response to the higher cost of such insurance [and] contribute to the downfall of an airline teetering on the edge of insolvency [and] inhibit innovation in the industry . . . The goal of ensuring a viable airline industry to foster commerce and make international travel more extensive and more accessible would be seriously undermined."[845]

2. ***Intent to cause damage*** is a state of mind which may be found in a person whatever their motives. "A man who, at London airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit."[846] The same is true of the carrier that allows perishable cargo to perish while deviating in order to get a passenger to hospital.[847] If the resulting damage to cargo was probable, when the decision was made, the damage is intentional. That is what counts, as long as it was caused by an act (such as deviation) that was intentional or an omission (care of cargo) during a course of action, article 22.5 applies.[848]

3. ***Recklessness*** is a concept well known to the law and to lawyers. However, in the Conventions it must be read in the context of the sentence and in close collocation with the phrase that follows: "and with knowledge that damage would probably result".[849] Received wisdom is that the current wording does no more than clarify the original wording "wilful misconduct", there being no change of substance intended. Certainly a subjective test of a kind has been inferred in the past even from the original wording of article 25 in some jurisdictions, including Belgium,[850] parts of the US[851] and the UK. This

842. *Consorts Pénègre v. Swissair, Cass Civ 15.4.1986* (1986) 40 RFDA 241. See also *Ass. Rotterdam v. Sabena, TC Brussels 19.4.1969,* (1969) 4 ETL 1174 in which the claimant was not allowed to use WSC art. 25 to recover more than his own declaration of value.

843. *Asher v. United,* 70 F Supp 2d 614 (D Md, 1999).

844. *Re Air Disaster at Lockerbie,* 928 F 2d 1267 (2 Cir, 1991). "The liability limit was believed necessary to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which their insurance rates could be calculated" (pp. 1270–1271). Also to lessen litigation (p. 1271) and to promote uniformity of law between nations (pp. 1273–1274).

845. Pp. 1287–1288.

846. *R v. Moloney* [1985] 1 All ER 1025, 1037 *per* Lord Bridge (HL). See further SB VII(130 *ff*).

847. SB *loc cit*.

848. *Idem* the pilot who does not check available instrumentation data in the course of navigating the aircraft: *Koirala v. Thai Airways,* 126 F 3d 1205 (9 Cir, 1997).

849. See e.g. the discussion in *Cortes v. American,* 177 F 3d 1272, 1284 *ff* (11 Cir, 1999).

850. See *Tondriau v. Air India, Brussels 17.9.1975* (1976) 11 ETL 907.

851. E.g. *Grey v. American,* 227 F 2d 282, 285 (2 Cir, 1955), *cert denied* 350 US 989 (1956), has been applied in e.g. *Westway Metals v. Lan-Chile Airlines,* 18 Avi 18,556 (SDNY, 1984) requiring "a realization of the probability of injury".

is wisdom that should be received with respect but also with caution—like some early statements on the matter.[852] See note 4.2, below.

4. ***Knowledge*** of the fact that "damage will probably result" is wording intended to indicate, more clearly than the original wording of 1929, a subjective awareness[853] of the probability of damage. The awareness at the time of the act or omission is awareness not only that the conduct was risky and wrong (something that the person concerned was not supposed to do) but also awareness that damage (injury to passengers, loss of or damage to baggage or cargo) would probably result.

4.1 *Awareness of wrong.* The leading case in England on the original wording (and which is still referred to) is *Horabin v. BOAC*,[854] in which Barry J said that to be "guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act". The "persistence" may be a series of acts or it may be a single act of persistence. He also said[855] that the same act "may amount on one occasion to mere negligence, and on another to wilful misconduct" and went on to give an illustration of what he meant, which has been much quoted since:

"Two men driving motor cars may both pass traffic lights after they have changed from yellow to red. In both cases there are the same act, the same traffic lights, the same cross-roads and the same motor cars. In the first case the man may have been driving a little too fast. He may not have been keeping a proper look-out, and he may not have seen the lights (although he ought to have seen them) until he was too close to them and was unable to stop, and therefore, crossed the roads when the lights were against him. He was not intending to do anything wrong, to disregard the provisions of the Road Traffic Act or to endanger the lives of anyone using the road, but he was careless in not keeping a proper look-out and in going too fast, and as a result, without intending to do anything wrong, he committed an act which was clearly an act of misconduct. The second driver is in a hurry. He knows all about the lights, and he sees in plenty of time that they are changing from yellow to red, but he says to himself: 'Hardly any traffic comes out of this side road which I am about to cross.

852. English law contains a number of instances of a party being deprived of a legal right or advantage of some kind because he has behaved badly and, mostly, what is bad behaviour depends on actual awareness of its "badness": Clarke ULR 1998.III.351, 361 *ff.* English criminal law does not assist. In *Goldman v. Thai Airways* [1983] 1 WLR 1186 the Court of Appeal rejected an application of the current criminal test of recklessness, as that applies an objective test: *R v. Caldwell* [1982] AC 341 and *R v. Lawrence* [1982] AC 510.

The English emphasis has been said to be out of line with that in at least some other European countries: Kronke, art. 25, para. 25. For the approach taken by the High Court of South Africa see *KLM v. Hamman*, Unif L Rev 2002.924.

853. *Goldman* (above); *Gurtner v. Beaton* [1993] 2 Lloyd's Rep 369, 387 *per* Neill LJ (CA). A subjective rule is applied (to the amended WSC) in other countries. Australia: *SS Pharmaceuticals v. Qantas* [1991] 1 Lloyd's Rep 288. Belgium: *Tondriau v. Air India, Brussels 17.9.75* (1976) 11 ETL 907; *Cass 27.1.1977* (1977) 31 RFDA 193. Canada: *Newell v. Canadian Pacific* (1976) 74 DLR (3d) 574 583–584 (Ont); *Johnson Estate v. Pischke* [1989] 3 WWR 207, 220 (Sask). Germany: *BGH 16.2.1979* (1980) 15 ETL 229, 239–240; *BGH 12.1.1982*, NJW 1982.1218; *OLG Frankfurt 15.10.1991*, TranspR 1993.61; *OLG Stuttgart, 24.2.1993*, TranspR 1995.74, 75. Switzerland: *Baartmanns v. Swiss Air, Trib. Fed. 11.7.1972* (1974) 28 RFDA 75, 78; *Claudio v. Avianca, Trib. Fed. 29.6.1987* (1988) 23 ETL 498.

854. [1952] 2 All ER 1016, 1022. In this case, a Dakota aircraft crashed while on a flight from London to Lagos. It was argued that there was wilful misconduct, within the meaning of art. 25 of the original WSC, in that the company had selected a crew which did not know the route and had failed to provide them with adequate maps. The jury was unable to agree a verdict and, before the issue was resolved, the action was settled.

855. *Horabin v. BOAC* [1952] 2 All ER 1016, 1020 *per* Barry J. The judgment was quoted in Israel in *Olympic v. Manqal/Manzal Qalimi* (Sup Ct Israel 1982) ULR 1984.II.387, 397. It has also been quoted by courts concerned with "wilful misconduct" in cases concerned with other transport conventions, e.g. CMR: *Jones v. Bencher* [1986] 1 Lloyd's Rep 54.

I will go on. I am not going to bother to stop.' He does not expect an accident to happen, but he knows that he is doing something wrong. He knows that he should stop, and he is able to stop, but he does not, and he commits exactly the same act as the other driver. But in that frame of mind no jury would have very much difficulty in coming to the conclusion that he had committed an act of wilful misconduct. Of course, he did not intend to kill anyone or to injure anyone coming out of the side road. He thought that in all probability nobody would be coming out of the side road. None the less, he took a risk which he knew he ought not to take, and in those circumstances he could be rightly found to have committed an act of wilful misconduct."

4.2 *Awareness of consequences*. Ackner J once said of "wilful misconduct" that it "goes far beyond any negligence, even gross or culpable negligence and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted *regardless of the consequences, not caring what the result of his carelessness may be*".[856]

Then with evident approval he referred, as many courts have done, to the judgment in *Horabin* (above), which included this: "To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act *regardless of the consequences, or acts with reckless indifference as to what the results may be*."[857]

Indeed, awareness is still required under the current rule, but awareness of what? The answer now is awareness "that damage would probably result". Opinions such as those just quoted appear to put the emphasis less on the degree of risk actually taken than on the fact that it was taken deliberately, so that there might be wilful misconduct when the resulting damage, although foreseeable, could not be described as probable. Indeed, the judge in *Horabin*[858] also said that "what was actually done matters less than the intention or state of mind of the person who did it". Whether or not in 1952 that was a correct interpretation of the original wording of WSC, that is not true of the current wording of the rule, which requires both deliberate and wrongful risk taking and also awareness of the probability of damage.

4.3 *The degree of awareness* of the circumstances and of what will probably result is infinitely variable but the human mind has a finite capacity for actively processing information. Many court decisions beg the question of how much *actual* awareness is required, but that was the main point before the court in *Nugent*.[859] The claimants represented a passenger killed in a helicopter accident. The defendants, among them the owner of the helicopter, admitted liability under article 17 subject to the limits of article 22. The claimants argued against the limits, however, on the ground that the pilot had been reckless.[860] In particular, they argued that the probability of damage was "within his

856. *Rustenburg Platinum Mines v. SAA* [1977] 1 Lloyd's Rep 564, 569, *per* Ackner J (emphasis added); affirmed [1979] 1 Lloyd's Rep 19 (CA). The American interpretation of English law in *Brinks v. SAA*, 149 F 3d 127 (2 Cir, 1998) was that English law required "*both* a showing beyond what is required to prove negligence or gross negligence *and* a demonstration of subjective intent" (p. 133 emphasis added). This is a mistaken view of English law. However it is agreed on both sides of the Atlantic that wilful misconduct requires something more than (procedural) negligence; e.g. *Nipponkoa Ins Co v. Globeground Services*, 2007 WL 2410292 (ND Ill, 2007); DeMay 73 JALC 131, 237 (2008).

857. *Horabin v. BOAC* [1952] 2 All ER 1016, 1022 (emphasis added). See also note 4.1.

858. P. 1020.

859. *Nugent v. Goss* [2000] 2 Lloyd's Rep 222 (CA).

860. That he had failed to keep his flying skills up to date, failed to acquaint himself with the navigational aids of the helicopter, failed to plan the flight properly, and had flown when he was tired.

knowledge" even if it was not present in his mind at the material time; that, if he had addressed his mind to the matter he would have appreciated, by reason of his knowledge and skill as an experienced pilot, that death or serious injury was probable; and that that was enough for a rule like article 22.5 to apply. In other words, it was argued that actual knowledge could include background knowledge, i.e. the actor pilot's store of knowledge.

That argument was largely accepted by one of the judges, stating[861] that the contrary submission, "that one can isolate what a person is thinking at a particular moment from his fund of knowledge", was artificial. He continued: "A pilot does not escape liability merely because, by reason of, for example, drink or tiredness, he forgets for a moment his training and the general knowledge his experience of flying brings him."[862] However, the other judges did not agree and the argument failed.[863] The claimant's interpretation was described as a "subtle gloss" on the word "knowledge",[864] which was incompatible with the actual wording (of article 25 WSC) and with what had been said about it in previous decisions of the court.

4.4 *Objective evidence of awareness* may well be the only evidence available of the actor's person's state of mind. In the past, courts in the US have been more ready than courts in England to infer a state of mind from the evidence. Otherwise, it was argued, claimants would be "at the mercy of those capable of the most invincible self-deception".[865] The point is perhaps less compelling in England, where there is no jury in such cases and where states of mind, associated for example with fraud, are regularly assessed by the court.[866] Be that as it may, the process of inference is what appeared to distinguish the approach prevalent in the US[867] from the approach taken in England to the rule (in WSC article 25).

4.4.1 *In the US* after 1945, courts, more there than in many other jurisdictions, were willing to infer subjective awareness of risk from objective indications.[868] This becomes apparent from the picture of American liability law at large presented in 1996 by the District of Columbia Court of Appeals in *Saba*.[869]

861. P. 231 *per* Pill LJ. There is some support for the view in *SS Pharmaceuticals v. Qantas* [1991] 1 Lloyd's Rep 288.

862. *Ibid*. He conceded that "obscure" information, "once received but readily forgotten" would not count.

863. They all agreed that the claimants' case failed on the facts.

864. P. 228 *per* Auld LJ.

865. *In Re Air Crash near Cali, Colombia*, 985 F Supp 1106, 1129 (SD Fla, 1997).

866. *Ackerhielm v. De Mare* [1959] AC 789 (PC). An allegation of fraud being a serious matter, words are accepted as meaning not what the reasonable man would have intended by them but what the alleged fraudster appears to have meant. However, the less plausible the meaning advanced the less willing the acceptance, until there comes a point at which belief is beggared and the court rejects his evidence.

867. Also Germany, where the approach is more like that in the US than that in the UK: Koller, art. 25, para. 3.6.

868. A "subtle but immensely significant shift of emphasis", which thus broadened the scope of wilful misconduct: McGilchrist [1977] LMCLQ 539, 540.

869. *Saba v. Air France*, 78 F 3d 664 (DC Cir, 1996). The court, reversing the decision of the court below, accepted the carrier's argument that the court below "ignored the difference between misconduct and *willful* (sic) misconduct", and that what was missing in the case was "any evidence that the [carrier] acted with a conscious awareness that its acts or omissions were wrongful", in respect to damage to the claimant's carpets.

The court first conceded that "from our earliest cases under the Warsaw Convention, we have treated reckless disregard as equivalent to wilful misconduct . . . But we have never been very clear as to what we mean by reckless disregard."[870] It then said that there is "a continuum that runs from simple negligence through gross negligence to intentional misconduct. Recklessness, or reckless disregard, lies between gross negligence and intentional harm. The critical analytical division between the tort that can be made out through presentation of merely objective evidence—without regard to the defendant's state of mind—and one that requires a showing of subjective state of mind cuts recklessness in half. One meaning of recklessness, then, is simply a linear extension of gross negligence, a palpable failure to meet the appropriate standard of care. The second, as we have recognised in other contexts, is a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent. If it were not used as a proxy, it might be all too easy for the wrongdoer to deliberately blind himself to the consequences of his tortious actions." The lesson is that under WSC recklessness had the second meaning.[871] The court then stated the "crucial point" to be that "the actor's intent may be inferred from indirect evidence and the reckless nature of his acts".[872]

An illustration could be found in *Ospina*, where the court restated the question before it to be whether there was knowledge of the probable result or behaviour "*in a manner which implied* a reckless disregard of the probable consequences".[873] Again, in *Cortes*[874] the court said that "establishing knowledge on the part of the actor need not be accomplished by direct evidence; a fact finder is permitted to infer from circumstantial evidence that the actor actually drew the inference that the circumstances posed a substantial risk of harm. Indeed, it is possible to premise this inference on 'the very fact that the risk was obvious' ".[875]

The evidence regarded as sufficient to justify the inference has varied. It may be no more than a single decision or manoeuvre. In the *Cali* case,[876] for example, the court agreed that

870. P. 667 (citations omitted).

871. The *Saba* court then said (pp. 667–668) that, bearing in mind that "a carrier is subject to unlimited liability only if it engages in willful misconduct or its 'equivalent', we think it is clear that we have meant reckless disregard to serve a limited function: providing a proxy for willful misconduct's scienter requirement. Our use of that term therefore should be taken, not as creating a separate, less onerous exception to limited liability, but as an effort to alleviate problems of proof of wilful misconduct".

An overtly subjective rule has been applied in a number of cases in the US over the years, both before *Saba*: e.g. *International Mining v. Aero. Nac. De Colombia*, 380 NYS 2d 405, 408 (NY Sup Ct App Div, 1977); *Maschinenfabrik Kern v. Northwest*, 17 Avi 18,340 at 18,342 (ND Ill, 1983); *Martin v. Pan Am*, 17 Avi 18,352 at 18,356 (DC Col, 1983); and since, e.g. *Shah v. Pan Am*, 148 F 3d 84, 93 (2 Cir, 1998).

872. P. 668, with reference to *In Re Korean Air Lines Disaster*, 704 F Supp 1135, 1136 (DDC, 1988). See also *Ospina v. TWA*, 24 Avi 17,109 at 17,110 (2 Cir, 1992) and *Cortes v. American*, 177 F 3d 1272, 1291 (11 Cir, 1999).

A similar approach has been taken in Germany; see, e.g. *BGH 16.2.1979*, BGH NJW.1979.2474.

873. *Ospina v. TWA*, 24 Avi 17,109 at 17,110 (2 Cir, 1992): emphasis added.

874. *Cortes v. American*, 177 F 3d 1272, 1291 (11 Cir, 1999).

875. P. 1291 with reference to the decision of the Supreme Court in (a non-aviation case) *Farmer v. Brennan*, 511 US 825, 842 (1994). *Cortes* was applied in *Husain v. Olympic*, 116 F Supp 2d 1121, 1138 (ND Cal, 2000) leading to a finding that a stewardess who refused to help an asthmatic passenger (who died as a result) to a seat away from the smoking section of the aircraft was guilty of wilful misconduct; the decision was affirmed: 316 F 3d 829 (9 Cir, 2002); Cornett 68 JALC 163 (2003).

876. *In Re Air Crash near Cali, Colombia*, 985 F Supp 1106, 1127 *ff* (SD Fla, 1997). The court kept the issue of wilful misconduct from the jury "because no reasonable jury could find that the acts of the pilots . . . amounted to anything less than wilful misconduct" (p. 1109). See discussion of this case by Alimonti (1998) 64 J AL & Com 29, 71 *ff*.

a subjective state of mind could be established by objective circumstantial evidence[877] and inferred it in this case from the fact that "the danger of likely harm was plain and obvious".[878] The pilot in that case continued a descent in rugged mountainous terrain when he was very much aware that he did not know exactly where he was. In other cases the inference may "be based upon the cumulative effect of numerous departures from required standards",[879] such as failure in whatever system was in place for preventing theft.[880]

4.4.2 *In England* there have been signs of a shift in the direction taken by courts in the US. Perhaps the first sign was to be seen in connection with motoring offences.[881] So perhaps it is no surprise that more recently, in the WSC case *Nugent*,[882] the Court of Appeal agreed that "inferring knowledge" that damage would probably result "is different from imputing it",[883] which would be appropriate only if the test were objective; and that the "greater the obviousness of the risk the more likely the tribunal is to infer recklessness and that, the defendant, in so doing, knew that he would probably cause damage. As a matter of proof the two will often stand together".[884]

4.5 *Cargo neglect*, to which a rule such as MC article 22.5 might well apply, is typified by a case reported in 1991, *SS Pharmaceuticals v. Qantas*,[885] in which cargo was exposed to the elements. The agents and employees of the carrier "observed the marks on the cargo which indicated that it should be stored in a dry environment, observed the poor state of the plastic wrapping later reported in Tokyo, observed that it was raining, and that a typical Sydney summer thunderstorm was likely, and left the cargo in the open without taking the steps that they knew would be essential to protect that cargo if it should rain heavily." From this the New South Wales court inferred that "such servants and agents *must also have known* that such 'deplorably bad handling' of the cargo would probably result in damage to the cargo".[886]

877. Pp. 1125–1126.

878. P. 1129.

879. *Reiner v. Alitalia*, 9 Avi Cas 18,228 (SC NY, 1966). The same is true of *faute lourde* in France under CMR: *Paris 25.2.1954* (1954) 8 RFDA 45; Gouilloud B.T. 1985.337, citing *Cass 29.1.1985*, B.T. 1985.345. See also instances in France: *Bejon v. Pakistan Int Airlines, Toulouse 7.7.1998* (1998) 208 RFDA 307; and Germany: *OLG Frankfurt 15.10.1991*, TranspR 1993.61, 63.

880. *BGH 21.9.2000*. TranspR 2001.29, 33 with reference *inter alia* to CMR cases.

881. *R v. Reid* [1992] 3 All ER 673, 675 (HL).

882. *Nugent v. Goss* [2000] 2 Lloyd's Rep 222, 226 (CA).

883. P. 230 *per* Pill LJ.

884. P. 227 *per* Auld LJ who gave as an example the view of the majority of the court in *SS Pharmaceuticals v. Qantas* [1991] 1 Lloyd's Rep 288 (CA NSW) that a combination of "deplorably bad handling" and a failure to call evidence entitled the court to infer both recklessness and the probability of damage.

885. [1991] 1 Lloyd's Rep 288 (CA NSW). See discussion of this decision by Auld LJ in *Nugent v. Goss* [2000] 2 Lloyd's Rep 222, 227 (CA). For more illustrations from courts' decisions, see Kronke, art. 25, paras 33 *ff*; and *Air France v. Winterthur, Lyon 17.12.1999* 2000 BTL 29.

886. P. 293 *per* the majority (emphasis added). See also *Lg Hamburg 3.12.92*, TranspR 1995.76: the court applied art. 25 to the carrier who left photo equipment in cardboard boxes on airport tarmac at Warsaw, where it got soaked by rain, even though it was summer and the consignee was late collecting it (carrier must allow for that). *Idem* concerning heat sensitive goods which the carrier had been expressly instructed to (but failed to) keep at a low temperature: *Air France v. Winterthur, Lyon 17.12.1999*, BTL 2000.29; *Generali Transports v. Air France, TC Bobigny 16.3.2000* BTL 2000.394; *Unat v. Air France, Cass 16.5.1999* (2000) 35 ETL 141; *Paris 20.9.2000*, BTL 2000.838; *Winterthur v. Jules Roy, TC Lyon 16.3.2001*, 218 RFDA 226 (2001). *Idem* vaccine which was delayed and not kept cool enough: *Connaught Laboratories v. British Airways* (CA Ont, 2005) ULR 2006.428, 77 OR (3d) 34.

Similar inferences have been drawn when cargo was exposed to theft: when, for example, a carrier had been made well aware of the high value of goods but took no steps at all to protect them from thieves.[887] Moreover, in *Swiss Bank v. Air Canada*[888] the Canadian Federal Court considered the argument that "when the theft has taken place as a result of participation by one or several persons unknown acting within the scope of their employment the intention to cause damage or knowledge that damage would probably result cannot be proved because it is impossible to determine *whose* intentions must be examined". It rejected the argument because "*any* thief or thieves must be aware that damage would probably result even though that was not their specific intent when they stole the package in question".[889]

5. ***Probable results*** are results which are likely to happen.[890] Hence it is not enough that the damage should be "plainly foreseeable"[891] because, in English common law at least, foreseeability (even plain foreseeability) connotes a lesser degree of likelihood than probability.[892] For example, if the carrier has what proves to be an unsafe system for handling cargo, damage to cargo is (reasonably) foreseeable but it is not probable (or likely) and that was why WSC article 25 does did not apply in one case.[893] However, if there is awareness that some damage is probable, the claimant does not have to establish awareness of the degree of damage that actually occurred.[894]

6. ***Result*** is a word that indicates a causal connection of some kind between the (mis)conduct and the damage. First the court must determine whether the conduct was the "but for" cause of the loss, damage or delay.[895] That is clear law. It is also clear that a "but

887. *British Airways v. UAP, Cass 9.7.1991*, (1992) 27 ETL 279. See also *Air France v. Uni Europe, Paris 15.11.2000*, BTL 2000.877; *Finnair v. Winterthur*, Unif L R 2003.776 (Swiss Fed Ct). *Cf Mezri v. Air France, TC Bobigny 20.10.2000* (2001) 217 RFDA 138.

888. (1982) 129 DLR (3d) 85 (Fed Ct); *affirmed* (1987) 44 DLR (4th) 680 (FCA). As regards (ineffective) carrier internal investigation of likely theft by its employee, held to be in breach of art. 25, see also *Ericsson v. KLM* [2006] 1 HKLR 584, (2006) 41 ETL 699.

889. Pp. 104–105 (emphasis added), with reference to *Air France v. Moinot, Cass Civ 16.4.1975* (1976) 30 RFDA 105, 107. The court also pointed out (*loc cit*) that to "interpret the article otherwise would have the effect of rendering it virtually meaningless".

Generally, the objective test applied in France has led more easily to the application of WSC art. 25. See *Le Languedoc v. Sté Hernu-Peron, Paris 17.11.1975* (1976) 30 RFDA 109; *Helvétia v. Air France, Paris 3.2.2000*, BTL 2000.410; *Helvétia v. Finnair, Paris 22.3.2000*, BTL 2000.411. Likewise when express cargo is delayed: *DHL v. Amagansett, Cass Com 7.7.1998*, BTL 1998.843; (1999) ETL 850. In Germany a court has held that, if a sealed parcel turns out to be empty on delivery, there is a *prima facie* case of art. 25: *Lg Darmstadt 24.9.2002*, TranspR 2003.114.

890. *Goldman v. Thai Airways* [1983] 3 All ER 693, 700, *per* Eveleigh LJ (CA). McQueen [1991] LMCLQ 165. *D'Alessandro v. American Airlines*, 139 F Supp 2d 305 (EDNY, 2001).

891. This was the test applied under the original WSC in *Tarar v. PIA*, 17 Avi 18,618, 18,624 (SD Tex, 1982).

892. *Koufos v. Czarnikow* [1969] 1 AC 350.

893. *Rolls Royce v. HVD* [2000] 1 Lloyd's Rep 653.

894. *Husain v. Olympic*, 116 F Supp 2d 1121, 1140 (ND Cal, 2000): awareness that *some* injury to an asthmatic passenger, who in fact died, was probable was sufficient; decision affirmed: 316 F 3d 829 (9 Cir, 2002); Cornett 68 JALC 163 (2003).

895. *In Re Air Crash near Cali, Colombia*, 985 F Supp 1106, 1147 (SD Fla, 1997). Albeit in circumstances that included a defective FMC (flight management computer) on board and ATC at Cali which, if up to the standards of ATC in North America, might have warned the pilots about their position. Pilots flying into such places had been expressly instructed not to rely on local ATC.

for" cause alone is not sufficient.[896] However, what else (what further causal connection) is required is far from clear.[897]

7. ***Scope of employment***, referred to in the final proviso of article 22.5, is also relevant to article 30.1, below. Related points of vicarious liability were the subject of divergence between national laws in 1929 and have been ever since. Feeling unable to resolve the differences, the drafters deliberately left the matter to national law.[898]

In New York, for example, an employee is not acting within the scope of employment unless "he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising control, directly or indirectly, over the employee's activities".[899] In other jurisdictions the rule may well be different. In particular, in English law the element of actual or potential control is no longer required.[900]

The underlying idea in most countries comes from tort law: that employers should not be responsible for what their employees do "off the job" or "out of office hours", i.e. outside the scope of the employment. However, when the "victim" is not the anonymous unknown person of classical tort law, such as the chance victim of negligence, but a person with whom the employer has contracted to perform the service of carriage by air, the parameters are different. The central question becomes rather which of the two (carrier or passenger victim) should bear the risk of the employees intent or recklessness, notably but not only, of the employee's dishonesty. Not surprisingly, courts have tended to decide that it should be the carrier, who brought what turns out to be an unsatisfactory or dishonest employee into the situation in the first place rather than the customer who did not and could do nothing to monitor the carrier's employees, who bears the risk and ultimate cost.

Theft out of hours is a common case in point. General tort law is likely to favour the employer. However, the tendency to allocate risk to the air carrier offers an explanation of

896. *Shah v. Pan Am*, 148 F 3d 84, 95, 96 (2 Cir, 1998), deciding that false statements about airport security at Karachi did not cause damage resulting from a hijacking there.

897. The answer may vary according to whether the case is governed by the original wording of art. 25 or by the HP 1955, wording which is also found in MC. The original version of art. 25, applicable in the US until 1999, simply specified that art. 25 applies when the "damage was caused by wilful misconduct".

Decisions were largely influenced by national law. E.g. *In Re Air Crash near Cali, Colombia*, 985 F Supp 1106, 1147 *ff* (SD Fla, 1997).

It is far from clear that this would be the rule applied to a WSC case in other jurisdictions. In Germany, for example, art. 252, BGB provides that compensation includes lost profits, if, in the ordinary course of things or in the particular circumstances (especially any preparations or arrangements), it might be expected that such a profit would probably be made (*mit Wahrscheinlichkeit erwartet werden konnte*). See Markesinis, Lorenz and Dannemann, *The German Law of Obligations*, Vol. 1 (1997) pp. 635 *ff*.

In France recoverable damage must be "direct", whether based in contract or delict. As regards breach of contract, art. 1150 c.civ. requires damage for which a debtor is liable to be foreseeable, however, that does not apply to *dol*, which includes *faute lourde*: see Nicholas, *The French Law of Contract* 2nd edn, (1992) pp. 228 *ff*. Generally, see Treitel, *Remedies for Breach of Contract* (1988), paras 136 *ff*.

898. *Brinks v. SAA*, 93 F 3d 1022, 1028 (2 Cir, 1996).

899. *Rymanowski v. Pan Am*, 416 NYS 2d 1018, 1020 (NY, 1979), quoting *Lundberg v. State of New York*, 306 NYS 2d 947, 950 (1969), which concerned a tort action in respect of negligent driving. Also in this sense, in the UK: *Rustenburg Platinum Mines v. SAA* [1977] 1 Lloyd's Rep 564, 574, *per* Ackner J; affirmed [1979] 1 Lloyd's Rep 19, 23 *per* Lord Denning MR (CA), with reference to cases concerning theft by employees of a cleaning company and a firm of solicitors.

900. *Winfield & Jolowicz on Tort* 15th ed (W.V.H. Rogers, 1998), pp. 696 *ff*. On "course of employment" in English law see *Markesinis and Deakin's Tort Law* (6th edn, Oxford 2007) 6.4.3.

decisions concerning theft of cargo or baggage which have held the carrier liable. Indeed courts have sometimes ruled that a carrier is liable for theft by its employees, without any enquiry by the court whether the theft occurred during working hours or not.[901] On this point, it should also be said, these decisions appeared to disregard the clear wording of the Convention provision.[902]

The relevant rule of English law, which an English court is now likely to apply, is that an employer is "liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them".[903]

Article 22.6—[Expenses of Litigation]

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

[Article 22 continued]

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Comment

In the UK, courts usually exercise a discretion in favour of awarding such costs.[904] The last sentence of MC article 22.6 encourages provisional payments, a possibility not found in WSC. Carriers' advisers have been sceptical,[905] suggesting that claimants will be

901. E.g. *Swiss Bank v. Air Canada* (1982) 129 DLR (3d) 85, 106 *ff*; *affirmed* (1987) 44 DLR (4th) 680 (FCA).

902. E.g. *Cie Saint-Paul Fire and Marine v. Cie Air France, Cass Com 22.7.1986* (1986) 40 RFDA 428. In contrast, strike action by employees is something which employers can do less to prevent than theft. For a variety of reasons, courts tend to find that acts by employees on strike are outside the scope of their employment. E.g. *OLG Stuttgart, 24.2.1993*, TranspR 1995.74, concerning wrist-watches stolen during a token strike of over 2 hours in the middle of the night, which took the management by surprise.

903. *Lister v. Hesley Hall* [2001] UKHL 22; [2002] 1 AC 215, [15] *per* Lord Steyn; Hopkins [2001] CLJ 458. See also *Dubai Aluminium v. Salaam* [2002] UKHL 48; [2003] 2 AC 366. For futher developments see McBride [2003] CLJ 255. Generally see *Markesinis and Deakin's Tort Law* (6th edn Oxford 2007) pp. 690 *ff*.

904. See *McGregor on Damages* (2009) para. 17–003 *ff*. Art. 22.4 was applied in the Commercial Court in *GKN Westland v. Korean Air* [2003] EWHC 1120 (Comm); [2003] 2 Lloyd's Rep 629.

905. See Whalen, 25 Air & Space Law 12, 19 (2000). *Cf* Bin Cheng, 49 ZLW 484, 495 *ff* (2000).

advised not to institute suit for six months but to wait for an offer from the carrier, thus compelling the carrier to make an offer without discovery about the claimant's financial situation. The carriers' only source of information, it is said, will be the claimant's (legal) representative, but the carrier has little incentive to pursue that source lest the cost mount up.

Article 23—Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1,500,000 monetary units per passenger in judicial proceedings in their territories; 62,500 monetary units per passenger with respect to paragraph 1 of Article 22; 15,000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

[Article 22 continued]

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial

proceedings, be made according to the gold value of such currencies at the date of the judgment.

6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2(b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned.

Comment

In the UK, SDRs were substituted for francs by the Carriage by Air and Road Act 1979, s. 4(1), which came into force on 1 December 1997.[906] Calculation is a matter of obvious importance and the rules necessary for this purpose are set out in MC article 23 (WSC article 22.5 and article 22.6).

Article 24—Review of Limits[907]

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five year intervals, the first such review to take place at the end of the fifth years following the date of entry into force of this Convention . . . by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates

906. SI 1997 No 2565.

907. This has become known as the "escalator clause". See Bin Cheng, ZLW 2000.287, 300 *ff*. and (2004) 53 ICLQ 832, 853 *ff*. It is uncertain who is to operate the clause. Although MC art. 53(5) identifies the Depositary as ICAO the *travaux* are ambiguous on the question of which part of ICAO is to act: Bin Cheng (2004) p. 855, who also points to an ambiguity in art. 24.2.

of increase or decrease of the Consumer Prices indices of the States whose currencies comprise the Special Drawing Rate mentioned in paragraph 1 of Article 23.
2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.
3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25—Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26—Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability(1) or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 23

1. Any provision tending to relieve the carrier of liability(1) or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.
2. Paragraph 1 of this Article shall not apply(2) to provisions governing loss or damage resulting from the inherent defect, quality or vice(3) of the cargo carried.

Comment

This provision, in the legal language of the last century, makes the Convention "paramount". In 1929, when WSC was first agreed, to surrender freedom of contract "was an important concession on the part of the carriers, which made sense only in the context of the entire set of rules by which their conduct was to be regulated".[908] That concession was enshrined by what is now MC article 26 as a minimum liability rule.

908. *Sidhu v. BA* [1997] AC 430, 446 *per* Lord Hope.

Notes to article 26

1. ***Any provision tending to relieve the carrier of liability*** is an expression giving rise to discussion on at least two points.

1.1 *Tending to relieve*, it has been contended,[909] suggests something occurring at the time of contract, with the corollary that an agreement having that effect after the event is not invalidated. This, of course, means that these provisions do not inhibit the settlement or compromise of claims.

1.2 *Provisions* relieving the carrier of liability are not defined by the Conventions. In the UK a court is likely to read it as meaning any provision having the effect of excepting or excluding Convention liability which, but for that provision, would be imposed on the carrier.[910] Such is a provision excluding the carrier's liability for valuables in checked luggage,[911] as well as a provision shifting the burden of proof in a way that favours the carrier[912]; or requiring notice of damage as a condition precedent to a claim within a period less than the limitation period (of two years) established by MC article 35 (WSC article 29).[913] Moreover, the carrier cannot rely on a declaration of value by the consignor the application of which would bring the carrier's liability below that of the Convention.[914]

The rule is confined to liability "laid down in this Convention". Therefore it does not apply to an exception or exclusion of liability on matters not directly regulated by MC (or WSC) but remitted to (and "laid down" by) national law, such as damages[915] or liability for errors in making out the AWB.[916]

2. ***The application of the exclusions*** is not automatic. It is subject to the normal rules of national law about the incorporation of exclusions into contracts, such as sufficient notice to the consignor.[917]

3. ***Inherent defect, quality or vice***, referred to in WSC article 23.2, a defence common in contracts of carriage generally and still provided for as a defence in respect of damage to cargo under MC article 18.2(a), was understood differently by the different national delegations to the conferences preceding the 1929 Convention.[918] Hence its meaning under the air Conventions is determined by national law, however, some degree of uniformity has developed: not least because it has been interpreted to mean what it does

909. Giemulla, art. 23, para. 2.

910. See *Smith v. Bush* [1991] 1 AC 831.

911. Such as jewellery: *Cohen v. Varig*, 405 NYS 2d 44 (1978). See also *Montazami v. Kuwait Airways*, 20 Avi 17,1943 (EDNY, 1987).

912. *BGH 9.10.1964*, NJW 1964.2348, 2349.

913. *Sheldon v. Pan Am*, 74 NYS 2d 267 (NY Sup Ct, 1947), affirming 74 NYS 2d 578; *Nissan v. Fritz*, 210 F 3d 1099, 1106 (9 Cir, 2000); *BGH 22.4.1982*, NJW 1983.516, 517, nullifying the 120-day notice period under ADSp.

914. *BRI v. Air Canada*, 725 F Supp 133, 138–139 (EDNY, 1989).

915. E.g. consequential loss: *Cohen v. Varig*, 405 NYS 2d 44 (1978).

916. *OLG Frankfurt 20.4.1989*, VersR 1990.1031 (wrong address).

917. *Paris 31.3.1995*, BTL.1995.377. For English law see Treitel 7–004 *ff.*

918. *A-G of Canada v. Flying Tiger Line* (1987) 61 OR (2d) 673, 679. *Cf* the view still held in France that inherent nature and inherent vice mean the same thing: De Juglart, para. 2791; see Clarke, CMR, para. 89a.

in other transport contexts. For example, *Albacora*,[919] a leading English shipping case, has been applied to carriage by air.[920] Whether cargo suffers from inherent defect, quality or vice depends not only on the cargo itself, but also what it can reasonably be expected to withstand during carriage.

Live animals do not suffer from "inherent . . . quality" simply because they are alive and thus difficult passengers.[921] Carriers, aware that they have agreed to carry animals, can be expected to take measures to deal with all but the unexpected. If goods need special care, such as temperature control or protection from bruising or vibration, but the carrier has not been made aware of this, the goods which suffer in consequence do so as a result of inherent defect, quality or vice.[922] In *Albacora* Lord Reid said that, if the contract of carriage "had required refrigeration there would have been no inherent vice. But as it did not there was inherent vice because the goods could not stand the treatment which the contract authorized or required."[923] That was also "the case of flowers which froze during carriage because the aircraft was not heated and there was no reason for the shipper to believe it would be heated".[924] Moreover, there was a "defect", for example, in "the case of a machine which fell apart during the flight because it was so constructed as to be unable to stand the *normal* incidents of flight".[925] See also article 18, note 12.

The packing, in English law, is part of the "cargo" so that cargo packed in such a way that it will not survive the expected transit suffers from inherent vice.[926] However, in Germany the view has been taken that questions of the (in)sufficiency of packing should be decided on a different basis.[927] Indeed it is possible that English courts will take a similar view (not regard insufficient packing as an inherent vice) today because MC article 18.2(b) provides separately for the defence of defective packing.[928]

Article 27—Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

919. *Albacora v. Westcott & Laurance* [1966] 2 Lloyd's Rep 53 (HL).

920. *A-G of Canada v. Flying Tiger Line* (1987) 61 OR (2d) 673, 677. The court also referred (p. 678) to *Scrutton on Charterparties and Bills of Lading*, 19th edn (London 1984).

921. *A-G of Canada v. Flying Tiger Line* (1987) 61 OR (2d) 673. *Idem* concerning live *poussins*, unless the carrier could prove (no) that the ones which died were ill: *Assureurs Divers v. Alitalia, TC Paris 4.11.1982*, (1983) 37 RFDA 153.

922. *Gan v. Venezolana, Cass Com 28.11.1997*, BTL 1998.63; (1998) 33 ETL 574. *Idem* Kronke, art. 23, para. 24.

923. *Albacora* (above) p. 59.

924. *A-G of Canada v. Flying Tiger Line* (1987) 61 OR (2d) 673, 677. E.g. also deep frozen shrimps: *Paris 31.3.1995*, BTL.1995.377.

925. *Flying Tiger* (above) *loc cit* (italics added).

926. *LNWR v. Hudson* [1920] AC 324, 333 *per* Lord Dunedin.

927. Koller, art. 23, para. 2.

928. See MC, art. 18.2(b); HR and HVR, art. IV rule 2(n); CMR, art. 17.4(b).

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention

Comment

In no sense are international carriers by air "common carriers".[929] However, states, for example large states, in which air transportation is essential to everyday life, are free to provide otherwise for internal flights. The UK does not do so. Moreover, although the air Conventions are exclusive within their domain, they do not create comprehensive regimes.[930] Carriers are free to supplement the rules of the Conventions with contract terms.[931] In practice there is widespread use of terms and regulations drafted by IATA.

Article 28—Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29—Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages,(1) however founded,(2) whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 24

1. In the carriage of passengers and baggage, any action for damages,(1) however founded,(2) can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
2. In the carriage of cargo, any action for damages,(1) however founded,(2) whether under this Convention or in contract or tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their

929. For this common law concept see *Palmer on Bailment* (3rd edn, London 2009) 16–016 *ff.*
930. See Part 1, Chapter 2, 2.2.
931. *Cf* Koller, art. 33, para. 1.

respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

Comment

WSC did not purport to deal with all matters relating to contracts of carriage by air but was exclusive on what it did cover. The same is true of MC. In *Sidhu*,[932] a leading case on the point, Lord Hope, with whom all other members of the House of Lords concurred, said of WSC that it "is clear from the content and structure of the Convention that it is a partial harmonisation only of the rules relating to international carriage by air". However, he referred to the words "certain rules" in the title of the Convention, which are also found in MC, and continued: "I do not find in that phrase an indication that, in regard to the issues with which the Convention does purport to deal, its provisions were intended to be other than comprehensive."[933] Above all a claimant cannot evade the liability limits of by bringing an action in tort. Thus, Lord Hope then referred to the compromise central to the regime: the "carrier surrenders his freedom to exclude or to limit his liability. However, the passenger or other party to the contract is restricted in the claims which he can bring in an action of damages by the conditions and limits set out in the Convention. The idea that an action of damages may be brought by a passenger against the carrier outside the Convention in the cases covered . . . seems to be entirely contrary to the system."[934] Other cases, of course, can be made subject to the carrier's exclusions and limitations.[935]

Notes to article 29

1. ***Actions for damages*** are the usual means of redress but remedies other than damages, if available in national law, might be awarded to claimants successful under the Conventions. For example, the Frankfurt court[936] once ordered price reduction on the assumption that the action was not an "action for damages".

2. ***Action founded outside*** WSC has not been allowed and the same is likely to be true in respect of MC. In *Sidhu*[937] the House of Lords held that resort could not be had to national law on the liability of air carriers, even when the case fell outside the liability provisions of WSC (articles 17 to 19). *Sidhu* concerned the invasion of Kuwait by Iraq and a flight that was detained there. A passenger, who suffered personal injury arising out of detention in the terminal at Kuwait but for which no action lay under article 17, was

932. *Sidhu v. British Airways plc* [1997] AC 430, 443 *ff*. This part of the judgment was quoted with approval in Quebec in *British Airways v. Safi* (1998) 52 RFDA 166, 170. See also *Fellowes v. Clyde Helicopters* [1997] 1 All ER 775, 791 *per* Lord Hope (HL) and Chapter 2 (above), 2.2.

933. P. 444. US in this sense *El Al v. Tseng*, 525 US 155, 142 L Ed 2d 576 (1999). A similar conclusion has been reached in other countries, such as France: *Nuyttens v. Air France, Paris 3.12.1992* (1993) 47 RFDA 107.

934. P. 447.

935. *Abrahamson v. JAL*, 739 F 2d 130 (3 Cir, 1984), *cert denied* 470 US 1059 (1985).

936. *Ag Frankfurt 28.6.1995*, TranspR 1996.347; noted critically by Leffers (1997) 22 A & SL 312. The assumption was that the court could apply national law on contracts for work and services: BGB, arts 631 *ff*. As this is a "no-fault" liability, the court argued that, being greater than that of WSC, it was not incompatible with WSC.

937. *Sidhu v. British Airways* [1997] AC 430.

refused an action against the air carrier in respect of that injury at common law.[938] Lord Hope, with whom all other members of the House concurred, concluded:

"I believe that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law."[939]

He also referred to article 22 which, "is important, because it limits the liability of the carrier . . . . This has obvious implications for insurance by the carrier and for the cost of his undertaking as a whole . . . The effect of these rules would, I think, be severely distorted if they could not be applied generally to all cases in which a claim is made against the carrier."[940]

In the US, the issue has given rise to more difficulty and more litigation. There too it has been held that WSC was intended to be an "entire liability scheme" which, when a case is within its general scope, rules out alternative causes of action in state law.[941] WSC will pre-empt state law causes of action "when the subject matter demands uniformity vital to national interests such that allowing state regulation 'would create potential frustration of national purposes' ".[942] In 1999, in *Tseng*,[943] Justice Ginsburg, delivering the opinion of the US Supreme Court, pointed out that recourse to local law "would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster".[944] In that case the claimant suffered emotional trauma following a body search as part of pre-boarding security procedures. It being agreed that this did not amount to an "accident" compensable under article 17 of WSC, the Appeals Court held[945] that the claimant could pursue actions for false imprisonment in the courts of New York.

938. P. 437 *per* Lord Hope.

939. P. 453 *per* Lord Hope. See also in this sense *Herd v. Clyde Helicopters* [1997] AC 534. Lord Hope also found support in the text of the Convention. He pointed out (pp. 444–445) that "article 1(1) states that the Convention applies to 'all international carriage of persons, baggage or cargo performed by aircraft for reward' ". Moreover, the relevant chapter heading "expresses its subject matter in the words 'Liability of the Carrier'. In contrast to the title to the Convention itself, which uses the expression 'certain rules', we find here a phrase which is unqualified. My understanding of the purpose of this chapter therefore . . . is that it is designed to set out all the rules relating to the liability of the carrier which are to be applicable to all international carriage of persons, baggage or cargo by air to which the Convention applies." *Sed quaere*.

940. P. 446.

941. *Velasquez v. Avianca*, 23 Avi 17,153 (SD Fla, 1990); *Re Air Disaster at Lockerbie*, 928 F 2d 1267, 1280 (2 Cir, 1991); *Shah v. Pan Am*, 148 F 3d 84, 97–98 (2 Cir, 1998); *Waxman v. CIS Mexicana*, 13 F Supp 2d 508, 511 (SDNY, 1998). Germany *idem*: *BGH 28.11.1978*, NJW 1979.496. *Cf*, however, the view of the American cases on the point expressed in *Sidhu* pp. 451–452. See, e.g. *Abramson v. JAL*, 18 Avi 18,064 (3 Cir, 1984): the injury which occurred during the carriage by air was not an "accident" and thus gave rise to no liability under WSC. Whereas this would have left the carrier without liability in England, the court held that the passenger could still seek a tort based remedy in state law. However, in *Adler v. Malev*, 23 Avi 18,157 (SDNY, 1992) a passenger unable to recover for "psychic injury" resulting from an accident (hijacking) during air carriage was not permitted to bring suit in that regard under state law.

942. *Re Air Disaster at Lockerbie*, 928 F 2d 1267, 1275 (2 Cir, 1991), quoting *San Diego v. Garmon*, 359 US 236, 244 (1959).

943. *El Al v. Tseng*, 525 US 155, 142 L Ed 2d 576 (1999).

944. P. 576.

945. 122 F 3d 99, 104 (2 Cir, 1997): "local law is precluded only where the incident is 'covered' by art. 17, meaning where there has been an accident".

The Supreme Court reversed. It found WSC article 24 ambiguous; however, the "cardinal purpose" of the Convention being "to achieve uniformity of rules governing claims arising from international air transportation" and the "comprehensive scheme of liability rules" being those in articles 17 *ff*, the Court preferred the contention of the appellant carrier which supported uniformity,[946] avoided anomalies[947] and "artful pleading".[948]

2.1 *Actions founded outside but subject to Convention limits.* There is force in the view that, as article 24 WSC (like MC article 29) refers to "any action for damages, *however founded*",[949] it "recognises the continued existence of causes of action not founded" on WSC but none the less subjects them to the conditions and limits set out in the Convention.[950] The position is the same when the claim concerns not passengers but cargo.[951] A claim within the general scope of WSC or MC cannot be "improved" by basing it, for example, in the law of bailment.[952] However, as regards cargo, there are some instances of action based outside WSC but none the less allowed to proceed subject to the conditions and limits set out in that Convention.[953]

2.2 *Non-performance.* If an air carrier has contracted transportation within the general scope of the applicable Convention but altogether fails to commence performance, that carrier is liable under national law.[954] Moreover, if an air carrier has contracted transportation within the general scope of the Conventions, although they may be exclusive of the carrier's liability, it is not so of that of other persons with liability arising out of an incident occurring during transportation, such as a manufacturer or certifying authority.[955]

Article 30—Servants, Agents—Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that

946. P. 590 *per* Justice Ginsburg, delivering the opinion of the Court, with reference (p. 593) *inter alia* to the reasoning of the House of Lords in *Sidhu v. BA* [1997] AC 430. *Cf Donkor v. British Airways*, 62 F Supp 2d 963 (EDNY, 1999). *Tseng* applied, e.g. to loss of baggage in *Cruz v. American Airlines*, 193 F 3d 526, 530 (DC Cir, 1999). Likewise against an award of punitive damages contrary to art. 29 MC: *In re Air Crash at Lexington, Kentucky*, 2008 US Dist LEXIS 11255 (ED Ky, 2008).

947. Whereby, for example, claimants "injured physically in an emergency landing might be subject to the caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside the Convention for potentially unlimited damages": p. 591.

948. The Court referred to pleading by claimants "seeking to opt out of the Convention when local law promised recovery in excess of that prescribed": *ibid*.

949. Italics supplied.

950. *Emery v. Nerine Nurseries* [1997] 3 NZLR 723, 735 (CA). Similarly, in the US the view of some courts, e.g. the Florida courts, is that WSC provides an independent but not exclusive cause of action; but that the "cause of action on which the recovery is based is not limited by the convention. Both state law and the convention may provide a cause of action. Any recovery, no matter how founded, will be subject to the limitations of the Convention": *Rhymes v. Arrow Air*, 636 F Supp 737, 740 (SD Fla, 1986). See further for such cases Alimonti, 64 J Air L & Com 29, 58 *ff*. (1998).

951. *OLG Koln 16.2.1990*, TranspR 1990.199: the claim could not be based on *die schuldhafte Vertragsverletzung*.

952. *Emery v. Nerine Nurseries* [1997] 3 NZLR 723 (CA), noted by Mybergh [1998] LMCLQ 476; *Motorola v. Kuehne & Nagel*, 171 F Supp 2d 799 (ND Ill, 2001).

953. E.g. *Cass 2.4.1996*, (1997) 50 RFDA 448.

954. Giemulla, Introduction, para. 19. *Idem* under CMR: Clarke, CMR, para. 65. National law applies anyway to certain specified questions: notably procedural matters (art. 28.2 WSC or art. 33.4 MC), and calculation of the limitation period (art. 29.2 or art. 35.2 MC).

955. See *Perrett v. Collins*, which is discussed in Chapter 2, 2.3.2.

they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier is entitled to invoke under this Convention.
2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.
3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 25A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier is entitled to invoke under article 22.
2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.
3. In the carriage of passengers and baggage, the provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Comment

These provisions extend the protection afforded to the carrier to servants and agents, which may not be substantial enough to be "worth powder and shot" by claimants. To allow claimants to recover from agents what the regime does not allow them to recover from carriers would subvert the regime. In this respect MC article 30 is substantially the same as WSC article 25A, however, note that MC articles 43 and 44 extend comparable protection from contracting carriers to actual carriers. For WSC the same was achieved by GSC, article V and article VI.

Article 31—Timely Notice of Complaints

1. Receipt by the person entitled to delivery(6) of checked baggage or cargo(2) without complaint(3) is prima facie evidence(4) that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.
2. In the case of damage,(5) the person entitled to delivery(6) must complain(2) to the carrier(7) forthwith(8) after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date(9) on which the baggage or cargo have been placed at his or her disposal.(10)
3. Every complaint must be made in writing(11) and given or dispatched(12) within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie[13] against the carrier, save in the case of fraud on his part.[14]

Article 26

1. Receipt by the person entitled to delivery of baggage[1] or cargo[2] without complaint[3] is prima facie evidence[4] that the same have been delivered in good condition and in accordance with the document of carriage.
2. In the case of damage,[5] the person entitled to delivery[6] must complain[2] to the carrier[7] forthwith[8] after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date[9] on which the baggage or cargo have been placed at his disposal.[10]
3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing[11] dispatched[12] within the times aforesaid.
4. Failing complaint within the times aforesaid, no action shall lie[13] against the carrier, save in the case of fraud on his part.[14]

Comment

MC article 31 is substantially the same as WSC article 26. One necessary adjustment is the reference in the last sentence of article 31.1 to "other means", i.e. electronic documentation which brings the provision into line with article 4.2.

MC article 31 (like WSC article 26.1) states a presumption that delivery has been made in accordance with the contract of carriage, a presumption in favour of the carrier unless a complaint is made. As it is for a claimant, making a complaint, to prove a case against the carrier anyway, it seems to lawyers in common law countries,[956] as well as some others[957] that this presumption adds little or nothing to the underlying legal position. The presumption is stated, however, as it reflected (perhaps reflects still) thinking on contracts of carriage in certain other countries, such as France.[958]

The practical importance of article 31 lies mostly in the time limits for complaints set out in article 31.2. In *Fothergill*,[959] a leading baggage case, Lord Wilberforce stated that the purpose of the provision (at the time article 26 of WSC) "is: (1) to enable the airline to check the nature of the 'damage'; (2) to enable it to make inquiries how and when it occurred; (3) to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers; (4) to enable it to ensure that relevant documents (for example, the baggage checks or . . . the air waybill) are retained until the issue of

956. E.g., concerning the parallel provision of the shipping Convention (art. III r. 6) see Scrutton p. 434.
957. E.g., Germany: *OLG Frankfurt 12.7.1993*, RIW 1994.68. Giemulla, art. 26, para. 4; Kronke, art. 26, para. 4.
958. See e.g. *Generali France v. Air France, TC Bobigny 6.4.2001*, 218 RFDA 238 (2001): failure to give the notice required by art. 26 was effectively fatal to the claim against the carrier. Generally, see further Clarke, CMR, paras 61b *ff*.
959. *Fothergill v. Monarch* [1982] AC 251, 272. This opinion was adopted in *Denby v. Seaboard World*, 575 F Supp 1134, 1140 (EDNY, 1983).

liability is disposed of". In the case of cargo, in particular, it may be difficult to ascertain when it was damaged, and how. It is important therefore that those who might be liable because they were in charge of the cargo at the time it was damaged, notably the carrier, be alerted to the possibility so that enquiries can be instituted before the trail becomes cold and evidence is lost.[960] For this purpose, the person entitled to delivery is required to register a written complaint sufficient to put the carrier on enquiry. If not, "no action shall lie against the carrier" in the absence of fraud: article 31.4.

The times stated cannot be reduced. A claimant is not entitled to rely on a statement by a representative of the carrier that complaint may be filed later than the relevant period—at least when, as is commonplace, the contract provides that agents are not authorised to modify contract terms.[961] However, a claimant is entitled to rely on a clause in the contract of carriage giving the claimant a longer period for registering a complaint.[962] In other respects the rules of complaint set out in article 31 must be strictly observed.

Notes to article 31

1. ***Baggage*** is checked baggage, as is spelled out in MC article 31.1 (but not WSC 26).

2. ***Cargo*** means any cargo for which the carrier is liable under article 18.

3. ***Complaints*** *in writing* are required. A complaint is sometimes referred to as notice (of what there is to complain about) and the notice must be adequate to achieve the purposes behind the requirement of complaint. As regards the purposes of the requirement as a whole, see the remarks of Lord Wilberforce (above). Not all of these must be or can be achieved by the complaint; some things can only be achieved later by "follow-up activity". In particular, the complaint does not have to quantify any damage in monetary terms.[963]

3.1 *The contents of the complaint* must indicate the line of enquiry that is called for in the case. Nonetheless, it may be sufficient that the complaint is in "general terms".[964] If goods arrive damaged, it is enough to stamp the waybill "Received damaged". That indicates the line of inquiry; and it may be difficult to do more as "writing space may be limited on such a document" and "succinct complaints are often a necessity".[965] Moreover, inadvertent errors in the (notice of) complaint, which make it harder than need be to pursue the line of enquiry indicated, do not invalidate it as long as the line to be taken

960. In this sense, e.g. *Connaught Laboratories v. Air Canada* (1979) 94 DLR 3d 586, 593 *per* Robins J (HC Ont); and *OLG Düsseldorf 13.12.1990*, TranspR 1991.106, 108.

961. *Wexler v. Eastern*, 18 Avi 17,155 (DC Super Ct, 1982).

962. E.g. *Cunliffe-Fraser v. Pan Am*, 21 Avi 18,145 (SDNY, 1985).

963. E.g. an incorrect AWB number: *Mystique Creations v. North Star*, 22 Avi 18,418 (NYC Civ Ct, 1990). Kronke, art. 26, para. 9.

964. *Western Digital v. BA* [2000] EWCA Civ 153; [2000] 2 Lloyd's Rep 142, [88] *per* Mance LJ. See also *Denby v. Seaboard World*, 575 F Supp 1134, 1138 (EDNY, 1983); *OLG Nürnberg 9.4.1992*, TranspR 1992.276; *OLG München 10.8.1994*, TranspR 1995.118. For comparable case law under CMR, see Clarke, CMR, paras 61 *ff*.

965. *Schmoldt v. Pan Am*, 767 P 2d 411, 415 (Okl, 1989).

remains clear.[966] However, to indicate the line of enquiry the notice must indicate damage of the *kind* in question if the notice is to assist the claimant in any subsequent action.[967]

Western Digital v. BA[968] concerned cargo part of which had been lost. The complaint informed the carrier that an identified part of the cargo had been delivered at destination "in a *condition* which obliges us to reserve the right to claim".[969] The carrier argued that this was not an adequate complaint because the reference to "condition" was not a reference to "partial loss". The claimant countered that "damage" includes "partial loss"[970] so the same could be said of "condition". This argument was rejected as "specious"[971] *inter alia* by reference to the purpose of the rule. The complaint here was "specifically limited to physical damage to identified items and did not embrace the loss of such items".[972]

3.2 *Two kinds of complaint*. Complaints are provided for by both article 31.1 and article 31.2 but the effect of the two provisions differs. Complaints under article 31.1 prevent the presumption of good delivery (discussed above in the Comment) from arising. Complaints under article 31.2 preserve (but do not establish) the right of action against the carrier.

4. ***Prima facie evidence*** means what (to the common lawyer) it says, that receipt will give rise to a presumption of delivery in the same condition in which it was received by the carrier and in accordance with the document of carriage. This presumption may be rebutted if the claimant establishes contrary evidence sufficient to rebut the presumption.

5. ***The damage complained of***, as a requirement of notice, depends on the purpose of requiring notice: to enable carriers which, as an American court once said, usually "conduct business on an international scale, using a host of different baggage crews and other employees and a variety of changing flight schedules, to investigate damage claims as soon as possible after the events which allegedly caused the damage".[973] The court continued: "If prompt notice were not required, a carrier would often be unable to conduct any detailed investigation into the causes of the alleged damage, in large part because of the inability to identify, weeks or months after the damage has occurred, which employees played a role in processing the baggage or goods in question, or whether there is a possibility that the damage was caused in whole or in part by the negligence of the complaining party." However, detailed investigation of this kind may be expensive and disruptive. To advise the carrier of the *possibility* of damage to goods, for example because their packing is damaged, is apparently not enough, unless it indicates something

966. *Mystique Creations* (above).
967. Kronke, article 26, para. 9.
968. [2000] EWCA Civ 153; [2000] 2 Lloyd's Rep 142 (CA).
969. Emphasis added.
970. *Fothergill v. Monarch* [1981] AC 251.
971. By Mance LJ ([83]) with whom the other members of the court agreed.
972. *Ibid*. *Cf BRI v. Air Canada*, 725 F Supp 133 (EDNY, 1989) in which the court upheld in respect of missing goods a notice that they did not arrive "intact". But a copy of the waybill marked "breakdown" is not informative enough: *Lg München 17.2.1999*, TranspR 2000.183.
973. *Wexler v. Eastern*, 18 Avi 17,155, 17,158 (DC Super Ct, 1982), quoted in *Denby v. Seaboard World*, 575 F Supp 1134, 1142 (EDNY, 1983).

more than a mere possibility of damage and of an associated claim.[974] In contrast, when there is total loss, the likelihood of a claim[975] and the circumstances to be investigated are obvious.

5.1 *Total loss* is not "damage". A typical case is that in which there is no delivery because the cargo has disappeared altogether or been destroyed during carriage.[976] Another is that in which, although there are some remains with some monetary value, the cargo is commercially "lost".[977] On total loss article 31 and article 26 are silent. The inference is that the omission of any reference to loss was intentional[978] and that *total* loss, unlike partial loss according to some courts (see note 5.2), is not "damage" to which the rule applies.[979] Therefore, courts in the US have upheld a contract clause specifying notice, e.g. within 120 days of the issue of the AWB, of total loss. Although a clause like this "may operate to bar recovery", it is not "a limitation of liability within the intendment of the Convention"[980] of the kind prohibited by the Convention. In Europe, however, the view has been that unless there has been a delivery which raises the presumption of good performance, no question of complaint arises and the notice requirement is inapplicable. Even so, that does not sideline the rest of the Convention. Any contract requirement of complaint or notice within less than two years, lack of which purports to bar suit, is an infringement of the limitation rule whereby actions are not "extinguished" unless brought after two years.[981]

5.2 *Partial loss* is also distinguishable from damage. Whether it should be treated differently, so that notice is not required, has given rise to divergent case law. The cases can be divided into three groups.[982]

(i) *Partial loss of the contents of a single piece* of baggage (or of cargo) was the situation before the House of Lords in *Fothergill*.[983] The House decided that this was

974. See Koller, art. 26, para. 12 and *OLG München 30.12.1994*, TranspR 1995.300, 301; *OLG Frankfurt 8.10.1996*, TranspR 1997.287.

975. *BGH 22.4.1982*, NJW 1983.516, 517.

976. Destruction is assimilated to total loss and art. 26 does not apply: *Dalton v. Delta*, 570 F 2d 1244 (5 Cir, 1978), applied in e.g. *Hughes-Gibb v. Flying Tiger Line*, 504 F Supp 1239 (ND Ill, 1981). Koller, art. 26, para. 6.

977. They are lost in the sense that they cannot be used as goods of the kind in question*: Hughes-Gibb v. Flying Tiger Line*, 504 F Supp 1239 (ND Ill, 1981).

978. See *Denby v. Seaboard World*, 575 F Supp 1134, 1138 (EDNY, 1983) and cases cited as regards WSC art. 26.

979. *Helvétia v. Air France, Paris 3.2.2000*, BTL 2000.410.

980. *Butler's Shoe Corp v. Pan Am*, 514 F 2d 1283, 1285 (5 Cir, 1975). See also *Gensplit v. Pan Am*, 581 F Supp 1241 (ED Wis, 1984); *St Paul v. VIASA*, 807 F 2d 1543 (11 Cir, 1987). See also *Denby v. Seaboard World*, 575 F Supp 1134, 1138 (EDNY, 1983) and cases cited.

981. Article 35 (art. 29 WSC).

982. *Cf* Giemulla, art. 26, para. 24.

983. *Fothergill v. Monarch* [1982] AC 251, 272–273 *per* Lord Wilberforce. Also in this sense: *Panzer v. Aerolineas Argentinas*, 19 Avi 18,228 (1986); *Air France v. ASTIR, Athens 19.6.1991*, (1992) RFDA 78. For *travaux* in support of this view, see Giemulla, art. 26, para. 24. The rule was confirmed in England by the Carriage by Air Act 1961, s. 4A (inserted by the Carriage by Air and Road Act 1979, s. 2).

Contra: some decisions of lower courts: *Schwimmer v. Air France*, 384 NYS 2d 658 (1976); *Air Zaire v. Kimo, TC Bruxelles 9.1.1976*, (1977) 31 RFDA 96; *Helvétia v. Alitalia, TC Lyon 6.3.1978* (1979) 33 RFDA 89; *Helvétia v. Air France, TC Toulouse 14.2.1980*, (1981) 35 RFDA 236. However, *cf* also German decisions, notably *BGH 22.4.1982*, NJW 1983.516, that partial loss can be regarded as damage only when it is the result of damage.

"damage" (rather than loss) because all the reasons for prompt notice of damage applied to partial loss of this kind. Explaining the difficulty of interpretation (with regard to article 26 WSC), Lord Diplock said[984] that "both 'damage' and '*avarie*' when looked at in isolation or in a context limited to the other words of the sentences in the English or French language in which they are respectively to be found in article 26 are words that are ambiguous. They are capable of bearing either a narrower meaning confined to physical harm to the subject matter of the damage or *avarie*, and this is the more usual meaning; or they may bear a more extensive meaning, with which *avarie* in particular is used as a term of legal art in connection with carriage by sea, as including also partial loss of the subject matter carried."

Taking a purposive construction to the Convention looked at as a whole, the House reached a decision for a more "extensive" interpretation[985] for reasons stated by Lord Wilberforce. One was that, in the case of loss, "it may be assumed that the carrier is already aware of the occurrence and is able to make the necessary arrangements required to secure proof" and it "is a fact which can be verified at any time without the need for proof, a protest is not necessary". Partial loss is different. On the contrary, "it is vital to establish what is missing as quickly as possible since, as time goes by, the probability of the loss being the result of an event occurring after delivery increases".[986] Moreover, "prompt notification may give the airline an opportunity of recovering the objects lost".[987]

(ii) *Unit loads assembled by the consignor* were treated in the same way in New York in *Cunliffe-Fraser v. Pan Am*,[988] a case concerning "shortage" in containerised goods, and for the same reasons—reinforced by concerns about theft. *Prima facie* the rule in *Fothergill*, to which the court was referred, applied. However, the claimant in New York argued otherwise on the ground that the discrepancy in weight was such that it should have been obvious to the carrier that contents were missing. The court rejected the argument "because of the possibility that the Pan American employees who knew of the shortfall were accomplices in a deception. Moreover, there is no reason to believe that the applicability of [the rule] turns upon a case-by-case determination of such particularized factual circumstances."[989] Semble it makes little difference whether the container holds a single consignment or consolidates the cargo of more than one person, consigned under more than one waybill or ticket. In *Denby*,[990] the court (also in New York) pronounced that the "realities of modern industry" dictate that air carriers "have the earliest possible notice of pilferage from an intact cargo container". The seven-day notice provision "is designed to afford the airlines, as the parties in the best position to prevent theft, an opportunity to undertake the kind of prompt investigation that increases the likelihood of

984. *Fothergill* p. 279. View adopted in *Denby v. Seaboard World*, 575 F Supp 1134, 1139 (EDNY, 1983).
985. Lord Diplock (p. 279); also see Lord Fraser (p. 287), Lord Scarman (p. 295) and Lord Roskill (p. 302).
986. P. 275 *per* Lord Wilberforce.
987. P. 273 *per* Lord Wilberforce.
988. 21 Avi 18,145 (SDNY, 1985). See also *Denby v. Seaboard World*, 575 F Supp 1134, 1140 (EDNY, 1983), *rev'd on other grounds*: 737 F 2d 172 (2 Cir, 1984).
989. P. 18,147, with reference to *Denby.*
990. Above.

locating stolen goods, identifying the responsible individuals, and averting future incidents".[991]

(iii) *Separate units under a single waybill*, however, have been treated differently from partial loss within a single unit in situation (*ii*). When there is partial loss of a *consignment* in the sense of a short number of packages under a single waybill, there the shortage is *visible* on a single count *before* they leave the charge of the carrier. Then the situation is best characterised as one of total loss.[992]

6. ***The person entitled to take delivery*** is the person named in the ticket or the AWB[993] or the agent of that person,[994] provided that the agent is some person other than the carrier: the carrier as agent cannot complain to itself as carrier.[995]

Some appeals courts in Germany, with doctrinal support, have decided that, given the purpose to alert the carrier to the possibility of a claim in respect of damage, it does not matter whether the substance of the complaint comes from the person entitled to delivery or some other person on the spot such as a handling firm acting for the carrier: the purpose of the complaint has been achieved in each case.[996] However, courts in the US have rejected that view, insisting on observance of the formality of written notice "to avoid endless speculation about who knew what and when".[997] The view taken in the US seems to be more widespread.

7. ***The carrier*** or the carrier's agent,[998] must receive the complaint. When damage is apparent on delivery it can reasonably be assumed that the person making delivery on behalf of the carrier is authorised to receive the complaint. Some courts have taken this view in Germany,[999] and also in the US, even when the person in question has been a road carrier carrying out the final feeder service.[1000]

991. P. 1137. See also, p. 1143.

992. P. 1143. Also in this sense: *Siemens v. KLM*, 19 Avi 18,502 (NY City Civ Ct, 1986); *BGH 22.4.1982*, NJW 1983.516; *Lg Stuttgart 21.2.1992*, TranspR 1993.141. Koller, art. 26, para. 7 and cases cited. *Cf Leather's Best v. Aerolineas Argentinas*, 520 NYS 2d 490 (1987) in which only one of three pallets consigned under a single AWB arrived; the court required notice to the carrier because the partial loss was obvious without addressing whether it was or, if so, it was relevant that it was equally obvious to the carrier.

993. *Calberson v. ISA, Cass 9.5.1995*, (1996) 31 ETL 435.

994. E.g. a customs agent: *Air Zaire v. Kimo, TC Bruxelles 9.1.1976*, (1977) 31 RFDA 96; subrogated insurer: *Aetna v. Borair*, 338 NYS 2d 786, 790 (NY City Civ Ct, 1972).

995. *Compaq v. Circle* 2001 SLT 368 (Ct Sess).

996. E.g. *OLG Nürnberg 9.4.1992*, TranspR 1992.276; and *OLG München 30.12.1994*, TranspR 1995.300, with reference to *BGH 14.3.1985*. TranspR 1986.22. See also *OLG Düsseldorf 13.12.1990*, TranspR 1991.106; *OLG Frankfurt 8.10.1996*, TranspR 1997.287. Koller, art. 26, para. 9; Kronke, art. 26, para. 10. More German decisions to that effect are listed by Giemulla, art. 26, para. 34.

997. *Stud v. Trans International*, 727 F 2d 880, 884 (9 Cir, 1984). See also *Amazon Coffee Co v. TWA*, 18 Avi 17,264 (NY, 1983); and *Royal v. Aerolineas Argentinas*, 20 Avi 18,404 (NY Civ Cty Ct, 1987).

998. The person authorised to receive such complaints on behalf of the carrier: *Shah v. Western*, 17 Avi 17,101 (WD Wa, 1982). *OLG München 10.8.1994*, TranspR 1995.118. See further Giemulla, art. 26, para. 10.

999. Koller, art. 26, para. 14. Including a person charged with transhipment of goods: *Lg Stuttgart 21.2.1992*, TranspR 1993.141.

1000. *Pan Am v. CF Airfreight*, 23 Avi 17,189 (SDNY, 1990); the case was seen as one of successive carriers, discussed next as regards successive *air* carriers. The point was accepted as correct in *General Electric v. Harper Robinson*, 24 Avi 17,541 (EDNY, 1993).

When there is more than one actual carrier, i.e. a case of successive carriage, notice to one carrier is regarded as notice to the others.[1001] The "liability of the carriers being joint and several", according to article 36.3, "there is no necessity to provide notice to each and every successive carrier and no requirement in the Convention that such be done".[1002] Moreover, in *Kern* the court added that, given "the relatively short time period within which written notice must be given, it would be unfair, if not impossible, to force the damaged party to discover the 'culprit' as a predicate to giving notice".[1003]

8. ***Forthwith*** is not literally "on arrival", however, the next day may not be soon enough.[1004] Such words have been interpreted in other contexts to mean "as soon as reasonably possible" having due regard to the circumstances of the parties and the need for speed.[1005]

9. ***The days from the date*** are not working days but "calendar days" (MC article 52). The carrier's standard conditions may stipulate that days are "full" calendar days. If so, the day on which a complaint is sent does not count. If questions of this kind are not answered by the terms of the contract of carriage, reference must be made to national law.[1006]

The specified period must be strictly observed.[1007] For example, in *Bennett*[1008] notice of loss given before delivery and the commencement of the specified period, in the belief that the goods had indeed been lost, was not notice of a claim based on delay. It did not satisfy the letter of the rule (WSC article 26). Nor did it satisfy the spirit because it did not alert the carrier to the appropriate response. By the time the carrier received the notice of loss it had found the goods and because, as it seemed to the carrier, it "had cured the loss by the time it received the letter, it was reasonable for [the carrier] to ignore the claim for loss, take no action toward settlement, and fail to investigate whether [it] was at fault"[1009] as regards delay.

10. ***Disposal*** stands in contrast with the "receipt" of cargo which triggers the period in the case of damage to cargo.[1010] Cargo is at the disposal of the person entitled to delivery when that person has been notified that it has arrived and can be collected.[1011]

11. ***Notice in writing separate*** from the document of carriage is a possibility envisaged with the passenger and air ticket in mind. Any written document that serves the purpose

1001. *Connaught Laboratories v. Air Canada* (1979) 94 DLR 3d 586 (Ont); *INA v. Yusen*, 18 Avi 18,271 (SDNY, 1984); *Jallah v. TWA*, 19 Avi 17,804 (D Col, 1985).

1002. *Connaught* (above) p. 592, *per* Robins J concerning the corresponding rule in WSC (art. 30.3). See also *Maschinenfabrik Kern v. Northwest*, 17 Avi 18,340 (ND Ill, 1983).

1003. Above.

1004. See *OLG Frankfurt 12.7.1993*, RIW 1994.68. Giemulla, art. 26, para. 18.

1005. At common law and shipping claims see *Roberts v. Brett* (1865) 11 HLC 337; and, as regards notice of insurance claims, Clarke, *Law of Insurance Contracts* (6th edn, London, 2009), ch. 26–2E3 *ff*.

1006. E.g. *Nielsen v. Wait* (1885) 16 QBD 67.

1007. *Cf BRI v. Air Canada*, 725 F Supp 133 (EDNY, 1989) which decides that a late complaint does not bar action if in fact the carrier had a sufficient opportunity to investigate the claim.

1008. *Bennett v. Continental*, 21 Avi 17,917 (D Mass, 1988).

1009. P. 17,922. *Bennett* was followed in *Arkwright v. Pan Am*, 22 Avi 18,198 (D Mass, 1990).

1010. Koller, art. 26, para. 11.

1011. Giemulla, art. 26, para. 20.

should suffice.[1012] It has been suggested that this includes an electronic message provided that it can be printed out by the recipient.[1013] Whereas MC article 3.2 provides for electronic AWBs, MC appears to have made no such provision for electronic complaints.

12. ***Dispatch of notice*** must be within the prescribed period. Article 31 does not require actual receipt by the carrier: provided that the selected mode of transmission is a reasonable one to choose, the risk of delay or loss in transmission is on the carrier.[1014]

13. ***No action shall lie*** of any kind, if in essence the action is to enforce liability under MC. This rule applies also to a recourse action.[1015] The rule was characterised in France as one of procedure, the detail of which depends on the *lex fori*.[1016] Moreover, in New York at least, as a matter of public policy, it is "well established law that one may not, even innocently, mislead another and then attempt to claim a benefit from this deception".[1017]

14. ***Fraud*** is not defined by the Conventions and is thus left to the definition of national law.[1018] In England this is likely to be understood as common law fraud, i.e. a representation (words or conduct) on the part of the carrier which the carrier knew was false, did not believe to be true, or which the carrier made recklessly as to whether it was true or false.[1019] The fraud exception operates "in the case of" fraud, hence *prima facie* whether or not the fraud has caused damage to the claimant. Clearly, the case includes fraud by the carrier the effect of which is that the complaint is not made in the time required by article 26.[1020] However, without some such effect, making it harder for the person entitled to delivery to see that all is not well, it has been suggested, the fraud exception will not apply.[1021] The onus of proof of fraud is on the claimant.[1022]

1012. E.g. telex: *UTA v. Blain, Paris 6.1.1977*, (1977) 31 RFDA 181. *Cf* the excessively literal decision, in *United v. Conesa, Versailles 4.2.2000*, BTL 2000.424, that a hand-written statement on a document proved by the baggage service at the destination airport was not a "complaint" as required by art. 26. Unsurprisingly, "notice" by ordinary telephone has been regarded as insufficient: *Condor Firmas v. Iberia, Hoge Raad 21.5.1999*, Schip & Schade 1999.103.

1013. Koller, art. 26, para. 12.

1014. Giemulla, art. 26, para. 17. As regards the position when, although no notice is sent to the carrier, the carrier none the less acquires the relevant knowledge in other ways, see Kronke, art. 26, para. 11.

1015. E.g. by a forwarding agent not sued by its client until some months after the goods had been received (damaged) at destination: *Institut de Sélection Animale v. Calberson, TC Paris 3.7.1991* (1991) 44 RFDA 391 in respect of art. 26 WSC.

1016. *Cf* Tinayre BTL 1999.5, with reference to *Réunion Européenne v. Alitalia, TC Bobigny 3.9.1998*, BTL 1999.18.

1017. *Soundwave Electronics v. Iberia*, 18 Avi 17,488, 17,489 (NY, 1983).

1018. Thus in France, for example, fraud has been understood broadly to include any carrier conduct intended to make it difficult for the consignee to realise that all was not well with the goods: De Juglart, para. 3067.

1019. *Derry v. Peek* (1889) 14 App Cas 337. A more "developed" concept of fraud concerning insurance claims has now been established: Clarke, *Law of Insurance Contracts* (6th edn, London, 2009), ch. 27–2B. In Germany "fraud" has been interpreted as a lack of good faith (*Treu und Glauben*): *OLG Düsseldorf 29.4.1993*, TranspR 1994.285.

1020. *Ibid.*

1021. Giemulla, art. 26, para. 32; Koller, art. 26, para. 16. An *obiter dictum* in this sense: *Denby v. Seaboard World*, 575 F Supp 1134, 1144 (EDNY, 1983).

1022. *Denby loc cit*.

Article 32—Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Comment

This provision was included to ensure that action could be brought in States such as the UK, where claims based in tort do not survive the victim. The effect on corporate persons, if any, is unclear.[1023] What is clear, however, is that such provisions have little relevance to the modern air carrier.

Article 33—Jurisdiction

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[1024] or of its principal place of business,(2) or where it has a place of business through which the contract has been made(3) or before the court at the place of destination.(4)

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(5) and to or from which the carrier operates services(6) for the carriage of passengers by air, either in 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.

3. For the purposes of paragraph 2,

- **(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;**
- **(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.**

4. Questions of procedure shall be governed by the law of the court seised of the case.

1023. Giemulla, art. 27, para. 1.

1024. Argument that a carrier's domicile was where it was incorporated was rejected in *Aikpitanbi v. Iberia*, 533 F Supp 2d 872, 877 (ED Mich, 2008).

Article 34—Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.
2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.
3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.
4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 28

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident,(1) or has his principal place of business,(2) or has an establishment by which the contract has been made,(3) or before the court having jurisdiction at the place of destination.(4)
2. Questions of procedure shall be governed by the law of the court seised of the case.

Comment

(a) The appropriate forum for a dispute arising out of carriage by air is the forum with jurisdiction in each of three respects. First it must have subject matter jurisdiction: this requires a characterisation of the cause of action as one (tort, contract or an independent action) arising out of the Convention itself.[1025] Second, the court must have personal jurisdiction, i.e. jurisdiction over the person of the defendant.[1026] Third, the court must have treaty jurisdiction: it must be one of the *fora* specified in article 33.

Not only the questions of procedure referred to in article 33.4[1027] but also the further jurisdictional question, the appropriate court within a state with jurisdiction under article 33, all this is a matter for the law of the court seised of the case. For example, when a state has jurisdiction as the place of destination there is the further question of whether the "place" is the entire state or, in a federal state such as Germany, the local state.[1028] Similar questions arise in some non-federal states such as France.[1029] These are questions for the law of the (federal) state. In the UK such questions arise but are less acute. If the court

1025. This affects *inter alia* the appropriate court (e.g. state or federal) within a (federal) state.

1026. *Smith v. Canadian Pacific*, 452 F 2d 798, 800 (2 Cir, 1971). MacIntyre (1995) 60 J Air L & Com 657, 670 *ff*.

1027. Applied in *Pierre-Louis v. Newvac* (USCA 11, 2009). A current issue is the effect of attornment to jurisdiction by filing a defence; see for example in Canada *M J Jones Inc v. Kingsway General Insurance Company*, [2004] OJ No 3286 (CA).

1028. See *BGH 6.2.1981*, NJW 1981.1902. As regards Italy see *Corte di Cass 26.5.2005*, Unif L Rev 2006.436. Giemulla, art. 28, para. 7.

1029. *Cie Air France v. Liberator, Cass Civ 16.4.1975* (1975) 29 RFDA 293; De Juglart, para. 3006. Concerning Italy: *Empresa Consolidada Cubana de Aviacion, Cass. It. 15.6.1993*, (1994) 47 RFDA 368. CMR cases in France are in the same sense, e.g. *Angers 4.12.1995*, BTL 1996.337.

seised is the High Court in London, it may have to decide whether it is indeed the right court or whether, for example, the case belongs to the courts in Scotland.[1030]

(b) The scope of jurisdiction under article 33 is limited to some but not all actions that might arise out of carriage by air. It covers claims for damages against the carrier.[1031] For such claims it takes precedence over the Brussels Convention on Jurisdiction of 1968,[1032] as well as over the jurisdiction rules of the forum.[1033] Article 33 "creates a self-contained code within the limits of which the plaintiff must found his jurisdiction."[1034] Party agreement for jurisdiction elsewhere is contrary to article 26. Moreover, arbitration is allowed only in one of the locations permitted by article 34.2. Two exceptions to the exclusivity of these provisions have been considered by courts in respect of article 28, the corresponding provision of WSC.

First, it has been argued successfully in England that, although article 28 takes precedence over the jurisdictional rules of the forum, these have not been ruled out altogether. The contrary argument, that this was a case in which (except as permitted by article 28) "jurisdiction has been actively withdrawn from the court and conferred on another tribunal", has been rejected.[1035] This is because "the argument ignores the distinction between legislation which changes the jurisdictional rules of the *lex fori*, and that which takes away the jurisdiction of the local court altogether". The air Convention has the first of the effects but not the second.[1036]

Second, it was successfully argued, in France in 1998 in *Bejon*,[1037] that in an action in the court competent to entertain a claim against the maker of an aircraft, the claimants could also join the carrier concerned. The carrier objected to the joinder, as the court was not

1030. *Abnett v. BA* [1994] 1 ASLR 1 (Ct Sess). See also in the US: *Mertens v. Flying Tiger Line*, 341 F 2d 851, 855 (2 Cir, 1965), *cert denied* 382 US 816; *Eck v. United Arab Airlines* [1966] 2 Lloyd's Rep 485, 489 (2 Cir, 1965); *Smith v. Canadian Pacific*, 452 F 2d 798, 801 (2 Cir, 1971); *In Re Air Crash Disaster near New Orleans, Trivelloni-Lorenzi v. Pan Am*, 821 F 2d 1147, 1161 (5 Cir, 1987).

1031. But not the carrier's personnel, such as pilots: *BGH 6.10.1981*, N.J.W. 1982.49. Nor does art. 28 apply to the carrier's action for carriage charges.

1032. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 27.9.1968, art. 57. Note also the Brussels Regulation: *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd* [2004] EWCA Civ 1598, [49].

1033. *Rotterdamsche Bk NV v. BOAC* [1953] 1 WLR 493, 502 *per* Pilcher J. *Smith v. Canadian Pacific*, 452 F 2d 798, 801 (2 Cir, 1971).

1034. *Rothmans v. Saudi Arabian Airlines* [1981] QB 368, 385 *per* Roskill LJ; see also Mustill J p. 376; and Ormrod LJ p. 388.

1035. *Rothmans* (above) p. 375 *per* Mustill J.

1036. A particular example is that it does not "follow that the court must decline jurisdiction even when the defendant does not object". The wording of WSC is not strong enough to have this effect. Thus the fact that art. 32 (now MC art. 26) "specifically invalidates jurisdictional agreements made *before* the occurrence of damage suggests that the parties to the Convention recognised that a binding agreement on jurisdiction could be made *after* the event": *Rothmans* p. 376 (emphasis added). Moreover, this conclusion is reinforced by the policy underlying the rules here: "to prevent forum shopping by the plaintiff, and at the same time to prevent the defendant from imposing, through the medium of his standard conditions of carriage, a choice of jurisdiction likely to be favourable to his interests. Neither of these considerations is hostile to a choice of forum, by agreement or acquiescence, made after the damage has occurred, and at a time when the defendant is in a position freely to decide whether or not to submit": p. 377.

1037. *Pakistan Airlines v. Bejon* (1998) 205 RFDA 153. The action was brought by representatives of those who died in an accident in Nepal in 1992. An appended comment attacks the decision as unexpected and one which turns its back on 30 years or more of French case law, putting in question the uniformity of the regime.

competent (under article 28 WSC) to entertain an action against the carrier alone. The Court of Cassation, however, rejected the carrier's case because, said the Court, there was nothing in WSC which said expressly that a court competent under national law could not also be competent to hear a connected case against a carrier. This reasoning is doubtful; and in 2006 (in *Gulf Air v. Airbus* another action brought under article 28 WSC) the Court of Cassation reversed the position taken in *Bejon*.[1038] Assuming indeed that *Bejon* (1998) is wrong, what is the likely reaction of the English court to a decision abroad of that kind?

In principle, the English court may grant an anti-suit injunction. In *Lee Kui Jak*,[1039] The Privy Council held that an anti-suit injunction would be granted where justice required that a plaintiff amenable to the jurisdiction of the Court should be restrained from proceeding in a foreign jurisdiction. Lord Goff emphasised, however, that, since such an order indirectly affects the foreign Court, the jurisdiction is one which must be exercised with caution.[1040] "Comity requires a policy of non-intervention not only for the same reason that appellate courts are reluctant to interfere with the exercise of a discretion, namely that in the weighing of the various factors, different judges may legitimately arrive at different answers." Indeed the normal assumption is that the foreign judge is the best person to decide whether an action in his own court should proceed. The injunction will only be granted where the ends of justice so require.[1041]

(c) Forum conveniens is not an issue in England when article 33 applies.

"International conventions of this kind tend to prescribe jurisdiction in narrow terms, on the assumption that the case where the defendant has insufficient assets to satisfy the claims in any of the stipulated countries is catered for by the ready availability of enforcement in other countries which is available via the various conventions on mutual recognition of judgments. In the case of air carriers, who tend to have branch offices, and not merely agencies or local subsidiaries, throughout the world, the possibility of multiple jurisdictions implicit in a wide reading [such provisions] is something which the draftsman of the Convention is unlikely to have wished to encourage."[1042]

Otherwise there would be so many states where proceedings can be commenced against a carrier that carriers would find the outcome and likely cost of actions unpredictable and claimants would be disadvantaged if actions could be regularly stalled by inevitable arguments over *forum conveniens*. The latter concern supports the argument that any debate over *forum conveniens* is ruled out by the wording of article: the choice of jurisdiction among the specified *fora* is to be "at the option of the plaintiff".

In the US, unlike the UK, argument about *forum conveniens* will be entertained by the court seised of the case. The "interests of the federal forum in self-regulation, in

1038. See Bouckaert and Cadain, 31 Air & Space Law 455 (2006); Guillaume [2006] RFDA 227. The decision was reported in [2006] RFDA 319. *Idem Kenya Airways v. Airbus, Cass Civ 11.7.2006* [2006] RFDA.

1039. *Société Aérospatiale v. Lee Kui Jak* [1987] 1 AC 871. This decision did not concern WSC.

1040. P. 892.

1041. See e.g. *Deauville v. Aeroflot* [1977] 2 Lloyd's Rep 67.

1042. *Rothmans v. Saudi Arabian Airlines* [1981] QB 368, 375 *per* Mustill J; see also p. 388 *per* Ormrod LJ.

administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases".[1043] From this standpoint, the Court of Appeals of the Fifth Circuit rejected argument based on the wording of WSC article 28; it could see "no evidence anywhere" that the drafters "intended to alter the judicial system of any country".[1044] "We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool" as the doctrine of *forum non conveniens.* The court's underlying concern, however, was not to extend but to restrict the range of courts in which such cases could be brought; in particular, to ensure that American courts did not attract an excessive volume of litigation with no real connection with the US.[1045]

The Court of Appeal in England has taken the view that such reasoning is not compelling. In *Milor*[1046] the claimants sent four parcels of valuable gold jewellery from Milan to Philadelphia (Pennsylvania) via London. Action was brought in England, where the defendant carriers were ordinarily resident and had their principal place of business. The defendants, however, made a strong case for Pennsylvania as the more appropriate forum. Philadelphia was the source of much of the evidence that would have to be adduced at the trial, and it was likely that they would wish to bring third party proceedings there. However, the defendants' case was rejected for a number of reasons.

The first, according to Phillips LJ, was the natural meaning of the words "at the option of the plaintiff" in the context of article 28 WSC. He accepted that, in the appropriate context, "the expression 'to bring an action' can naturally mean 'to commence an action' ". To find such a context, he said, "one need look no further than . . . article 29" (MC article 35) which provides that the right to damages shall be extinguished if an "action is not brought within . . . two years".[1047] He continued:

"Plainly . . . 'brought' means 'instituted or commenced'. The natural meaning of 'brought' will, however, depend upon its context. If a litigant says, 'I brought a successful action,' the natural meaning of 'brought' embraces both the initiation and the pursuit of the action. In my judgment, the context . . . is one in which 'brought' naturally has the latter meaning, rather than meaning no more than 'instituted'. It seems to me that [the article] is dealing not merely with the jurisdiction in which proceedings will be initiated, but the jurisdiction in which the proceedings will be resolved. To give a plaintiff the option to choose in which of a number of competent jurisdictions to commence his suit is to give him nothing. It is axiomatic that, if there are a number of competent jurisdictions, the plaintiff will be able to choose in which one to commence proceedings. If the option . . . is to have

1043. *In Re Air Crash Disaster near New Orleans, Trivelloni-Lorenzi v. Pan Am*, 821 F 2d 1147, 1159 (5 Cir, 1987). *Idem*: *Re Air Crash off Long Island, New York*, 26 Avi 17,276 (SDNY, 1999); *Wong v. United*, 27 Avi 18,397 (ED La, 2001). Generally, see *Piper v. Reyno*, 454 US 235 (1981). Mendelsohn & Lieux, 68 J Air L & Com 75 (2003); Dieterich, 33 Hofstra L Rev 1507 (2005) debates whether courts will apply this to cases to which MC applies. An affirmative conclusion is suggested by Tompkins, 34 Air & Space L 421, 423 (2009). For a general survey of the positions see Rushing and Adler, 74 J Air Law & Com 403 (2009).

1044. *Trivelloni-Lorenzi v. Pan Am*, p. 1162. It gave the example of a Canadian citizen who, while visiting New York, bought a ticket Montreal–Frankfurt–Montreal on Lufthansa. The position taken by courts in the US does not appear to have changed; see *Sinochem Int Co v. Malaysia Int Shipping Corp*, 127 S Ct 1184 (2007).

1045. *Ibid*. See also *Luna v. Cia Panamena de Aviacion*, 851 F Supp 826, 831 *ff* (SD Tex, 1994).

1046. *Milor v. British Airways* [1996] QB 702, 710 *per* Phillips LJ.

1047. P. 706, with whom the other members of the court concurred.

value, it must be an option to the plaintiff to decide in which forum his claim is to be resolved."[1048]

The other reasons lay in inferences about the intention of those who drafted and signed the original text. One of the objects of the Convention was and remains to harmonise different national views on jurisdiction. That "harmony would inevitably be to some extent disturbed if by the use of the *forum non conveniens* doctrine a plaintiff would be denied the right in some countries to sue in one of the four forums nominated in . . . the Convention, but not denied that right in others".[1049] Another object, was and still is to promote the speedy settlement of claims by passengers. "Where, as so often, substantial costs are incurred in interlocutory battles in relation to jurisdiction", said Phillips LJ,[1050] "I have a suspicion that the object of the exercise is frequently not to ensure that the trial takes place in the appropriate forum, but to achieve a better negotiating stance in an action which neither side expects to go to trial. There is something to be said for a regime which restricts the choice of forum in a manner which excludes those which are likely to be inappropriate." Lastly, very few of the delegates at the time would have had any knowledge of the doctrine. Argument about *forum non conveniens* was not intended in 1929 and in England is not admitted today.

(d) The fifth jurisdiction is the name given to the provision of MC, article 32.2, with its reference to the place of the principal and permanent residence of the passenger, with which the carrier too must have certain connections. This is a major innovation of MC.[1051] In his Letter of Transmittal[1052] to the Senate the President of the US claimed that article 33 "reflects the US success in achieving a key objective . . . Given the number of carriers whose operations in the United States satisfy [the] criteria, this fifth jurisdiction provision should ensure that nearly all US citizens and other permanent residents of the United States have access to US courts to pursue claims under the Convention".

Notes to articles 33 and 34

1. *Domicile.* Ordinary residence in article 28 WSC was a rough translation of the French word *domicile*, the meaning of which is quite different from the common law "domicile". Whatever the reason,[1053] "domicile" as well as "principal place of business" is used in the equivalent provision article 33 of MC. The courts in the US, however, have reached an interpretation which is not applied in England, and held that the carrier's

1048. Pp. 706–707. He also observed (p. 707): "It is of interest, though in the absence of ambiguity it is not a legitimate aid to interpretation, that in the French text the word that is the equivalent of 'brought' in art. 28 is '*portée*'; the word that is the equivalent of 'brought' in art. 29 is '*intentée*'. It seems to me that the use of different words in each article is significant. '*Intentée*' conveys the narrow meaning that 'brought' has in the context of art. 29, namely 'initiated'. '*Portée*', in the context of art. 28, naturally carries the meaning that I consider that 'brought' has in that context, namely 'commenced and pursued."

1049. P. 707. He found support for this view in certain *dicta*: *Rothmans v. Saudi Arabian Airlines* [1981] QB 368, 385 *per* Roskill LJ and 388 *per* Ormrod LJ.

1050. P. 710.

1051. See Pradhan, 68 JALC 717 (2003); Bin Cheng (2004) 53 ICLQ 832, 853. The first reported case was *Hornsby v. Lufthansa*, 2009 WL 116962 (CD Ca, 2009): Tompkins, 34 Air & Space L 421, 424 (2009).

1052. 6 September 2000 (106th Congress, 2d Session): Treaty Doc 106–45.

1053. It is perhaps because in the American enactment of the 1929 Convention the French word *domicile* was translated as "domicile".

domicile is where the company was incorporated[1054]; but a carrier may be incorporated in more than one place.

When an air carrier incorporated in State A has a wholly owned subsidiary in State B, it has been argued that "the two corporations may be considered to be *alter egos* of one another" and the domicile of the subsidiary imputed to the parent, so that a single parent may possess several domiciles for the purpose of jurisdiction.[1055] The argument, which has been successful in some contexts, has been rejected for WSC article 28. The drafters of article 28 did not see *domicile* "as so expansive" but "as unitary and did not contemplate that a corporation might be domiciled in two separate countries".[1056] A large company may have many subsidiaries and extensive interpretation might result in jurisdiction on the basis of a subsidiary that "bears no relationship to the contract of carriage or the expectations of the parties".[1057] For the purposes of article 28 "a foreign corporation has only one 'principal place of business'".[1058] Today MC article 33 refers to where the carrier has either its "domicile" or "its principal place of business".

In *Rothmans*, the question was whether the foreign air carrier, with an office in central London, was "ordinarily resident" there in the sense of WSC article 28. Mustill J observed that "the possession of a place of business in a country was plainly not intended to found jurisdiction on its own, since article 28 lists a principal place of business as one of the four hallmarks of jurisdiction".[1059]

2. ***The principal place of business*** of an air carrier is its head office: its "operational headquarters".[1060] There can be only one such place.[1061] If the executive and managerial work is done in one place but the registered office or the carrier's depot is in another place, the principal place of business is none the less the first of them. This is "normally" where the carrier is incorporated[1062]; none the less what counts is where the executive and managerial work is done. That is the view in the US and is likely to be the view taken in England. What counts is "the centre from which the company is managed *without any further control* except such control as every company [is] liable to by the . . . shareholders of the company".[1063]

1054. *The People v. Giliberto*, 383 NE 2d 977, 981 (Ill, 1978): this analysis allows a clear conceptual line to be drawn between "domicile", principal place of business and where the carriage was contracted. See also in this sense: *Recumar v. KLM*, 608 F Supp 795, 798 (DC NY, 1985); *In Re Air Disaster Near Cove Neck, New York*, 774 F Supp 718, 720, 721 (EDNY, 1991). This is quite different from *domicile*: *ibid* 721.

1055. *In Re Air Disaster* (above).

1056. *Ibid* with reference to legislative history and the meaning of *domicile* in French law. See also *Pflug v. Egyptair*, 961 F 2d 26, 31 (2 Cir, 1992).

1057. *Loc cit.* The outcome was that the action had to be brought in Colombia rather than New York.

1058. *Singh v. Tarom*, 88 F Supp 2d 62, 65 (EDNY, 2000).

1059. *Rothman v. Saudi Arabian Airlines* [1981] QB 368, 375 (CA).

1060. *Recumar v. KLM*, 608 F Supp 795, 798 (DC NY, 1985); *Osbourne v. British Airways*, 198 F Supp 2d 901 (SD Tex, 2002). Koller, art. 28, para. 3.

1061. *Recumar loc cit.* See also *Eck v. United Arab Airlines* [1966] 2 Lloyd's Rep 485 (2 Cir, 1966); and *Swaminathan v. Swissair*, 962 F 2d 387 (5 Cir, 1992).

1062. *Swaminathan v. Swissair*, 962 F 2d 387, 390 (5 Cir, 1992).

1063. Swinfen Eady LJ in *The Polzeath* [1916] P. 241, 245 (CA) as quoted by Leggatt LJ in *The Rewia* [1991] 2 Lloyd's Rep 324, 334 (CA): cases concerning carriage by sea.

3. ***Where the contract has been made*** is the "place of business" where the (original) contract was made. An air ticket "constitutes a highly modifiable contract",[1064] none the less, no account was taken under WSC article 28 of where any subsequent variations of the contract were agreed.[1065] Divergent views were expressed about how significant the connection with such a place must be.[1066]

3.1 *The conclusion of the contract* of carriage occurs where the ticket is purchased or where the ticket or AWB is issued.[1067] For example, in *Lam*,[1068] a passenger in the US tried to contract in the US but, because the carrier's computer there was not working, faxed his requirement to an agent in Hong Kong, where the ticket was issued. The US court held that the contract was made in Hong Kong. In that case mutual assent to agree the contract was not apparent until the response of the agent in Hong Kong. The place of business through which the contract was concluded "is the place where the passenger ticket was issued" rather than where they were paid for.[1069] Compare *Boyar*,[1070] in which a round trip was purchased in Korea and the carrier's agent there phoned New York to book the passenger on one of the flights involved, but the contract was made nonetheless in Korea. The New York booking was in performance of a contract already concluded by mutual assent between carrier and passenger manifested in Korea. Similarly, in *Kapar*,[1071] the passenger contracted with a Kuwaiti carrier in Yemen and the court held that the contract was concluded there, even though, because the passenger was using a US government travel voucher, the reservation on the flight was made and the ticket was obtained through an American carrier and the latter's computer in New York. The ticket was issued in furtherance of a contract concluded in Yemen. Then, in *Shen*,[1072] the argument that a contract agreed in China could be the subject of suit in New York because it was paid by means of an American Express card with an account there was rejected. Once again, the act in question was seen as no more than performance (in New York) of a contract already made elsewhere (in China).

1064. *Vergara v. Aeroflot*, 390 F Supp 1266, 1269 (D Neb, 1975).

1065. *Boyar v. Korean Airlines*, 664 F Supp 1481 (DC, 1987). *Idem*: *Nebco v. Iberia*, 22 Avi 18,341 at 18,343 (SDNY, 1990) with reference *inter alia* to *Boyar. Quaere*, if additional carriage charges are agreed. In *Vergara* (above) it was suggested that this might be significant.

1066. See *Rothmans v. Saudi Arabian Airlines* [1981] QB 368, 374–375 *per* Mustill J; and the first edition of this book p. 187. Also *BGH 16.6.1982*, NJW 1983.518.

1067. E.g. as regards tickets, *Shen v. Japan Airlines*, 24 Avi Cas 18,084, 18,086 (SDNY, 1994). As regards the AWB issued under MC see e.g. *Transvalue v. KLM*, 539 F Supp 2d 1366 (SD Fla, 2008).

1068. *Lam v. Aeroflot*, 999 F Supp 728, 732 (SDNY, 1998). However, the court found jurisdiction on another ground (round trip destination).

1069. *Singh v. Tarom*, 88 F Supp 2d 62, 65 (EDNY, 2000), quoting from *Lam*.

1070. *Boyar v. Korean Airlines*, 664 F Supp 1481 (DC, 1987).

1071. *Kapar v. Kuwait Airways*, 663 F Supp 1065 (DDC, 1987). See also *Vergara v. Aeroflot*, 390 F Supp 1266 (D Neb, 1975). The decision in *Kapar* would be less easy to explain if the agent in Yemen had had no authority to contract and merely communicated the passenger's request for assent by the carrier manifested by the carrier's computer in New York. There is some evidence to support this account of the facts: p. 1068, note 3. However, the court was firmly of the view (p. 1067) that the "contract was entered into in Yemen, and that fact is not altered by the procedure through which reservations were made". The ruling was not disputed on appeal: 845 F 2d 1100 (1988). Semble, the purchase of tickets from agents in distant parts (and thus jurisdiction there) has led to a proliferation of claims on this basis which carriers are reluctant to defend because of the cost of doing so; and there are now signs that courts in Europe may be inclined to deny jurisdiction where a ticket was bought by a stricter (and narrower) interpretation of "establishment": Guerreri, 33 Air & Space Law 175 (2008).

1072. *Shen v. Japan Airlines*, 24 Avi Cas 18,084 (SDNY, 1994).

Online contracting came before the court in *Polanski v. KLM*.[1073] P bought online (from the KLM-Northwest alliance) a ticket for a one way flight from Los Angeles to Warsaw (via Amsterdam) but suffered pain on the flight to Amsterdam where he had to have surgery for a perforated duodenal ulcer. P sued KLM in California, where the court in 2005 held that there was jurisdiction, it being where the contract was made; it was there that P accepted KLM's offer by paying for the service and the ticket was issued.[1074] A 2006 note[1075] argued that the court took too simplistic a view of online contracting, ignoring such factors as passengers in transit using cell phones to buy tickets, the location of the parties' internet servers and, generally one might add, what is currently called "cloud computing".

4. ***Destination*** is the place where it is most likely that cargo consignees and, more often than not, passengers[1076] prefer to bring an action. The destination is the destination agreed by the parties. Their intention is objectively assessed,[1077] and *prima facie* that is the place stated as such in the ticket or AWB,[1078] regardless of the customer's actual intention[1079] or of whether the carrier is aware that the passenger or cargo are to continue beyond the placed stated in the ticket or AWB.[1080]

In the case of a single contract for a trip in several distinct sections the destination is the ultimate destination.[1081] However, in the case of multimodal transport with a final destination to be reached by some other mode of transport, it is not that final destination but the last air destination.[1082] In the case of a round trip, the destination is the place where the trip ends, although over many legs,[1083] many carriers[1084] and many days. This is likely to be the ruling, even though the trip ends where it began,[1085] even though the injury or

1073. 378 F Supp 2d 1222 (SD Cal, 2005).

1074. P. 1231.

1075. Tillery, 71 J Air Law & Com 91 (2006).

1076. *Gasca v. Empresa de Transporte Aero del Peru*, 992 F Supp 1377, 1380 (SD Fla, 1998).

1077. *Swaminathan v. Swissair*, 962 F 2d 387 (5 Cir, 1992).

1078. E.g. *Cia Mexicana de Aviacion v. US District Court*, 859 F 2d 1354 (9 Cir, 1988); *Sopcak v. Northern Mountain Helicopter Service*, 52 F 3d 817 (9 Cir, 1995); *Manion v. American*, 17 F Supp 2d 1, 4 (DDC, 1997); *OLG Hamm 24.10.2002*, TranspR 2003.201. So, Paris-Orly = Orly not Paris: *Air France v. Liberator, CA Paris 8.12.1973* (1974) 28 RFDA 287, affirmed *Cass 16.4.1975* (1975) 29 RFDA 293. See also *Qureshi v. KLM* (1979) 102 DLR (3d) 205, 207 (SC NS). *Swaminathan v. Swiss Air*, 962 F 2d 387 (5 Cir, 1992). MacIntyre (1995) 60 J Air L & Com 657. Koller, art. 28, para. 4.

1079. *Solanky v. Kuwait Airways*, 20 Avi 18,150 (SDNY, 1987), in which the passenger planned a trip Bombay–New York, but bought a round trip ticket to save money; the destination was that stated in the ticket: Bombay. See also *In re Korean Airline Disaster of September 1, 1983*, 664 F Supp 1478 (DDC, 1986), affirmed *sub nom Chan v. Korean Airlines*, 490 US 122 (1989); *Klos v. Polskie Linie*, 133 F 3d 164 (2 Cir, 1997); *Swaminathan v. Swiss Air*, 962 F 2d 387 (5 Cir, 1992). *Klos* was applied on this point to a claim under MC art. 33 in *Baah v. Virgin Atlantic Airways*, 473 F Supp 2d 591 (SDNY, 2007); DeMay 73 JALC 131, 206 (2008).

1080. *Surmont v. Valcke, Douai 4.1.1969*, (1969) 23 RFDA 191, 194.

1081. *Vergara v. Aeroflot*, 390 F Supp 1266, 1269 (D Neb, 1975); *Duff v. Varig*, 542 NE 2d 69, 72 (Ill App, 1989).

1082. *Surmont v. Valcke, Douai 4.1.1969*, (1969) 23 RFDA 191.

1083. E.g. 48 flight coupons in 12 booklets of tickets: *Vergara v. Aeroflot*, 390 F Supp 1266 (D Neb, 1975).

1084. *In Re Alleged Food Poisoning Incident, Al-Zamil v. British Airways*, 770 F 2d 3 (2 Cir, 1985). Germany: *BGH 23.3.1976*, NJW 1976.1568.

1085. *Grein v. Imperial Airways* [1937] 1 KB 50, 79 *per* Greene LJ (CA), applied in *Qureshi v. KLM* (1979) 102 DLR (3d) 205, 208 (SC NS). *Idem* Germany: *BGH 23.3.1976*, NJW 1976.1568. US: *Lam v. Aeroflot*, 999 F Supp 728, 732 (SDNY, 1998). Also *Swaminathan* (below).

damage occurs during a side trip made during the course of the round trip,[1086] and even though the dates and flight for return have been left open.[1087]

5. ***The principal and permanent residence of the passenger***, with which the carrier too has certain connections, is called the "fifth jurisdiction". US carriers would have liked to make this compulsory to prevent forum shopping i.e. actions in the US by nationals of other states.[1088] However, the belief is that the possibility of the fifth jurisdiction will conduce to that result.[1089]

Some feared that the value of MC might be diminished on this flank because too many cases would find their way to the courts of the US[1090] thus making states reluctant to ratify MC. Carriers want to know "where they stand" in every sense: so do their insurers, as a uniform system is cheaper to insure. In different parts of the world there are differences of wealth and in the monetary value put on human well-being. From an early stage of the evolution of MC it was accepted that "compensation levels should be adapted to the socio-economic *milieu* of the individual passenger".[1091] The Conventions set uniform limits but not uniform levels of compensation: the measure of loss is still governed by national law.[1092] Obviously a claimant has an incentive to seek compensation where the measure is most generous to claimants.[1093]

6. ***The territory from which the carrier operates services*** is a requirement added to MC article 32.2 to ensure a "commercial presence" of some kind on the part of the carrier. It was added to alleviate the fears on the part of non-US carriers of claims brought in the US by US citizens.[1094]

Article 35—Limitation of Actions

1. The right to damages(1) shall be extinguished(2) if an action(3) is not brought(4) within a period of two years, reckoned from the date of arrival(5) at the destination,(6) or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.(7)
2. The method of calculating(8) that period shall be determined by the law of the court seised of the case.

1086. *Gasca v. Empresa de Transporte Aero del Peru*, 992 F Supp 1377 (SD Fla, 1998).

1087. *Swaminathan v. Swiss Air Transport*, 962 F 2d 387 (5 Cir, 1992). But *cf Avianca v. Duque, Cass 15.8.1999*, ULR 2000.362, in which the French courts retained jurisdiction because the return to Colombia had been left open for six months. As regards the rule when tickets for different stages were issued in "books" see *Petrire v. Spantax*, 756 F 2d 263, 265–266 (2 Cir, 1985), *cert denied* 474 US 846, with reference to art. 1.3. *Petrire* was applied in *In re Alleged Food Poisoning Incident, Al-Zamil v. British Airways*, 770 F 2d 3 (2 Cir, 1985); *Gasca v. Empresa de Transporte Aero del Peru*, 992 F Supp 1377 (SD Fla, 1998). See also *Vergara v. Aeroflot*, 390 F Supp 1266 (D Neb, 1975), in which a single round trip involved 12 booklets.

1088. Dubuc, 22 Air & Space Law 291, 298 (1997).

1089. Mendelsohn, 21 Air & Space Law 183, 185 (1996).

1090. In particular, as the result of code-sharing or similar arrangements.

1091. Weber & Jakob 21 Air & Space Law 175, 177 (1996). In 1996 an American passenger was "worth" about $3m, a European passenger $1m, and a passenger from a developing country about $75,000 according to a representative of a reinsurance company quoted by R. L. Vojtovic, "Liability and Risk Management in International Air Transport" (McGill Univ. thesis, 1997) p. 83.

1092. See art. 17, note 3.2.

1093. Gardiner, 24 Air & Space Law 114, 119 (1999).

1094. Weber & Jakob, 21 Air & Space Law 175, 180 (1996).

Article 29

1. The right to damages[(1)] shall be extinguished[(2)] if an action[(3)] is not brought[(4)] within 2 (two) years, reckoned from the date of arrival[(5)] at the destination,[(6)] or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.[(7)]
2. The method of calculating[(8)] the period of limitation shall be determined by the law of the court seised of the case.

Comment

MC article 35 and WSC article 29, which are the same in substance, contain a rule whereby rights to damages are "extinguished" after two years. The period can be extended by party agreement[1095] but not shortened.[1096] The rule applies only to claims against the carrier (see note 3 (below)) and does not appear therefore to apply to claims by the carrier against the consignor,[1097] or to claims to contribution between persons liable under one or other of the Conventions.[1098]

Nor does the rule apply to actions related to carriage by air but based on alleged breaches of contract outside the Convention regime, such as non-performance of the contract of carriage. A marginal case is "bumping". In *Wolgel*, the court concluded that "the claim falls outside the Warsaw Convention, because the Wolgels seek damages for the bumping itself, rather than incidental damages due to their delay".[1099] In any event, the expiry in fact of the relevant period is for the defendant (carrier) to prove.[1100]

Notes to article 35

1. ***Rights to damages,*** which are extinguished, are the rights not only of parties to the contract of carriage but also of persons with rights in subrogation[1101] unless, it has been suggested by a French court,[1102] it was impossible for the person concerned to exercise those rights in time.

2. ***Extinguished*** means more than merely unenforceable. MC article 35 is headed "Limitation of actions", however, in each Convention the "two year period is not a mere period of limitation operating at its expiration to bar a remedy. It is an integral part of a right".[1103] If a person's right has been extinguished, it is "non-existent . . . finished, gone

1095. *BGH 22.4.1982*, NJW 1983.516; *OLG Frankfurt 15.9.1999*, TranspR 2000.183.
1096. That would be contrary to MC art. 26 (art. 23 WSC: *BGH 22.4.1982* (above)).
1097. Giemulla, art. 19, para. 2(a); Koller, art. 29, para. 2.
1098. As regards WSC see the Carriage by Air Acts (Implementation) Order 1999, SI 1999 No 1312. Fountain 11.54 *ff*. *Cf Hardy v. British Airways* 1983 SLT 45; and *Connaught Laboratories v. Air Canada* (1979) 94 DLR 3d 586 (HC Ont). Moreover, some courts in the US have held that art. 29 does apply to such actions: Giemulla, art. 29, para. 8.
1099. *Wolgel v. Mexicana*, 821 F 2d 442, 444 (7 Cir, 1987). The court found support in the *travaux* (*ibid*). See further above, art. 19, note 2.1.
1100. Koller, art. 29, para. 10 with reference to *Lg München 25.2.1992*, TranspR 1995.31, 32.
1101. *Lagarde v. Beaudinat, Chambery 17.10.1989*, (1989) 43 RFDA 551.
1102. *Air France v. Fonds de Garantie, Colmar 7.11.1997*, (1998) RFDA 150, 152.
1103. *Timeny v. British Airways* (1991) 102 ALR 565 (Sup Ct SA).

forever",[1104] whether invoked as a cause of action or as a defence[1105]; and a rule of the *lex fori* which "authorises the extension of the time prescribed for the institution of proceedings cannot operate to revive a right which has been extinguished".[1106] Moves after the two-year period, such as the addition of another defendant or the introduction of a new cause of action by an amendment, are matters regulated not by the Conventions but by the *lex fori*.[1107]

3. ***Actions affected*** by the rule in the UK include actions under the Fatal Accidents Acts and, it has been argued, the Law Reform Miscellaneous Provisions Act 1934, whether brought against the carrier or against agents or employees of the carrier. In the UK this was provided for by statute,[1108] as it is not stated in the Conventions. However, the same is indicated by a purposive reading of the Conventions that seeks to "ensure that the rules governing international aviation remain uniform and that the liability limitations remain intact, regardless of whom a plaintiff may choose to name as a defendant",[1109] not least because in some instances the employee or agent concerned may have right of recourse against the carrier.[1110] Apparently such reasoning has not influenced the German Supreme Court. In *BGH 10.12.2009*,[1111] the issue was whether the two year period in MC article 35.1 applied to an action brought not under MC but under the European Regulations concerning flight cancellation.[1112] Unlike the court below the BGH considered that only "relevant" provisions of MC applied to such actions and article 35 was not "relevant". Article 35 applied only to actions brought under MC, which was not true of an action for flight cancellation.

4. ***Brought*** means properly brought in a court competent to hear the action,[1113] as well as by a person competent (authorised) to bring it.[1114]

5. ***The date of arrival*** is the date of definitive arrival. So, on the one hand, cargo which has reached the agreed destination but been refused entry by customs authorities has not properly arrived; its arrival was no more than provisional. Unless the authorities relent, the earliest that time runs in such a case is when the cargo has been returned to the place of consignment.[1115] On the other hand, in *Air Afrique v. Scac Frigo*,[1116] the French Court of

1104. *Proctor v. Jetway* [1982] 2 NSWLR 264, 271.

1105. Fountain, 11.43, accepting that the rule in *Aries v. Total* [1977] 1 WLR 185 (HL), as applied to HR and HVR, also applies to carriage by air. The rule is controversial; see Clarke, CMR, para. 47g.

1106. *Proctor*, p. 267. *Cf Romanowski v. L'Europe, TGI Carpentras 5.5.1987*, (1988) 42 RFDA 72: the defendant who defends on the merits without raising art. 29 *in limine litis* is not thereby estopped from raising the objection later.

1107. Fountain, 11.52. They are not permitted by English law.

1108. Carriage by Air Act 1961, s. 3 and s. 5(1) as amended: SI 1999 No 1312.

1109. *Johnson v. Allied*, 19 Avi 17,847 at 17,850 (D Col CA, 1985). For a similar attitude in England see *Hall v. Heart of England Balloons Ltd* [2010] 1 Lloyd's Rep 374, [39] where the court applied *Laroche v. Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12; [2009] QB 778; [2009] 1 Lloyd's Rep 316, [69]–[70].

1110. *American Home v. Kuehne & Nagel*, 544 F Supp 2d 261 (SDNY, 2008): MC art. 35 barred an action against an agent of the actual carrier. Article 35 is absolute and there is no exception for contribution claims: *Chubb v. Menlo*, 32 Avi Cas 15,979, 15,981 (CD Cal, 2008).

1111. XR 61/09.

1112. No 261/2004. Generally see Chapter 2, 2.2.1.

1113. *Kamara v. Air France, Cass Civ 24.6.1968*, D 1968 J 745.

1114. *OLG Frankfurt 12.7.1977*, NJW 1978.502.

1115. *Eggink v. TWA*, 22 Avi 17,731 (SDNY, 1990).

1116. *Cass 3.6.1997* (1998) 205 RFDA 142.

Cassation annulled the decision of the court below that, when an aircraft arrived one day but delivered the cargo the next day, time did not begin to run until delivery.[1117] Although the view of some writers is that the date of arrival is the date of delivery to the consignee, that view has also been rejected in Germany too. The court there took the (intermediate) view that the limitation period starts when the carrier's (potential) liability ends by the transfer to the consignee not only of the cargo but also of the responsibility for the cargo; and that this occurs not when the cargo is delivered but earlier when the consignee has been informed that it is entitled to take physical possession of the cargo.[1118]

If the aircraft does not arrive at all, the date of arrival of the cargo is the scheduled date of arrival, as defined above (note 5), if any. If the aircraft arrives but the cargo does not, the rule is the same. If a date of arrival cannot be ascertained for the cargo, at latest the period "begins to run once a party with enforceable rights under a carriage knows or has reason to know something has gone wrong with this shipment, be it misdelivery, loss or delay".[1119] If part of the cargo arrives, but another part, in respect of which the claim is made, does not, the commencement date is also the date of arrival, as defined above, and not the date for the part of the cargo that did arrive.[1120]

6. ***The destination***, as regards passenger luggage, is the place of redelivery to the passenger. Cases decided in respect of WSC indicate that on a round trip, the destination for jurisdiction (MC article 33.1) is the passenger's final destination. However, WSC article 29 (MC article 35) clearly contemplated intermediate destinations. Thus, in *Rush*, on a round trip from Dayton (Ohio) to Paris and back, the destination of baggage lost or damaged on the journey from Dayton to Paris was Paris, not Dayton.[1121] It was at Paris that the claimant "knew damage had allegedly occurred" and time began to run. In *Korba*, the passenger arrived a day earlier than scheduled, and for the same reason it was the earlier date that counted: "*at latest* the limitations period begins to run once a party with enforceable rights has reason to know something has gone wrong".[1122]

Implied in this reasoning is that time should not start to run against a passenger and baggage or a consignee and cargo until there has been an opportunity to inspect it.[1123] None the less, carriage and the carrier's role and responsibility as carrier must come to an end. If, after a reasonable time the passenger or consignee has not come for the item, the carrier holds it not as carrier but as warehouseman, and a different limitation rule may apply.[1124]

7. ***Carriage ceases*** not when the physical movement of the baggage or cargo stops, a time that would often be the same as the time of arrival, but when the carrier's responsibility for it ends. This is a rule, consonant with that of other carriage conventions, which

1117. Note, however, that the court saw this as a question of calculation under art. 29.2, and based its decision not on interpretation of the Convention but on a rule of the *lex fori*.

1118. *Lg Stuttgart 19.8.1997*, TranspR 1998.196; ULR 1998.884.

1119. *Balani v. Malaysian Airline System*, 24 Avi 18,078 (SDNY, 1994).

1120. *Srivastava v. Alia*, 473 NE 2d 564, 566 (Ill App, 1985).

1121. *Rush v. US Air*, 19 Avi 18,129 (Ohio App, 1984).

1122. *Korba v. TWA*, 508 NE 2d 48, 53 (Ind App, 1987) quoting *Magnus Electronics v. Royal Bk of Canada*, 611 F Supp 436, 441 (CD Ill, 1985).

1123. The significance of this point has been accepted e.g. by the court in *Korba* (above) p. 52.

1124. *Belgian Endive v. American*, 673 NYS 2d 817 (NY, 1998).

premises that the carrier has promised not only movement but also safekeeping. Thus, in 1973 in *Alltransport*[1125] sequence was that the flight arrived at New York but the cargo was not handed over to the claimant until nearly a month later. The court held that time did not begin to run until the later date. Having noted that under article 18 the carrier was liable for damage caused by an occurrence "during transportation", and that transportation comprised "the period during which the baggage or goods are in charge of the carrier", the court concluded that "in charge" "must mean in this context actual custody and control".[1126] Rejecting the carrier's argument that carriage ended when the goods were turned over to customs, it underlined that WSC "is concerned with physical custody and actual delivery not constructive delivery".[1127]

8. ***The method of calculating*** the period according to the *lex fori* in MC article 35.2 is a reference to such matters as whether part of a day counts as a (whole) day.[1128] Note, however, that MC article 50 states that "day" means not a working day but a calendar day. Moreover, the argument, that article 29.2 WSC authorises reference to rules of the *lex fori* on the interruption or suspension of the period, has been rejected both by writers and by courts in other countries,[1129] even when the rule in issue is one of allowing an extension of time when the defendant has fraudulently concealed relevant facts from the claimant.[1130] In the UK the position seems to be the same because the Limitation Act 1980, which regulates such matters, does not apply to any action for which a period of limitation is prescribed by any other enactment: section 39.

Article 36—Successive Carriage

1. In the case of carriage to be performed(1) by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage(2) during which the accident or the delay occurred,(3) save in the case where, by express agreement, the first carrier(4) has assumed liability for the whole journey.(5)

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier,(4) and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier,(6) and further, each may

1125. *Alltransport v. Seaboard*, 349 NYS 2d 277 (NY City Ct, 1973).

1126. P. 280.

1127. P. 280. See also *Air Afrique v. Scac Frigo, Cass 3.6.1997*, (1998) 52 RFDA 142.

1128. Kronke, art. 29, para. 8. For the application of the rule in e.g. Germany, see *BGH 6.10.2005* (2006) 41 ETL 449.

1129. *Fishman v. Delta*, 132 F 2d 138, 144 (2 Cir, 1998); *Fireman's Fund v. Alpina*, 27 Avi 18,402 (ND Ill, 2001). See Giemulla, art. 29, paras 11 *ff* and 36 *ff* for the argument and the position in other jurisdictions, some of which take a different view. E.g. Germany: *Lg Darmstadt 20.6.2000*, TranspR 2001.34, and *Lg Frankfurt 8.3.2000*, TranspR 2001.35, criticised (*ibid*) by Otto.

1130. *Magnus Electronics v. Royal Bk of Canada*, 19 Avi 17,944 (ND Ill, 1985). See also *Air France v. Phillips, Paris 24.4.1990* (1990) 44 RFDA 355.

take action against the carrier which performed the carriage, during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.(7)

Article 30

1. In the case of carriage to be performed(1) by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage insofar as the contract deals with that part of the carriage which is performed under his supervision.
2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the carriage(2) during which the accident or the delay occurred,(3) save in the case where, by express agreement, the first carrier(4) has assumed liability for the whole journey.(5)
3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier,(4) and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier,(6) and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.(7)

Comment

Article 36 concerns rights of action when transportation is effected by successive carriers.[1131] The inference of article 1.3 is that successive carriage is carriage to be performed by several successive *air* carriers. When part of the transportation is to be performed by a non-air carrier, that part is outside the scope of the air Conventions: MC article 38.1 (WSC article 31.1). However, when a contract for carriage by successive air carriers has been concluded, the substitution of a non-air carrier for one stage, e.g. a road carrier when aircraft are grounded by fog, does not deprive a subsequent air carrier of its role as a successive air carrier. What matters, said the court (in 1967) in *Egan*,[1132] was that the subsequent carrier was "named as a successive air carrier on the ticket originally issued pursuant to that contract and, so long as the flight was performed under it, the Convention applied".

Party intention is crucial. Successive carriage, according to article 1.3, is carriage which the parties regard as a single operation, whether "agreed upon under the form of a single contract or of a series of contracts". However, article 36 (like article 30.1 WSC) appears to deal only with the case of successive carriage under a single contract, to which it makes

1131. Before MC, when WSC applied, rights and liabilities of the kind "enjoyed" by the contracting carrier to the actual carrier were governed by GSC: Guadalajara Supplementary Convention, signed at Guadalajara 18 September 1961, Cmd 1568, ICAO Document 88181. See Appendix 3. GSC was ratified by the UK but not, notably, the US.

1132. *Egan v. Kollsman*, 234 NE 2d 199, 202 (CA NY, 1967). The court left open the question whether the decision would have been the same if the land stage has been part of the original arrangement. See *Friesen v. Air Canada* (1981) 30 AR 527, 532 (QB Alberta). Concerning the identity of successive carriers under MC see *Best v. BWIA*, 581 F Supp 2d 359 (EDNY, 2008).

each of the carriers, accepting passengers, baggage or cargo, as the case may be, a party. In the case of successive carriage under a series of contracts, according to a leading commentary, "the carriers actually are contracting parties from the beginning and need not merely be deemed contracting parties" by virtue of article 36.[1133]

An actual carrier is an undertaking, other than the contracting carrier, which by virtue of authority from the contracting carrier performs part or all of the carriage, but which is not with respect to such carriage a successive carrier. Between the liability of an actual carrier and that of a successive carrier there are important differences. Successive carriers may be "jointly and severally liable": article 30.3. Moreover, the first carrier may assume liability for the whole journey: article 31.2. However, an actual carrier cannot be liable in excess of the limits in article 22 for the misconduct of the contracting carrier.[1134] The position of the actual carrier is regulated by MC articles 39 *ff*.

Notes to article 36

1. *Carriage to be performed* is wording indicating that article 36 applies only to carriage intended at the time of contract to be successive. *Ad hoc* post-contract substitution of one carrier for part of the transit does not trigger article 36.[1135] In *Rotterdamsche Bk v. BOAC*[1136] the defendant, Aden Airways, was held to be a successive carrier of cargo on part of the journey. In reaching that conclusion, the court was at some pains to point out that the role of Aden Airways was clear at the time of the contract from the AWB and the BOAC timetable.[1137] If the intention is clear at that time, however, the carrier that performs such a role does not have to be named then. In *Briscoe*,[1138] a round trip contract specified the dates of outwards stages, New York–Paris–Belgrade, but not the dates of the return. In the event the original carrier had no flight on the chosen date so another was used. The court applied the same rule (article 30 WSC) because "the completion and amendment [of the contract] at Belgrade was within the contemplation of the parties when the contract was made in New York".[1139]

1.1 *Code sharing* was not anticipated when WSC article 30 was conceived. Does the current rule (MC article 36) apply, for example, when a passenger buys a ticket from carrier A for a flight in two stages, of which the first is performed ("operated") by carrier A but the second by code-sharing associate carrier B, using the flight-code of both A and B?[1140] Or a similar arrangement is made for the movement of cargo? No doubt, as required to trigger article 36, the parties regard the entire journey as a single operation. However, when concluding the contract, they must also have been agreed that the carriage would be performed by successive and different carriers; and that is unlikely to be the case.[1141] "The

1133. Giemulla, art. 30, para. 7.
1134. Conti, 26 Air & Space Law 4, 8 (2001). So held in US: *Da Rosa v. TAP*, 796 F Supp 1508 (SD Fla, 1992); *Feeney v. America West*, 26 Avi 15,208 (D Colo, 1997).
1135. Giemulla, art. 30, paras 9 *ff*, citing German decisions to that effect.
1136. [1953] 1 WLR 493.
1137. P. 500 *per* Pilcher J.
1138. *Briscoe v. Air France*, 290 F Supp 863 (SDNY, 1968).
1139. P. 866. Also in this sense *El Al v. Maydeck, Paris 27.3.1962*, (1962) 15 RFDA 179; and *Kelechian v. Air France, Aix 21.5.1982*, (1982) 36 RFDA 349.
1140. See Giemulla/van Schyndel TranspR 1997.253, 257 and Thomas TranspR.1998.151.
1141. Conti, 26 Air & Space Law 4, 8 (2001).

passenger/consignor agrees that the contracting carrier will be responsible for performance of the entire carriage, from departure to the final destination, according to the way it advertises and offers this service under its brand name."[1142] For the customer to be aware, a matter of transparency and possibly legal obligation,[1143] that it is the intention of the contracting carrier, A, that code-sharing carrier B will perform the second stage, usually requires more. In practice, the customer "is merely aware of a special kind of substitution".[1144]

2. ***The performing carrier*** is the prime and only target permitted for actions by passengers in most cases (even though the claimant may not have been in direct contractual relations with that carrier) unless the first carrier has expressly assumed liability for the whole journey: article 36.2.

In contrast, in accordance with article 36.3, in actions concerning baggage and cargo passengers or consignors, as the case may be, have a right of action against the first carrier, and passengers or consignees entitled to delivery, as the case may be, have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place.[1145]

3. ***The accident or delay occurs*** when it is caused rather than when it has its effects. Thus, in a case in which a delay on stage 1 caused a passenger to miss a connecting flight for stage 2, the delay in arrival at destination was attributed to the carrier performing stage 1.[1146]

4. ***The first carrier*** is *prima facie* the person identified as being the first carrier in the ticket or AWB.[1147] However, it has been forcefully argued that the first carrier should be the one who actually contracted with the passenger or consignor, even when that carrier did not actually perform any part of the carriage and perhaps is not mentioned in the ticket or AWB as being the first carrier. The contracting carrier, it has been pointed out in Germany, "assumes a special position towards the consignor, since he agreed from the beginning to carry out the whole transportation, whereas the other carriers are under no obligation at this stage yet, and will only accede to the contract later". This view is said to give due weight to "the importance of the contract of carriage under the convention. The reference . . . to the first carrier in respect of the assumption of liability for the whole journey should probably be construed as a reference to the contracting carrier too. This

1142. Conti, p. 9, continuing: "Here lies the difference with *interlining*, which may fit more easily with the concept of successive carriage: in case of interlining, the contracting carrier sells two different carriages, one which will be performed by him, the other to be performed by a different carrier under its own make and flight code." The contracting carrier is no more than agent for the other carrier involved.

1143. "If the code-sharing situation has not been disclosed to him, the passenger may claim damages against this contracting carrier, arguing that the service of the code-sharing partner was not worth the price paid.": Conti, pp. 9–10.

1144. Conti, p. 9.

1145. In Germany, it seems, it has been decided that a contract between a consignor and a successive carrier can result from the mere acceptance of cargo from a preceding carrier, if the AWB indicates that the cargo was originally consigned somewhere else: Giemulla, art. 30, para. 3.

1146. *OLG Frankfurt 14.6.1989*, TranspR 1990.21. Giemulla, art. 30, para. 27.

1147. *OLG Hamburg 2.9.1982*, RIW 1983.874.

would make more sense than the assumption of liability for the whole journey by the carrier, who does not enter into the contract but who merely performs the first part of the transportation."[1148]

5. ***Assumption of liability*** by the first carrier must be proved by the person who alleges it. That person will be the claimant who brings a claim against the first carrier. However, it will be the performing carrier if that carrier raises the assumption of liability by the first carrier as a defence.[1149]

6. ***The last carrier*** is *prima facie* the carrier identified as such in the ticket or AWB.[1150] The last carrier is liable not only for loss occurring while it was performing carriage but also for loss caused by a prior carrier,[1151] provided that the last carrier accepted the baggage or cargo: article 36.1.[1152] The last carrier's rights in subrogation against that prior carrier are matters not for MC but for national law: article 37.

7. ***The consignee or consignor*** are each entitled to sue, but are they alone in this respect? In *Western Digital v. BA*,[1153] the question was whether a claim could be brought by the owner of a consignment of hard disks, part of which was never delivered, although the owner was not, as apparently required by WSC article 30.3, the consignor or consignee named in the waybill. David Steel J noted that the Convention was comprehensive on matters within its scope.[1154] That being so, "any action for damages must . . . be subject to the conditions of the Convention, including . . . the identity of the persons having right to bring proceedings. These persons are prescribed by article 30.3 namely the consignor and the consignee who is entitled to delivery".[1155] The Convention is silent on the right of suit in cases of *non*-successive carriage, which is indeed, as once observed in Australia, "remarkable",[1156] however, the inference of the text is that the rule should be the same, whether the carriage is successive or not.[1157] Moreover, David Steel J considered cases decided in other contracting states and found abundant support for his interpretation.[1158] None the less, his decision was reversed on appeal.[1159]

As regards decisions in other jurisdictions, Mance LJ, with whom Harrison J and Morritt LJ agreed, concluded,[1160] quite differently from David Steel J, that, apart from a line of

1148. Giemulla, with regard to WSC art. 30 (para. 40), citing various German commentators.
1149. *Contreras Perez v. Pan Am, Trib Supremo Espana 4.12.1990*, ULR 1991.II.377.
1150. *OLG Hamburg 2.9.1982*, RIW 1983.874.
1151. *Saiyed v. Transmediterranean*, 509 F Supp 1167 (WD Mich, 1981).
1152. Giemulla, art. 30, para. 43.
1153. [1999] 2 Lloyd's Rep 380.
1154. P. 385. He rejected the argument that in this respect art. 30.3 "is only prescriptive of the rights of suit in cases of successive carriage under art. 1(3)".
1155. P. 389.
1156. *Pan Am v. SA Fire* [1965] 3 SALR 150, 167.
1157. *Western Digital v. BA* [1999] 2 Lloyd's Rep 380, 385 *per* David Steel J: on what he called "any sensible construction".
1158. South Africa: *Pan Am v. SA Fire* [1965] 3 SALR 150. Also Germany: Giemulla, art. 18, para. 84. For a similar view in France see *Versailles 4.9.2003*, BTL 2003.798.
1159. [2000] EWCA Civ 153; [2000] 2 Lloyd's Rep 142.
1160. Pp. 161–162.

French cases[1161] (and some relatively early decisions in Belgium and Holland), "the direction of international authority has swung from a refusal to recognize any right of suit in anyone but a consignor, consignee other person entitled" to rights derived from the consignor, "towards a general readiness to recognise" others recognised by the law otherwise applicable to the transport. A general right of suit of this kind has indeed been maintained in New Zealand[1162] and in England in *Gatewhite*.[1163] However, to speak of a "swing" of this kind perhaps overstates the case.

An alternative view is that there is less a general swing than a general divide, which has been widened by the decision of the Court of Appeal in *Western Digital*. It is a divide between courts in common law countries which entertain a general right of suit and the civil law countries of Europe which do not.[1164] It is a divide which is found also in Europe with regard to CMR, in which there are rules which are regarded as analogous.[1165]

Concerns about a lack of uniform application of the Convention expressed by Lord Hope in *Sidhu* remain. He said, with reference to the edition of Shawcross and Beaumont on *Air Law* then current, that "the rule in civil law countries is that only a party to a contract of carriage, or a principal for whom he was acting, is regarded as the appropriate plaintiff. In common law countries the proper plaintiff is the owner of the goods, whose right to sue depends on his interest in the goods, not on the fact that he may also be a party to the contract. It would seem to me to be more consistent with the purpose of the Convention to regard it as providing a uniform rule about who could sue for goods which were lost or damaged during carriage by air, with the result that the owner who is not a party to the contract has no right to sue."[1166]

A particular concern lay in the argument that, according to the wider view sanctioned by the Court of Appeal in *Western Digital*, the consignor could "waive his claim under the contract and instead avail himself of a third party in order to bring a claim outside the Convention and its liability limits".[1167]

1161. E.g. *Air France v. Atlantic Mutual, Paris 19.3.1975*, (1975) 29 RFDA 199, a case of goods grouped in a single container; *Le Nord v. Pery, Paris 9.5.1980*, (1980) 34 RFDA 300, in which the sender and owner could not sue in respect of jewellery lost *en route* because it was the sender's agent whose name was shown on the AWB. The same decision was reached in the US as regards the sender in *Rank v. Jardine*, 20 Avi 18,325 (ND Ill, 1987); but *cf Bernstein v. Pan Am*, 421 NYS 2d 587 (NY, 1979).

1162. *Tasman Pulp v. Brambles* [1981] 2 NZLR 225, 235 in which the judge declined to accept the view that a person could be deprived of the right to sue at common law without an express provision to that effect in the Convention.

1163. *Gatewhite v. Iberia* [1990] 1 QB 326, 334 *per* Gatehouse J adopting the reason given in *Tasman Pulp* (above). Criticised in *Sidhu* [1997] AC 430, 450 by Lord Hope, with whom other members of the House agreed.

1164. Some decisions, mostly found in countries of civil law tradition, which reject rights of suit based on ownership, are listed by Giemulla, art. 18, para. 83. Giemulla, art. 18, paras 84 *ff* rejects the common law approach as exemplified by *Gatewhite*.

1165. See, Koller, art. 30, para. 1. Under CMR, the civilian preference is to limit the right of suit to the consignor or consignee, according to who has the right of disposal; this view is found in Austria, Belgium, France and Germany. See decisions referred to by Giemulla, art. 30, para. 34; and Clarke, CMR, para. 43b.

1166. *Sidhu v. BA* [1997] AC 430, 450 *per* Lord Hope, with whom other members of the House agreed. As regards French law, see Miller, p. 255.

1167. Giemulla, art. 18, para. 84 with reference to Aschonwerth/Muller-Rostin 1993 ZLW 21. *Sed quaere*.

One of the "common law" concerns[1168] about commercial efficacy was that the narrow civilian view might mean that "the owner of the goods is put completely in the hands of a nominal consignee" such as a customs agent or a forwarding agent "who, for a variety of reasons, may be incapable or adverse to instituting proceedings against an airline".[1169] This concern impressed Mance LJ in *Western Digital*[1170] and, together with his view of the trend in decided cases, led to the court's conclusion: that the right of action in cases governed by the WSC was not confined to the consignor and consignee but might also avail, first, a principal of the person named as consignor or consignee and, second, a person relying on ownership (or right to immediate possession) of cargo to claim against an actual carrier. This being so, it was indeed acceptable to refer to the definitions, if any, of national law[1171]—and still is: the same might be said of MC.

As regards a person relying on ownership (or right to immediate possession) of cargo to claim against an actual carrier, the same kind of argument could not be made and Mance LJ found "this a more difficult point to resolve".[1172] Nonetheless he resolved it in favour of such a claim. He noted that extra-contractual claims were contemplated by the Conventions. He concluded[1173] that "the Conventions do not exclude claims against an actual carrier based on title to the relevant baggage or cargo, but subsume them within the Convention scheme of liability" notably, of course, as regards carrier defences.

Article 37—Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Article 30A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Comment

Questions of subrogation and contribution between carriers, that arise *inter alia* out of successive carriage, are resolved by national law. In the US (Kentucky) it has been held in this connection that MC article 37 "does not preclude an apportionment instruction against a party whom reasonable jurors could determine was at fault".[1174]

1168. See *Western Digital v. BA* [2000] 2 Lloyd's Rep 142, at [81(I)(5)] *per* Mance LJ (CA).
1169. *Tasman Pulp* (above) *loc cit*. The same concern was expressed in *Gatewhite* (above) *loc cit*.
1170. *Western Digital* (above) at [75].
1171. An undisclosed principal (consignor) was allowed to sue in, for example, *Bernstein v. Pan Am*, 421 NYS 2d 587 (NY, 1979).
1172. At [81(II)(1)].
1173. At [81(II)(9)].
1174. *In re Air Crash at Lexington, Kentucky*, 2008 US Dist LEXIS 11255 at 10 (ED Ky, 2008).

CHAPTER IV

COMBINED CARRIAGE

Article 38—Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.
2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Article 31

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.
2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Comment

Combined carriage (also called multimodal or intermodal carriage)[1175] is carriage of goods by more than one mode of transport, when the contract provides for the employment of more than one mode of transport. The carrier cannot convert single mode (unimodal) air carriage into combined carriage by substitution of another mode without the consent of the consignor: MC article 18.4 (WSC article 18.3).

If an air carrier provides an ancillary feeder service by road or rail to the airport, loss or damage which might have occurred during that service is presumed none the less, according to article 18.4 MC, to have been caused by an event occurring during the carriage by air, unless the contrary is proved; in that case liability is governed not by the Convention but by the law governing the movement by road or by rail.[1176] The difference between a feeder stage, to which the presumption applies, and a prior land stage, which is always governed by the law applicable to the stage as such, is one of degree. For the presumption to apply the feeder service must be one that "takes place in the performance of the carriage by air": article 18.4. A bus service operated by the carrier from central

1175. See e.g. "Intermodal transportation and carrier liability", a study published by the European Commission (Luxembourg, 1999).

1176. E.g. CMR: *Arctic Electronics v. McGregor* [1985] 2 Lloyd's Rep 510. Note that if a road vehicle, such as a horse box, is loaded onto the aircraft a regime compulsory within its scope such as CMR will apply in preference to the air Conventions: Clarke, CMR, para. 66.

Paris to Paris CDG is a feeder service. A train service to the same airport by TGV from Marseilles is not; that is combined transport.

Except for the useful cross-reference to article 18.4 in paragraph 1, article 38 MC is identical to WSC article 31.

CHAPTER V

CARRIAGE BY AIR PERFORMED BY A PERSON OTHER THAN THE CONTRACTING CARRIER

Article 39—Contracting Carrier—Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier")[1177] **performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.**

Comment

MC articles 39 to 48 contain the rules for carriage by air performed by a carrier other than the contracting carrier. Under WSC such rules were not found in WSC itself but the Guadalajara Convention 1961 (GSC) which extended WSC rights and liabilities to the actual carrier.[1178] So far these MC provisions have given rise to little significant reported litigation.

Article 40—Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.[1179]

Article 41—Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

1177. Concerning the identity of the "actual" carrier see *McCarthy v. American Airlines* 2008 US Dist LEXIS 49389 (SD Fla, 2008).

1178. See Chapter 3, 3.1. For the GSC rules see Appendix 3.

1179. As to whether agents of the actual carrier can plead the limitation period (2 years) in MC art. 35, see *American Home v. Kuehne & Nagel* 544 F Supp 2d 261 (SDNY, 2008).

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42—Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43—Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44—Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45—Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46—Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in

Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47—Invalidity of Contractual Provisions[1180]

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48—Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

CHAPTER VI

OTHER PROVISIONS

Article 49—Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of cargo arbitration clauses are allowed subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

Comment

MC article 49, together with article 26, makes MC a matter of "*ordre public*". Such provisions are commonly found in international carriage conventions. This one differs from that in the maritime Conventions in that the latter prohibits clauses that relieve the carrier of liability but by clear implication allow clauses that increase it. Article 49 appears to be like that of CMR (article 41) which allows no derogation at all. However, the air Conventions differ from CMR in having more extensive provision for "special agreements".[1181] Moreover CMR, like the maritime regimes, specifically outlaw "benefit of

1180. As regards the contract carrier see art. 26.
1181. See also Koller, art. 33, para. 1.

insurance" clauses,[1182] which the air Conventions do not. However, it has been inferred from the reference to agreements *before* the damage occurred that article 49 (like WSC article 32) does not preclude an agreement after the damage occurred, i.e. a compromise or settlement of a claim.

Article 50—Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 51—Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 34

The provisions of articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Comment

These provisions concern "extraordinary circumstances arising or probable not during transportation but at the time of contracting".[1183] Examination of the *travaux* of the 1929 WSC reveals that they were "adopted to protect a carrier who, for a benevolent purpose, undertook a flight which *from its inception* is to be performed under 'extraordinary circumstances' and outside the normal scope of a carrier's business. The primary concern expressed by the delegates was that a carrier performing in an unusual situation would not be able to comply with such ticketing requirements as those required."[1184]

Cases suggested included the carriage of cargo to territory affected by hostilities or in other circumstances in which the transportation is likely to be unsafe,[1185] including rescue flights.[1186] The relaxation of the carrier's obligations provided for then is of relatively little significance today.

Article 52—Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

1182. Such clauses refer to insurance taken out and paid for by the consignor: a benefit clause insists that the consignor rely on the insurance rather than a claim against the carrier. Also prohibited is a clause in the insurance itself whereby the insurer agrees not to exercise rights in subrogation against the carrier liable for the loss insured: *Lg Duisburg 18.3.1975* (1975) 10 ETL 527. Clarke CMR, para. 92a.

1183. Koller, art. 34, para. 2.

1184. *Karfunkel v. Air France*, 427 F Supp 971, 978 (SDNY, 1977).

1185. Koller, art. 34, para. 2.

1186. Kronke, art. 34, para. 2. However, not hijacked flights: *Karfunkel* (above).

Article 35

The expression "days" when used in this Convention means current days, not working days.

[Articles 53 to 57 and the concluding words of the Montreal Convention are not reproduced here. They deal with signature, ratification, coming into force, denunciation and territorial extent where a State has more than one system of law. They appear in Appendix 1 below.]

Page Intentionally Left Blank

Appendices

Page Intentionally Left Blank

APPENDIX 1

Montreal Convention, 1999 (opened for signature on 28 May 1999)

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention" and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

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;

HAVE AGREED AS FOLLOWS:

CHAPTER I

General Provisions

Article 1—Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation,

whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2—Carriage Performed by State and Carriage of Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

CHAPTER II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3—Passengers and Baggage

1. In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;
(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4—Cargo

1. In respect of the carriage of cargo, an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5—Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and
(c) an indication of the weight of the consignment.

Article 6—Document Relating to the Nature of the Cargo

The consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. The provision creates for the carrier no duty, obligation or liability resulting therefrom.

Article 7—Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed subject to proof to the contrary, to have done so on behalf of the consignor.

Article 8—Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;
(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 9—Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 10—Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 11—Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packaging of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12—Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 13—Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14—Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15—Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16—Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III

Liability of the Carrier and Extent of Compensation for Damage

Article 17—Death and Injury of Passengers—Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term “baggage” means both checked baggage and unchecked baggage.

Article 18—Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;
(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
(c) an act of war or an armed conflict;
(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of

a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19—Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20—Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 21—Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22—Limits of Liability in Relation to Delay, Baggage and Cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23—Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judegment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1,500,000 monetary units per passenger in judicial proceedings in their territories; 62,500 monetary units per passenger with respect to paragraph 1 of Article 22; 15,000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 24—Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary

at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3 Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25—Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26—Invalidity of Contractual Provisions

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

Article 27—Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28—Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29—Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective

rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30—Servants, Agents—Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31—Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32—Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33—Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of 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.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

Article 34—Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35—Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36—Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37—Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

CHAPTER IV

Combined Carriage

Article 38—Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

CHAPTER V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 39—Contracting Carrier—Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40—Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41—Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42—Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43—Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44—Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45—Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46—Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47—Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48—Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

CHAPTER VI

Other Provisions

Article 49—Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 50—Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 51—Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 52—Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

CHAPTER VII

Final Clauses

Article 53—Signature, Ratification and Entry into Force

1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2. This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation.

3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4. Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

6. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

8. The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;
(c) the date of entry into force of this Convention;
(d) the date of the coming into force of any revision of the limits of liability established under this Convention;
(e) any denunciation under Article 54.

Article 54—Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 55—Relationship with other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to

(a) the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);
(b) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);
(c) the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);
(d) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);
(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Article 56—States with more than one System of Law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has made such a declaration:

(a) references in Article 23 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State; and
(b) the reference in Article 28 to "national law" shall be construed as referring to the law of the relevant territorial unit of that State.

Article 57—Reservations

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or
(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.

Page Intentionally Left Blank

APPENDIX 2

Authentic French Text of The Warsaw Convention, 1929

CONVENTION POUR L'UNIFICATION DE CERTAINES REGLES RELATIVES AU TRANSPORT AERIEN INTERNATIONAL

Le Président du Reich allemand, le Président fédéral de la République d'Autriche, Sa Majesté le Roi des Belges, le Président des Etats-Unis du Brésil, Sa Majesté le Roi des Bulgares, le Président du Gouvernement nationaliste de la République de Chine, Sa Majesté le Roi de Danemark et d'Islande, Sa Majesté le Roi d'Egypte, Sa Majesté le Roi d'Espagne, le Chef d'Etat de la République d'Estonie, le Président de la République de Finlande, le Président de la République française, Sa Majesté le Roi de Grande-Bretagne, d'Irlande et des Territoires britanniques au-delà des mers, Empereur des Indes, le Président de la République hellénique, Son Altesse Sérénissime le Régent du Royaume de Hongrie, Sa Majesté le Roi d'Italie, Sa Majesté l'Empereur du Japon, le Président de la République de Lettonie, Son Altesse Royale la Grande Duchesse de Luxembourg, le Président des Etats-Unis du Mexique, Sa Majesté le Roi de Norvège, Sa Majesté la Reine des Pays-Bas, le Président de la République de Pologne, Sa Majesté le Roi de Roumanie, Sa Majesté le Roi de Suède, le Conseil fédéral suisse, le Président de la République tchécoslovaque, le Comité central exécutif de l'Union des Républiques soviétiques socialistes, le Président des Etats-Unis du Venezuela, Sa Majesté le Roi de Yougoslavie,

Ayant reconnu l'utilité de régler d'une manière uniforme les conditions du transport aérien international en ce qui concerne les documents utilisés pour ce transport et la responsabilité du transporteur,

À cet effet ont nommé leurs Plénipotentiaires respectifs lesquels, dûment autorisés, ont conclu et signé la Convention suivante:

CHAPITRE PREMIER

Objet—Définitions

Article Premier

1. La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transports aériens.

2. Est qualifié "transport international", au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance même non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la même Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention.

3. Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de cette Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une même Haute Partie Contractante.

Article 2

1. La Convention s'applique aux transports effectués par l'Etat ou les autres personnes juridiques de droit public, dans les conditions prévues à l'article 1er.

2. Sont exceptés de l'application de la présente Convention les transports effectués sous l'empire de conventions postales internationales.

CHAPITRE II

Titre de transport

Section I—Billet de Passage

Article 3

1. Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

(a) le lieu et la date de l'émission;
(b) les points de départ et de destination;
(c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;
(d) le nom et l'adresse du ou des transporteurs;
(e) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

2. L'absence, l'irrégularité ou le perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été delivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

Section II—Bulletin de Bagages

Article 4

1. Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

2. Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

3. Il doit contenir les mentions suivantes:

(a) le lieu et la date de l'émission;
(b) les points de départ et de destination;
(c) le nom et l'adresse du ou des transporteurs;
(d) le numéro du billet de passage;
(e) l'indication que la livraison des bagages est faite au porteur du bulletin;
(f) le nombre et le poids des colis;

(g) le montant de la valeur déclarée conformément à l'article 22, alinéa 2;
(h) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

4. L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres (d), (f), (h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

Section III—Lettre de Transport Aérien

Article 5

1. Tout transporteur de marchandises a le droit de demander à l'expéditeur l'établissement et la remise d'un titre appelé "lettre de transport aérien"; tout expéditeur a le droit de demander au transporteur l'acceptation de ce document.

2. Toutefois, l'absence, l'irrégularité ou la perte de ce titre n'affecte ni l'existence, ni la validité du contrat de transport qui n'en sera pas moins soumis aux règles de la présente Convention, sous réserve des dispositions de l'article 9.

Article 6

1. La lettre de transport aérien est établie par l'expéditeur en trois exemplaires originaux et remise avec la marchandise.

2. Le premier exemplaire porte la mention "pour le transporteur"; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention "pour le destinataire"; il est signé par l'expéditeur et le transporteur et il accompagne la marchandise. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après acceptation de la marchandise.

3. La signature du transporteur doit être apposée dès l'acceptation de la marchandise.

4. La signature du transporteur peut être remplacée par un timbre; celle de l'expéditeur peut être imprimée ou remplacée par un timbre.

5. Si, à la demande de l'expéditeur, le transporteur établit la lettre de transport aérien, il est considéré jusqu'à preuvre contraire, comme agissant pour le compte de l'expéditeur.

Article 7

Le transporteur de marchandises a le droit de demander à l'expéditeur l'établissement de lettres de transport aérien différentes lorsqu'il y a plusieurs colis.

Article 8

La lettre de transport aérien doit contenir les mentions suivantes:

(a) le lieu où le document a été créé et la date à laquelle il a été établi;
(b) les points de départ et de destination;
(c) les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;
(d) le nom et l'adresse de l'expéditeur;
(e) le nom et l'adresse du premier transporteur;
(f) le nom et l'adresse du destinataire, s'il y a lieu;
(g) la nature de la marchandise;
(h) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;

(i) le poids, la quantité, le volume ou les dimensions de la marchandise;
(j) l'état apparent de la marchandise et de l'emballage;
(k) le prix du transport s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer;
(l) si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais;
(m) le montant de la valeur déclarée conformément à l'article 22, alinéa 2;
(n) le nombre d'exemplaires de la lettre de transport aérien;
(o) les documents transmis au transporteur pour accompagner la lettre de transport aérien;
(p) le délai de transport et l'indication sommaire de la voie à suivre (via) s'ils ont été stipulés;
(q) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

Article 9

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-ci ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

Article 10

1. L'expéditeur est responsable de l'exactitude des indications et déclarations concernant la marchandise qu'il inscrit dans la lettre de transport aérien.

2. Il supportera la responsabilité de tout dommage subi par le transporteur ou toute autre personne à raison de ses indications et déclarations irrégulières, inexactes ou incomplètes.

Article 11

1. La lettre de transport aérien fait foi, jusqu'à preuve contraire, de la conclusion du contrat, de la réception de la marchandise et des conditions du transport.

2. Les énonciations de la lettre de transport aérien, relatives au poids, aux dimensions et à l'emballage de la marchandise ainsi qu'au nombre des colis font foi jusqu'à preuve contraire; celles relatives à la quantité, au volume et à l'état de la marchandise ne font preuve contre le transporteur qu'autant que la vérification en a été faite par lui en présence de l'expéditeur, et constatée sur la lettre de transport aérien, ou qu'il s'agit d'énonciations relatives à l'état apparent de la marchandise.

Article 12

1. L'expéditeur a le droit sous la condition d'exécuter toutes les obligations résultant du contrat de transport, de disposer de la marchandise, soit en la retirant à l'aérodrome de départ ou de destination, soit en l'arrêtant en cours de route lors d'un atterrissage, soit en la faisant délivrer au lieu de destination ou en cours de route à une personne autre que le destinataire indiqué sur la lettre de transport aérien, soit en demandant son retour à l'aérodrome de départ, pour autant que l'exercice de ce droit ne porte préjudice ni au transporteur, ni aux autres expéditeurs et avec l'obligation de rembourser les frais qui en résultent.

2. Dans le cas où l'exécution des ordres de l'expéditeur est impossible, le transporteur doit l'en aviser immédiatement.

3. Si le transporteur se conforme aux ordres de disposition de l'expéditeur, sans exiger la production de l'exemplaire de la lettre de transport aérien délivré à celui-ci, il sera responsable, sauf son recours contre l'expéditeur, du préjudice qui pourrait être causé par ce fait à celui qui est régulièrement en possession de la lettre de transport aérien.

4. Le droit de l'expéditeur cesse au moment où celui du destinataire commence, conformément à l'article 13 ci-dessous. Toutefois, si le destinataire refuse la lettre de transport ou la marchandise, ou s'il ne peut être atteint, l'expéditeur reprend son droit de disposition.

Article 13

1. Sauf dans les cas indiqués à l'article précédent, le destinataire a le droit, dès l'arrivée de la marchandise au point de destination, de demander au transporteur de lui remettre la lettre de transport aérien et de lui livrer la marchandise contre le paiement du montant des créances et contre l'exécution des conditions de transport indiquées dans la lettre de transport aérien.

2. Sauf stipulation contraire, le transporteur doit aviser le destinataire dès l'arrivée de la marchandise.

3. Si la perte de la marchandise est reconnue par le transporteur ou si, à l'expiration d'un délai de sept jours après qu'elle aurait dû arriver, la marchandise n'est pas arrivée, le destinataire est autorisé à faire valoir vis-à-vis du transporteur les droits résultant du contrat de transport.

Article 14

L'expéditeur et le destinataire peuvent faire valoir tous les droits qui leur sont respectivement conférés par les articles 12 et 13, chacun en son propre nom, qu'il agisse dans son propre intérêt ou dans l'intérêt d'autrui, à condition d'exécuter les obligations que le contrat impose.

Article 15

1. Les articles 12, 13 et 14 ne portent aucun préjudice ni aux rapports de l'expéditeur et du destinataire entre eux, ni aux rapports des tiers dont les droits proviennent, soit de l'expéditeur, soit du destinataire.

2. Toute clause dérogeant aux stipulations des articles 12, 13 et 14 doit être inscrite dans la lettre de transport aérien.

Article 16

1. L'expéditeur est tenu de fournir les renseignements et de joindre à la lettre de transport aérien les documents qui, avant la remise de la marchandise au destinataire, sont nécessaires à l'accomplissement des formalités de douane, d'octroi ou de police. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces renseignements et pièces, sauf le cas de faute de la part du transporteur ou de ses préposés.

2. Le transporteur n'est pas tenu d'examiner si ces renseignements et documents sont exacts ou suffisants.

CHAPITRE III

Responsabilité du transporteur

Article 17

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

Article 18

1. Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés ou de marchandises lorsque l'événement qui a causé le dommage s'est produit pendant le transport aérien.

2. Le transport aérien, au sens de l'alinéa précédent, comprend la période pendant laquelle les bagages ou marchandises se trouvent sous la garde du transporteur, que ce soit dans un aérodrome ou à bord d'un aéronef ou dans un lieu quelconque en cas d'atterrissage en dehors d'un aérodrome.

3. La période du transport aérien ne couvre aucun transport terrestre, maritime ou fluvial effectué en dehors d'un aérodrome. Toutefois lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve contraire, résulter d'un événement survenu pendant le transport aérien.

Article 19

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de voyageurs, bagages ou marchandises.

Article 20

1. Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

2. Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite le l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage.

Article 21

Dans le cas où le transporteur fait la preuve que la faute de la personne lésée a causé le dommage ou y a contribué, le tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur.

Article 22

1. Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs *(8.300 Droits de Tirage spéciaux)*. Dans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

2. Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs *(17 Droits de Tirage spéciaux)* par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

3. En ce qui concerne les objets dont le voyageur conserve la garde, la responsabilité du transporteur est limité à cinq mille francs *(332 Droits de Tirage spéciaux)* par voyageur.

4. Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demi milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

Article 23

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention.

Article 24

1. Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

2. Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

Article 25

1. Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol.

2. Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercice de ses fonctions.

Article 26

1. La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire, que les marchandises ont été livrées en bon état et conformément au titre de transport.

2. En cas d'avarie le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de trois jours pour les bagages et de sept jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les quatorze jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

3. Toute protestation doit être faite par réserve inscrite sur le titre de transport ou par un autre écrit expédié dans le délai prévu pour cette protestation.

4. A défaut de protestation dans les délais prévus, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

Article 27

En cas de décès du débiteur, l'action en responsabilité, dans les limites prévues par la présente Convention, s'exerce contre ses ayants droit.

Article 28

1. L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

2. La procédure sera réglée par la loi du tribunal saisi.

Article 29

1. L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

2. Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

Article 30

1. Dans les cas de transport régis par la définition du troisième alinéa de l'article premier, à exécuter par divers transporteurs successifs, chaque transporteur acceptant des voyageurs, des bagages ou des

marchandises est soumis aux règles établies par cette Convention, et est censé être une des parties contractantes du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

2. Au cas d'un tel transport, le voyageur ou ses ayants droit ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident ou le retard s'est produit, sauf dans le cas où, par stipulation expresse, le premier transporteur aura assuré la responsabilité pour tout le voyage.

3. S'il s'agit de bagages ou de marchandises, l'expéditeur aura recours contre le premier transporteur et le destinataire qui a le droit à la délivrance contre le dernier, et l'un et l'autre pourront, en outre, agir contre le transporteur ayant effectué le transport au cours duquel la destruction, la perte, l'avarie ou le retard se sont produits. Ces transporteurs seront solidairement responsables envers l'expéditeur et le destinataire.

CHAPITRE IV

Dispositions relatives aux transports combinés

Article 31

1. Dans le cas de transports combinés effectués en partie par air et en partie par tout autre moyen de transport, les stipulations de la présente Convention ne s'appliquent qu'au transport aérien et si celui-ci répond aux conditions de l'article premier.

2. Rien dans la présente Convention n'empêche les parties, dans le cas de transports combinés, d'insérer dans le titre de transport aérien des conditions relatives à d'autres modes de transport, à condition que les stipulations de la présente Convention soient respectées en ce qui concerne le transport par air.

CHAPITRE V

Dispositions générales et finales

Article 32

Sont nulles toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente Convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport des marchandises, les clauses d'arbitrage sont admises, dans les limites de la présente Convention, lorsque l'arbitrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article 28, alinéa 1.

Article 33

Rien dans la présente Convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport ou de formuler des règlements qui ne sont pas en contradiction avec les dispositions de la présente Convention.

Article 34

La présente Convention n'est applicable ni aux transports aériens internationaux exécutés à titre de premiers essais par des entreprises de navigation aérienne en vue de l'établissement de lignes régulières de navigation aérienne ni aux transports effectués dans des circonstances extraordinaires en dehors de toute opération normale de l'exploitation aérienne.

Article 35

Lorsque dans la présente Convention il est question de jours, il s'agit de jours courants et non de jours ouvrables.

Article 36

La présente Convention est rédigée en français en un seul exemplaire qui restera déposé aux archives du Ministère des Affaires Etrangères de Pologne, et dont une copie certifiée conforme sera transmise par les soins du Gouvernement polonais au Gouvernement de chacune des Hautes Parties Contractantes.

Article 37

1. La présente Convention sera ratifiée. Les instruments de ratification seront déposés aux archives du Ministère des Affaires Etrangères de Pologne, qui en notifiera le dépôt au Gouvernement de chacune des Hautes Parties Contractantes.

2. Dès que la présente Convention aura été ratifiée par cinq des Hautes Parties Contractantes, elle entrera en vigueur entre Elles le quatre-vingt-dixième jour après le dépôt de la cinquième ratification. Ultérieurement elle entrera en vigueur entre les Hautes Parties Contractantes qui l'auront ratifiée et la Haute Partie Contractante qui déposera son instrument de ratification le quatre-vingt-dixième jour après son dépôt.

3. Il appartiendra au Gouvernement de la République de Pologne de notifier au Gouvernement de chacune des Hautes Parties Contractantes la date de l'entrée en vigueur de la présente Convention ainsi que la date du dépôt de chaque ratification.

Article 38

1. La présente Convention, après son entrée en vigueur, restera ouverte à l'adhésion de tous les Etats.

2. L'adhésion sera effectuée par une notification adressée au Gouvernement de la République de Pologne, qui en fera part au Gouvernement de chacune des Hautes Parties Contractantes.

3. L'adhésion produira ses effets à partir du quatre-vingt-dixième jour après la notification faite au Gouvernement de la République de Pologne.

Article 39

1. Chacune des Hautes Parties Contractantes pourra dénoncer la présente Convention par une notification faite au Gouvernement de la République de Pologne, qui en avisera immédiatement le Gouvernement de chacune des Hautes Parties Contractantes.

2. La dénonciation produira ses effets six mois après la notification de la dénonciation et seulement à l'égard de la Partie qui y aura procédé.

Article 40

1. Les Hautes Parties Contractantes pourront, au moment de la signature, du dépôt des ratifications, ou de leur adhésion, déclarer que l'acceptation qu'Elles donnent à la présente Convention ne s'applique pas à tout ou partie de leurs colonies, protectorats, territoires sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou à tout autre territoire sous suzeraineté.

2. En conséquence Elles pourront ultérieurement adhérer séparément au nom de tout ou partie de leurs colonies, protectorats, territoire sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou tout territoire sous suzeraineté ainsi exclus de leurs déclarations originelle.

3. Elles pourront aussi, en se conformant à ses dispositions, dénoncer la présente Convention séparément ou pour tout ou partie de leurs colonies, protectorats, territoires sous mandat, ou tout

autre territoire soumis à leur souveraineté ou à leur autorité, ou tout autre territoire sous suzeraineté.

Article 41

Chacune des Hautes Parties Contractantes aura la faculté au plus tôt deux ans après la mise en vigueur de la présente Convention de provoquer la réunion d'une nouvelle Conférence Internationale dans le but de rechercher les améliorations qui pourraient être apportées à la présente Convention. Elle s'adressera dans ce but au Gouvernement de la République Française qui prendra les mesures nécessaires pour préparer cette Conférence.

La présente Convention, faite à Varsovie le 12 octobre 1929 restera ouverte à la signature jusqu'au 31 janvier 1930.

PROTOCOLE ADDITIONNEL

Ad Article 2

Les Hautes Parties Contractantes se réservent le droit de déclarer au moment de la ratification ou de l'adhésion que l'article 2 alinéa premier, de la présente Convention ne s'appliquera pas aux transports internationaux aériens effectués directement par l'Etat, ses colonies, protectorats, territories sous mandat ou tout autre territoire sous sa souveraineté, sa suzeraineté ou son autorité.

APPENDIX 3

Guadalajara Supplementary Convention, 1961[1]

THE STATES SIGNATORY TO THE PRESENT CONVENTION

NOTING that the Warsaw Convention does not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage.

CONSIDERING that it is therefore desirable to formulate rules to apply in such circumstances.

HAVE AGREED AS FOLLOWS:

Article I

In this Convention:

a) "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, or the Warsaw Convention as amended at The Hague, 1955, according to whether the carriage under the agreement referred to in paragraph b) is governed by the one or by the other;

b) "contracting carrier" means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor;

c) "actual carrier" means a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.

Article II

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 1, paragraph b), is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.

Article III

1. The acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

1. 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. ICAO Doc. 8181. *[PN]*.

2. The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention or any special declaration of interest in delivery at destination contemplated in Article 22 of the said Convention, shall not affect the actual carrier unless agreed to by him.

Article IV

Any complaint to be made or order to be given under the Warsaw Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, orders referred to in Article 12 of the Warsaw Convention shall only be effective if addressed to the contracting carrier.

Article V

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he is unless it is proved that he acted in a manner which, under the Warsaw Convention, prevents the limits of liability from being invoked.

Article VI

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him.

Article VII

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article VIII

Any action for damages contemplated in Article VII of this Convention must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 28 of the Warsaw Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business.

Article IX

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Convention or to fix a lower limit than that which is applicable according to this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Convention.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

3. Any clause contained in an agreement for carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for the carriage of cargo arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place in one of the jurisdictions referred to in Article VIII.

Article X

Except as provided in Article VII, nothing in this Convention shall affect the rights and obligations of the two carriers between themselves.

Article XI

Until the date on which this Convention comes into force in accordance with the provisions of Article XIII, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialised Agencies.

Article XII

1. This Convention shall be subject to ratification by the signatory States.

2. The instruments of ratification shall be deposited with the Government of the United States of Mexico.

Article XIII

1. As soon as five of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the fifth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the United Nations and the International Civil Aviation Organization by the Government of the United States of Mexico.

Article XIV

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the Government of the United States of Mexico and shall take effect as from the ninetieth day after the date of such deposit.

Article XV

1. Any Contracting State may denounce this Convention by notification addressed to the Government of the United States of Mexico.

2. Denunciation shall take effect six months after the date of receipt by the Government of the United States of Mexico of the notification of denunciation.

Article XVI

1. Any Contracting State may at the time of its ratification of or accession to this Convention or at any time thereafter declare by notification to the Government of the United States of Mexico that the Convention shall extend to any of the territories for whose international relations it is responsible.

2. The Convention shall, ninety days after the date of the receipt of such notification by the Government of the United States of Mexico, extend to the territories named therein.

3. Any Contracting State may denounce this Convention, in accordance with the provisions of Article XV, separately for any or all of the territories for the international relations of which such State is responsible.

Article XVII

No reservation may be made to this Convention

Article XVIII

The Government of the United States of Mexico shall give notice to the International Civil Aviation Organization and to all States Members of the United Nations or of any of the Specialized Agencies:

a) of any signature of this Convention and the date thereof;

b) of the deposit of any instrument of ratification or accession and the date thereof;

c) of the date on which this Convention comes into force in accordance with Article XIII, paragraph 1;

d) of the receipt of any notification of denunciation and the date thereof;

e) of the receipt of any declaration or notification made under Article XVI and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Guadalajara on the eighteenth day of September One Thousand Nine Hundred and Sixty-one in three authentic texts drawn up in the English, French and Spanish languages. In case of any inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail. The Government of the United States of Mexico will establish an official translation of the text of the Convention in the Russian language.

This Convention shall be deposited with the Government of the United States of Mexico with which, in accordance with Article XI, it shall remain open for signature, and that Government shall send certified copies thereof to the International Civil Aviation Organization and to all States Members of the United Nations or of any Specialized Agency.

APPENDIX 4

Warsaw Convention as amended at the Hague, 1955 and by the Protocol No 4 of Montreal, 1975

CHAPTER I

Scope—Definitions

Article 1

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

Article 2

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Documents of Carriage

Section I—Passenger Ticket

Article 3

1. In respect of the carriage of passengers a ticket shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
(c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, nonetheless, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

Section II—Baggage Check

Article 4

1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

(a) an indication of the places of departure and destination;
(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
(c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute prima facie evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, nonetheless, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1(c)) does not include the notice required by paragraph 1(c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

Section III—Documentation Relating to Cargo

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this Article does not entitle the carrier to refuse to accept the cargo for carriage.

Article 6

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked “for the carrier”; it shall be signed by the consignor. The second part shall be marked “for the consignee”; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;
(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used.

Article 8

The air waybill and the receipt for the cargo shall contain:

(a) an indication of the places of departure and destination;
(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and
(c) an indication of the weight of the consignment.

Article 9

Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5.

Article 11

1. The air waybill or the receipt for the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

Article 13

1. Except when the consignor has exercised his right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14

The consignor and consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage.

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo.

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III

Liability of the Carrier

Article 17

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

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

(a) inherent defect, quality or vice of that cargo;
(b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;
(c) an act of war or an armed conflict;
(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Article 19

The carrier is liable for damage occasioned by delay in the transportation by air of passengers, baggage or cargo.

Article 20

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have

taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

Article 21

1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.

Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2.—(a) In the carriage of registered baggage, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination.

(c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national

currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.

6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2(b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned.

Article 23

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

2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 24

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

Article 25

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

Article 25A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his

employment, shall be entitled to avail himself of the limits of liability which that carrier is entitled to invoke under article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

3. In the carriage of passengers and baggage, the provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 26

1. Receipt by the person entitled to delivery of baggage or cargo without complaint is prima facie evidence that the same have been delivered in good condition and in accordance with the document of carriage.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing dispatched within the times aforesaid.

4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Article 28

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made, or before the court having jurisdiction at the place of destination.

2. Questions of procedure shall be governed by the law of the court seised of the case.

Article 29

1. The right to damages shall be extinguished if an action is not brought within 2 (two) years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court seised of the case.

Article 30

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage insofar as the contract deals with that part of the carriage which is performed under his supervision.

2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 30A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

CHAPTER IV

Provisions Relating to Combined Carriage

Article 31

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

CHAPTER V

General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of cargo arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

Article 34

The provisions of Articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier’s business.

Article 35

The expression “days” when used in this Convention means current days, not working days.

[Articles 36 to 41 are not reproduced here.]

Index

Absence, irregularity or loss of the check
  baggage check, and, 58
Accident
  air rage, and, 97–98
  asthma, and, 90
  baggage and cargo damage, and, 104–105
  cabin accidents, 95–96
  cabin service accidents, 96–97
  comment, 79–80
  connection with carriage by air, 94–95
  connection with carrier
    air rage, 97–98
    cabin accidents, 95–96
    cabin service accidents, 96–97
    hijacking, 98
    introduction, 94–95
    passenger misconduct, 97–98
    terrorism, 98
  damage to baggage and cargo, and, 104–105
  deep vein thrombosis, 91–92
  emotional sensitivity, 91
  external events
    deep vein thrombosis, 91–92
    emotional sensitivity, 91
    introduction, 90
    physical weakness, 90–91
    self-inflicted injury, 91
    tour operators, 92
  heart attack, and, 90
  hijacking, 98
  introduction, 90
  passenger misconduct, 97–98
  physical weakness, 90–91
  self-inflicted injury, 91
  terrorism, 98
  tour operators, 92
Accident or delay occurs
  successive carriers, and, 197
Act of war
  damage to baggage and cargo, and, 113
Actions affected
  limitation of actions, and, 184
Actions for damages
  basis of claims, and, 160
Actions founded outside WSC
  but subject to WSC limits, 162
  introduction, 160–162
  non-performance, 162
Actual carriage
  comment, 46
  text of the Article, 46
Actual carriers
  generally, 193
  liability, 193–194
  mutual relations, 195
Actual payment
  limits of liability in relation to delay, baggage and cargo, and, 140
Advance payments
  text of the Article, 159
After the cargo has been accepted
  description of air waybill, and, 62–63
Agents
  aggregation of claims, and
    comment, 163
    text of the Articles, 162–163
  all necessary measures defence, and, 124–125
  carriage performed by person other than the contracting carrier actual carrier, and, 194
Aggregation of claims
  comment, 163
  text of the Articles, 162–163
Aggregation of damages
  carriage performed by person other than the contracting carrier actual carrier, and, 194
Agreed stopping place
  international carriage, and, 43
Agreement of the parties
  international carriage, and, 43
Air rage
  accident, and, 97–98
Air waybills (AWB)
  contents
    comment, 59–60
    general note, 60–61
    text of the Articles, 59
  customs formalities
    comment, 78
    general note, 78
    text of the Articles, 77–78
  delivery of cargo
    comment, 74
    general note, 74–75
    text of the Articles, 73–74
  description
    comment, 62

Air waybills (AWB)—*cont*.
description—*cont*.
general note, 62–63
text of the Articles, 61–62
disposition of cargo
comment, 70–72
general note, 72–73
text of the Articles, 69–70
enforcement of rights
comment, 76
text of the Articles, 76
evidentiary value
comment, 66–67
general note, 67–69
text of the Articles, 65–66
generally
comment, 58
general note, 59
text of the Articles, 58
making out, 62
multiple packages, and
comment, 63
text of the Articles, 63
nature of cargo, 61
non-compliance with requirements
comment, 64
text of the Articles, 63–64
relations of parties
comment, 77
text of the Articles, 76–77
responsibility for particulars
comment, 65
general note, 65
text of the Articles, 64
signature, 62
three original parts, 62
Aircraft
meaning, 38–39
All necessary measures defence
agents, 124–125
comment, 124
excursus
force majeure, 130
introduction, 130
reasonable care, 131–132
utmost care, 132
factors influencing courts
introduction, 126–127
legality, 127
likelihood of loss, 127
practicality of measures, 127
seriousness of loss, 127
standard of care, 127–128
general note
"all necessary measures", 126–130
"delay", 130
"servants or agents", 124–126
legality, 127
likelihood of loss, 127
meaning
examples, 128–130
factors influencing courts, 126–128
All necessary measures defence—*cont*.
meaning—*cont*.
introduction, 125–126
practicality of measures, 127
seriousness of loss, 127
servants
introduction, 124–125
scope of employment, 125
standard of care, 127–128
text of the Articles, 124
Apparent condition
evidentiary value of waybill, and, 68–69
Arbitration
See also Jurisdiction
text of the Articles, 173
Arrival late
delivery of cargo, and, 75
Assumption of liability
successive carriers, and, 189
Asthma
accident, and, 90
Awareness
cargo neglect, 150–151
consequences, of, 147
degree of, 147–148
introduction, 146
objective evidence
England, in, 150
introduction, 148
US, in, 148–150
wrong, of, 146–147

Bad weather
delay to baggage, cargo and passengers, and, 121
Baggage
damage to
and see below
comment, 104–106
general note, 106–118
text of the Articles, 103–104
delay to
and see Delay
comment, 118
general note, 118–124
Montreal Convention, 6
text of the Articles, 118
Warsaw Convention, 4
meaning, 38
notice of complaints, and, 165
scheme of liability
Montreal Convention, 5–6
Warsaw Convention, 3–4
Baggage check
comment, 54
form, 57
general note
"absence, irregularity or loss of the check", 58
"check", 56–57
"checked baggage", 55–56
"Hague notice", 57
"*prima facie* evidence", 57
"registered baggage", 55–56

Baggage check—*cont*.
general note—*cont*.
"stopping places", 57
legibility of statements, 57
tags, 56–57
text of the Articles, 53–54
Baggage damage
accidents, 104–105
act of war, 113
basis of claims
comment, 160
general note, 160–162
text of the Articles, 159–160
carriage, 105
carriage by air, 112–113
carrier is liable, 106–109
causation, 112
"checked baggage", 111
comment
accidents, 104–105
carriage, 105
damage, 105
feeder services, 105–106
presumptions, 106
proof, 106
damage
comment, 105
generally, 111–112
damage sustained, 108–109
defective packing, 113
defence
and see All necessary measures defence
comment, 124
general note, 124–132
text of the Articles, 124
destruction, 109
exoneration of carrier
and see Exoneration
comment, 133
general note, 133–134
text of the Articles, 132–133
feeder services, 105–106
general note
"act of war", 113
"carriage by air", 112–113
"carrier is liable", 106–109
"causation", 112
"checked baggage", 111
"damage", 110–111
"damage sustained", 108–109
"defective packing", 113
"destruction", 109
"in the charge of the carrier", 113–116
"inherent defect", 113
"inherent vice", 113
"loss", 109–110
"occurrence", 112
"performance outside an airport", 116–118
"registered baggage", 111
"transhipment", 118
in the charge of the carrier
checked baggage, 115
Baggage damage—*cont*.
in the charge of the carrier—*cont*.
customs authorities, 113–115
hand baggage, 116
introduction, 113–113
misdelivery, 116
storage of cargo, 115
sub-contractors, 114
inherent defect, 113
inherent vice, 113
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
liable carrier
introduction, 106
single carriers, 107–108
successive carriers, 107
limits of liability
and see Limits of liability
comment, 139
general note, 139–141
text of the Articles, 137–138
loss, 109–110
measure of damage, 109
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
occurrence, 112
performance outside an airport
airport, 117–118
introduction, 116
performance, 116–117
presumptions, 106
proof, 106
registered baggage, 111
text of the Articles, 103–104
transhipment, 118
Basis of claims
actions for damages, 160
action founded outside WSC
but subject to WSC limits, 162
introduction, 160–162
non-performance, 162
comment, 160
general note
"actions for damages", 160
"action founded outside WSC", 160–162
text of the Articles, 159–160
Bodily injury
comment, 79
evidence of injury, 86–87
interpretation
French text, 83
introduction, 83
legislative history, 83–84
national law, 84–85
introduction, 82
meaning, 79
psychic injury
associated with physical injury, 88–89

Bodily injury—*cont.*
psychic injury—*cont.*
caused by physical injury, 89
incidental to physical injury, 89
introduction, 87–88
no recovery of damages, 88
range of injuries, 85–86
Brought
limitation of actions, and, 184
Bumping
delay to baggage, cargo and passengers, and, 124

Cabin accidents
accident, and, 95–96
Cabin service accidents
accident, and, 96–97
Cargo
air waybills
and see Air waybills
contents, 59–61
customs formalities, 77–78
delivery of cargo, 73–75
description, 61–63
disposition of cargo, 69–73
enforcement of rights, 76
evidentiary value, 65–69
generally, 58–59
multiple packages, 63
nature of cargo, 61
non-compliance with requirements, 63–64
relations of parties, 76–77
responsibility for particulars, 64–65
damage to
and see below
comment, 104–106
general note, 106–118
text of the Articles, 103–104
delay to
and see Delay
comment, 118
general note, 118–124
Montreal Convention, 6
text of the Articles, 118
Warsaw Convention, 4
delivery
comment, 74
general note, 74–75
text of the Articles, 73–74
disposition
comment, 70–72
general note, 72–73
text of the Articles, 69–70
meaning, 38
notice of complaints, and, 165
scheme of liability
Montreal Convention, 6
Warsaw Convention, 4
Cargo damage
accidents, 104–105
act of war, 113
basis of claims
comment, 160
basis of claims—*cont.*
general note, 160–162
text of the Articles, 159–160
cargo, 111–112
carriage, 105
carriage by air, 112–113
carrier is liable
introduction, 106
single carriers, 107–108
successive carriers, 107
causation, 112
"checked baggage", 111
comment
accidents, 104–105
carriage, 105
damage, 105
feeder services, 105–106
presumptions, 106
proof, 106
damage
generally, 110–111
introduction, 105
damage sustained, 108–109
defective packing, 113
defence
and see All necessary measures defence
comment, 124
general note, 124–132
text of the Articles, 124
destruction, 109
exoneration of carrier
and see Exoneration
comment, 133
general note, 133–134
text of the Articles, 132–133
feeder services, 105–106
general note
"act of war", 113
"cargo", 111–112
"carriage by air", 112–113
"carrier is liable", 106–108
"causation", 112
"checked baggage", 111
"damage", 110–111
"damage sustained", 108–109
"defective packing", 113
"destruction", 109
"in the charge of the carrier", 113–116
"inherent defect", 113
"inherent vice", 113
"loss", 109–110
"occurrence", 112
"performance outside an airport", 116–118
"registered baggage", 111
"transhipment", 118
in the charge of the carrier
checked baggage, 115
customs authorities, 113–115
hand baggage, 116
introduction, 113–113
misdelivery, 116

Cargo damage—*cont.*
in the charge of the carrier—*cont.*
storage of cargo, 115
sub-contractors, 114
inherent defect, 113
inherent vice, 113
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
liable carrier
introduction, 106
single carriers, 107–108
successive carriers, 107
limits of liability
and see Limits of liability
comment, 139
general note, 139–141
text of the Articles, 137–138
loss, 109–110
measure of damage, 109
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
occurrence, 112
performance outside an airport
airport, 117–118
introduction, 116
performance, 116–117
presumptions, 106
proof, 106
registered baggage, 111
text of the Articles, 103–104
transhipment, 118
Cargo receipt
contents, 62
Carriage
international carriage, and, 42
scope of the Conventions, 13–14
Carriage of postal items
comment, 47
general note, 47
text of the Articles, 46–47
Carriage performed by more than one carrier
comment, 44
general note
"carriage to be performed by", 44
"carrier", 44
"the parties", 45
"undivided carriage", 44–45
"within the territory of the same state", 45–46
text of the Articles, 44
Carriage performed by person other than the contracting carrier
actual carrier
generally, 193
liability, 193–194
mutual relations, 195
additional jurisdiction, 194–195
addressee of claims, 194
addressee of complaints and instructions, 194
Carriage performed by person other than the contracting carrier—*cont.*
aggregation of damages, 194
comment, 193
contracting carrier
generally, 193
liability, 193–194
mutual relations, 195
invalidity of contractual provisions, 195
liability of carriers
generally, 193
mutual, 193–194
mutual liability of carriers, 193–194
mutual relations, 195
servants and agents, 194
text of the Articles, 193–195
Carriage performed by the state
comment, 47
general note, 47
text of the Articles, 46–47
Carriage performed in extraordinary circumstances
comment, 196
text of the Articles, 196
Carriage stops
limitation of actions, and, 185
Carriage to be performed
carriage undertaken by more than one carrier, and, 44
successive carriers, and, 187–188
Carriage undertaken by more than one carrier
comment, 44
general note
"carriage to be performed by", 44
"carrier", 44
"the parties", 45
"undivided carriage", 44–45
"within the territory of the same state", 45–46
text of the Articles, 44
Carriers
carriage undertaken by more than one carrier, and, 44
compensation for death or personal injury, and, 136
personal injury and death, and, 80
scope of the Conventions, 13–14
Carriers' liability
responsibility for particulars, and, 65
Case law
interpretation of Conventions, and, 2
Causation
personal injury and death, and, 98–99
Charges due
delivery of cargo, and, 75
Charterers of aircraft
transport undertaking, and, 40
Charters
international carriage, and, 37
Checked baggage
baggage check, and, 55–56
damage, and
generally, 111
in the charge of the carrier, 115

Checked baggage—*cont*.
delay, and
Montreal Convention, 6
Warsaw Convention, 4
limits of liability in relation to delay, baggage and cargo, and 139
scheme of liability, and
Montreal Convention, 5–6
Warsaw Convention, 3
Checking cargo
evidentiary value of waybill, and, 68
Code sharing
carriage undertaken by more than one carrier, and, 44
Combined carriage
comment, 192–193
text of the Articles, 193
Commentaries
interpretation of Conventions, and, 29
Compensation for damage to baggage or cargo
comment, 139
expenses of litigation, and
comment, 153–154
text of the Articles, 153
general note
"actual payment", 140
"affecting the value of other packages", 141–142
"checked baggage", 139
"declared sums", 140
"package concerned", 141
"registered baggage", 139
"special declarations", 139–140
"sum that can be awarded", 139
"weight of baggage or cargo", 140–141
"weight of parts", 141
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
text of the Articles, 137–138
Compensation for death or personal injury
carrier, 136
comment, 135–136
expenses of litigation, and
comment, 153–154
text of the Articles, 153
general note
"carrier", 136
"monetary limit", 136–137
"special contracts", 137
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
monetary limit, 136–137
special contracts
form, 137
Compensation for death or personal injury—*cont*.
special contracts—*cont*.
generally, 137
text of the Articles, 135
Compensation for delay
comment, 139
expenses of litigation, and
comment, 153–154
text of the Articles, 153
general note
"actual payment", 140
"affecting the value of other packages", 141–142
"checked baggage", 139
"declared sums", 140
"package concerned", 141
"registered baggage", 139
"special declarations", 139–140
"sum that can be awarded", 139
"weight of baggage or cargo", 140–141
"weight of parts", 141
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
text of the Articles, 137–138
Compensatory damages
damage, and, 81
Complaints, notice of
baggage, 165
cargo, 165
comment, 164–165
complaints, 165–166
damage complained of
introduction, 166–167
partial loss, 167–169
total loss, 167
general note
"baggage", 165
"cargo", 165
"carrier", 169–170
"complaints", 165–166
"damage complained of", 166–169
"days from the date", 170
"dispatch of notice", 171
"disposal", 170
"forthwith, 170
"fraud", 171
"no action shall lie", 171
"notice in writing separate", 170–171
"person entitled to take delivery", 169
"*prima facie* evidence", 166
partial loss
contents of single piece of luggage, 167–168
introduction, 167
separate units under single waybill, 169
unit loads assembled by consignor, 168–169
prima facie evidence, 166

Complaints, notice of—*cont.*
text of the Articles, 163–164
total loss, 167
Conditions mentioned
evidentiary value of waybill, and, 67–68
Conditions of carriage
delivery of cargo, and, 75
Conflict of laws
scope of the Conventions, 7
Connection with carriage by air
generally, 93–94
Connection with carrier
air rage, 97–98
cabin accidents, 95–96
cabin service accidents, 96–97
hijacking, 98
introduction, 94–95
passenger misconduct, 97–98
terrorism, 98
Consignee
delivery of cargo, and, 74–75
enforcement of rights
comment, 76
text of the Articles, 76
relations with consignor
comment, 77
text of the Articles, 76–77
successive carriers, and, 189–191
Consignor
description of air waybill, and, 63
enforcement of rights
comment, 76
text of the Articles, 76
relations with consignee
comment, 77
text of the Articles, 76–77
successive carriers, and, 189–191
Contracting carrier
generally, 193
liability, 193–194
mutual relations, 195
Contribution between carriers
comment, 191
text of the Articles, 191
Contributory negligence
comment, 133
general note
"contributory negligence", 133–134
"exoneration", 134
"other wrongful act or omission", 134
"own law", 134
"person suffering damage", 134
text of the Articles, 132–133
Control
embarking, and, 102
Conversion of monetary limits
comment, 155
text of the Articles, 154–155
Costs of litigation
comment, 153–154
text of the Articles, 153
Customs authorities
in the charge of the carrier, and, 115
Customs formalities
comment, 78
general note, 78
text of the Articles, 77–78

Damage
baggage and cargo, to
generally, 110–111
introduction, 104
notice of complaints, and
introduction, 166–167
partial loss, 167–169
total loss, 167
responsibility for particulars, and, 65
Damage sustained
baggage and cargo, to, 108–109
introduction, 80–81
meaning, 81–82
measure, 82
Date of arrival
limitation of actions, and, 183–184
"Days"
text of the Articles, 196–197
Death of liable person
comment, 172
text of the Articles, 172
Death of passenger
accident
connection with carriage, 93–94
connection with carrier, 94–98
external events, 90–92
introduction, 90
advance payments, 159
basis of claims
comment, 160
general note, 160–162
text of the Articles, 159–160
bodily injury
evidence of injury, 86–87
interpretation, 83–85
introduction, 82
psychic injury, 87–89
range of injuries, 85–86
carrier, 80
causation, 98–99
comment, 79–80
compensation for
advance payments, 159
comment, 135–136
general note, 136–137
text of the Articles, 135
damage sustained
introduction, 80–81
meaning, 81–82
measure, 82
defence
and see All necessary measures defence
comment, 124
general note, 124–132
text of the Articles, 124

Death of passenger—*cont.*
disembarking
introduction, 99–100
literal interpretation, 100
public areas, 102–103
tripartite test, 100–102
embarking
introduction, 99–100
literal interpretation, 100
public areas, 102–103
tripartite test, 100–102
exoneration of carrier
and see Exoneration
comment, 133
general note, 133–134
text of the Articles, 132–133
general note
"accident", 90–98
"bodily injury", 82–90
"carrier", 80
"causation", 98–99
"damage sustained", 80–82
"disembarking", 99–103
"embarking", 99–103
"liability", 80
liability, 80
limits of liability
and see Limits of liability
comment, 135–136
general note, 136–137
text of the Articles, 135
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
scheme of liability, and
Montreal Convention, 5
Warsaw Convention, 3
text of the Articles, 78–79
Declared sums
limits of liability in relation to delay, baggage and cargo, and, 140
Deep vein thrombosis
accident, and, 91–92
Defective packing
damage to baggage and cargo, and, 113
Defences
waiver
comment, 159
text of the Articles, 158–159
Definitions
aircraft, 38–39
baggage, 38
cargo, 38
carriage undertaken by more than one carrier
comment, 44
general note, 44–46
text of the Articles, 44
comment, 36
general note
aircraft, 38–39
baggage, 38
Definitions—*cont.*
general note—*cont.*
cargo, 38
international carriage, 36–37
persons carried, 37–38
restitution, 40
reward, 39
transport undertaking, 39–40
international carriage
comment, 41–42
general note, 42–44
generally, 36–37
text of the Articles, 41
introductory note
carriage, 13–14
carriers, 14
conflict of laws, 7
exclusivity, 8–13
persons carried, 37–38
restitution, 40
reward, 39
text of the Articles, 35
transport undertaking, 39–40
Delay to baggage, cargo and passengers
bad weather, and, 121
bumping, and, 124
comment, 118
damage occasioned
disappointment, 119
distress, 119
introduction, 118–119
legal costs, 120
measure of damage, 119–120
defence
and see All necessary measures defence
comment, 124
general note, 124–132
text of the Articles, 124
general note
"damage occasioned", 117–120
"delay", 120–123
"in the transportation", 120
"non-arrival at destination", 123–124
in the transportation, 120
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
limits of liability
and see Limits of liability
comment, 139
general note, 139–141
text of the Articles, 137–138
mechanical failure, and, 121
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
nature of
breach of terms of contract, 121–123
immediate cause, 121
introduction, 120

Delay to baggage, cargo and passengers—*cont.*
non-arrival at destination, 123–124
operational reason, 121
outage, and, 121
overbooking, and, 124
scheme of liability, and
Montreal Convention, 6
Warsaw Convention, 4
text of the Articles, 118
unfair terms, and, 122
Delivery of cargo
comment, 74
enforcement of rights
comment, 76
text of the Articles, 76
general note
"arrival late", 75
"charges due", 75
"conditions of carriage", 75
"consignee", 74–75
"except when disposed of", 74
"rights which flow from contract of carriage", 75
text of the Articles, 73–74
Delivery of ticket
introduction, 51
proof, 51
time, 51
Déplacement
international carriage, and, 36
Destination
jurisdiction, and 180–181
limitation of actions, and, 185
Destination and departure, places of
air waybill, and, 60
passenger ticket, and, 52
Destruction
damage to baggage and cargo, and, 109
Dimensions and packing
evidentiary value of waybill, and, 68
Disembarking
introduction, 99–100
literal interpretation, 100
public areas, 102–103
tripartite test
control, 102
interpretation, 100–101
location, 101–102
passenger activity, 101
Disposition of cargo, right of
comment, 70–72
enforcement of rights
comment, 76
text of the Articles, 76
general note
"expenses occasioned", 72
"impossibility", 73
"other consignors", 72
"person other than the consignee", 72
"prejudice to the others", 72
"subject to obligations", 72
text of the Articles, 69–70
Documents of carriage
baggage check
comment, 54
general note, 55–58
text of the Articles, 53–54
cargo waybills
contents, 59–61
customs formalities, 77–78
delivery of cargo, 73–75
description, 61–63
disposition of cargo, 69–73
enforcement of rights, 76
evidentiary value, 65–69
generally, 58–59
multiple packages, 63
nature of cargo, 61
non-compliance with requirements, 63–64
relations of parties, 76–77
responsibility for particulars, 64–65
passenger ticket
comment, 49
general note, 49–53
text of the Articles, 47–49
Dommage psychique
bodily injury, and, 83
Dommage survenu
damage, and, 81

Embarkation
passenger ticket, and, 53
Embarking
introduction, 99–100
literal interpretation, 100
public areas, 102–103
tripartite test
control, 102
interpretation, 100–101
location, 101–102
passenger activity, 101
Emotional sensitivity
accident, and, 91
Evidence
bodily injury, and, 86–87
Evidentiary value of waybill
comment, 66–67
general note
"apparent condition", 68–69
"checking cargo", 68
"conditions mentioned", 67–68
"*prima facie* evidence", 67
"statements relating to condition", 68
"weight, dimensions and packing", 68
text of the Articles, 65–66
Except when disposed of
delivery of cargo, and, 74
Exclusivity
EU Regulation, 10–13
generally, 8–10
Exoneration of carrier
comment, 133
general note
"contributory negligence", 133–134

Exoneration of carrier—*cont*.
general note—*cont*.
"exoneration", 134
"other wrongful act or omission", 134
"own law", 134
"person suffering damage", 134
text of the Articles, 132–133
Expenses occasioned
disposition of cargo, and, 72
Expenses of litigation
comment, 153–154
text of the Articles, 153
External events
deep vein thrombosis, 91–92
emotional sensitivity, 91
introduction, 90
physical weakness, 90–91
self-inflicted injury, 91
tour operators, 92
Extinguished
limitation of actions, and, 182–183
Extraordinary circumstances, carriage performed in
comment, 196
text of the Articles, 196

Fault
customs formalities, and, 78
Feeder services
damage to baggage and cargo, and, 105
First carrier
successive carriers, and, 188–189
Flying clubs and instructors
transport undertaking, and, 40
Force majeure clause
generally, 130
introduction, 124
Forum conveniens
jurisdiction, and, 175–177
Freedom to contract
comment, 159
text of the Articles, 158–159
French text
bodily injury, and, 83
interpretation of conventions, and, 32
Warsaw Convention 1929, of, 217–226

Good faith
interpretation of Conventions, and, 25
Guadalajara Supplementary Convention (GSC) 1961
generally, 15
text, 227–230

Hague notice
baggage check, and, 57
passenger ticket, and, 52–53
Hague Protocol, 1955
generally, 15
Hand baggage
in the charge of the carrier, and, 116
scheme of liability, and
Montreal Convention, 6
Warsaw Convention, 4
Heart attack
accident, and, 90
High contracting parties
international carriage, and, 43
Hijacking
accident, and, 98
Historical background
Montreal regime
limits on liability, 19
streamlining, 20
reasons for reform
carriers' interests, 18–19
harmonisation, 16–17
reallocation of risk, 17–18
Warsaw "system"
introduction, 15
limits on liability, 16

Impossibility
disposition of cargo, and, 73
In the charge of the carrier
checked baggage, 115
customs authorities, 113–115
hand baggage, 116
introduction, 113–113
misdelivery, 116
storage of cargo, 115
sub-contractors, 114
Indications required
passenger ticket, and, 52
Inherent defect
damage to baggage and cargo, and, 113
invalidity of contractual provisions, and, 157–158
Inherent vice
damage to baggage and cargo, and, 113
invalidity of contractual provisions, and, 157–158
Insurance
text of the Article, 196
Intentional damage
awareness
consequences, of, 147
degree, 147–148
introduction, 146
objective evidence, 148–150
wrong, of, 146–147
cargo neglect, 150–151
comment, 142–144
general note
"intent to cause damage", 145
"knowledge", 146–151
"liability affected", 144–145
"probable results", 151
"recklessness", 145–146
"result", 151–152
"scope of employment", 152–153
intent to cause damage, 145
knowledge
cargo neglect, 150–151
consequences, of, 147
degree of, 147–148
introduction, 146
objective evidence, 148–150

Intentional damage—*cont*.
knowledge—*cont*.
wrong, of, 146–147
liability affected, 144–145
objective evidence
England, in, 150
introduction, 148
US, in, 148–150
probable results, 151
recklessness, 145–146
result, 151–152
scope of employment, 152–153
text of the Articles, 142
Intermodal carriage
comment, 192–193
text of the Articles, 193
International carriage
definition
"agreed stopping place", 43
"agreement of the parties", 43
"carriage", 42
comment, 41–42
"high contracting parties", 43
"international", 42
text of the Articles, 41
generally, 36–37
Interpretation of Conventions
case law, and, 29–30
commentaries, and, 29
consideration of French text, by, 32
general principles, 21
good faith, in, 25
legislative history, and, 28–29
object and purpose, in light of
generally, 26–27
harmonisation, 27
ordinary meaning, in accord with
context, in, 23–25
different texts, of, 22–23
preparatory work, and, 28–29
schematic approach, by, 26
subsequent practice, and, 29
supplementary means, by
case law, 29–30
commentaries, 29
introduction, 27–28
legislative history, 28–29
other conventions, 31–32
preparatory work, 28–29
subsequent practice, 29
teleological approach, by, 26
Vienna Convention, under, 21–22
Invalidity of contractual provisions
comment, 156
carriage performed by person other than the contracting carrier actual carrier, and, 195
general note
"application", 157
"inherent defect, quality or vice", 157–158
"tending to relieve the carrier of liability", 157
text of the Articles, 156
Irregularity or loss of the check
baggage check, and, 58

Jurisdiction
comment
appropriate forum, 173–174
fifth jurisdiction, 177
forum conveniens, 175–177
scope of jurisdiction, 174–175
destination, 180–181
domicile, 177–178
general note
"destination", 180–181
"domicile", 177–178
"ordinary residence", 177–178
"principal and permanent residence", 190
"principal place of business", 178
"territory from which carrier operates", 190
"where contract has been made", 179–180
principal place of business, 178
residence
ordinary, 177–178
principal and permanent, 181
territory from which carrier operates, 181
text of the Articles, 172
where contract has been made
conclusion of contract, 179–180
establishment, 179
introduction, 179

Knowledge
cargo neglect, 150–151
consequences, of, 147
degree of, 147–148
introduction, 146
objective evidence
England, in, 150
introduction, 148
US, in, 148–150
wrong, of, 146–147

Last carrier
successive carriers, and, 189
Legal costs
comment, 153–154
text of the Articles, 153
Legality
all necessary measures defence, and, 127
Legislative history
bodily injury, and, 83–84
interpretation of Conventions, and, 28–29
Les travaux préparatoires
interpretation of conventions, and, 28
Lesion corporelle
bodily injury, and, 83
Liability
personal injury and death, and, 80
Liability of carriers
and see under individual headings
advance payments, 159
agents and servants
comment, 163

Liability of carriers—*cont.*
agents and servants—*cont.*
text of the Articles, 162–163
aggregation of claims
comment, 163
text of the Articles, 162–163
arbitration, 173
baggage, damage to
comment, 104–106
general note, 106–118
text of the Articles, 103–104
baggage, delay of
comment, 118
general note, 118–124
text of the Articles, 118
basis of claims
comment, 160
general note, 160–162
text of the Articles, 159–160
cargo, damage to
comment, 104–106
general note, 106–118
text of the Articles, 103–104
cargo, delay of
comment, 118
general note, 118–124
text of the Articles, 118
carriage performed by person other than the contracting carrier actual carrier, and
generally, 193
mutual, 193–194
compensation for death or personal injury
comment, 135–136
general note, 136–137
text of the Articles, 135
contribution
comment, 191
text of the Articles, 191
conversion of monetary limits
comment, 155
text of the Articles, 154–155
death of liable person
comment, 172
text of the Articles, 172
death of passenger
advance payments, 159
comment, 79–80
general note, 80–103
text of the Articles, 78–79
defences
comment, 124
general note, 124–132
text of the Articles, 124
delay
comment, 118
general note, 118–124
text of the Articles, 118
exclusion of limits, 156
exoneration
comment, 133
general note, 133–134
text of the Articles, 132–133
Liability of carriers—*cont.*
expenses of litigation
comment, 153–154
text of the Articles, 153
freedom to contract
comment, 159
text of the Articles, 158–159
intentional damage
comment, 142–144
general note, 144–153
text of the Articles, 142
invalidity of contractual provisions
comment, 156
general note, 157–158
text of the Articles, 156
jurisdiction
comment, 173–177
general note, 177–181
text of the Articles, 172
limitation of actions
comment, 182
general note, 182–185
text of the Articles, 181–182
limits of liability
comment, 139
general note, 139–141
text of the Articles, 137–138
minimum liability rule
comment, 156
general note, 157–158
text of the Articles, 156
notice of complaints
comment, 164–165
general note, 165–171
text of the Articles, 163–164
personal injury of passenger
advance payments, 159
comment, 79–80
general note, 80–103
text of the Articles, 78–79
reckless damage
comment, 142–144
general note, 144–153
text of the Articles, 142
servants and agents
comment, 163
text of the Articles, 162–163
stipulation on limits, 156
subrogation
comment, 191
text of the Articles, 191
successive carriers
comment, 186–187
general note, 187–191
text of the Articles, 185–186
waiver of defences
comment, 159
text of the Articles, 158–159
Likelihood of loss
all necessary measures defence, and, 127
Limitation of actions
comment, 182

Limitation of actions—*cont.*
general note
"actions affected", 183
"brought", 183
"carriage ceases", 184–185
"date of arrival", 183–184
"destination", 184–185
"extinguished", 182–183
"method of calculating", 185
"rights to damages", 182
text of the Articles, 181–182
Limits on liability
aggregation of claims, and
comment, 163
text of the Articles, 162–163
baggage, for
and see below
comment, 139
general note, 139–141
text of the Articles, 137–138
cargo, for
and see below
comment, 139
general note, 139–141
text of the Articles, 137–138
death of passenger, for
and see below
comment, 135–136
general note, 136–137
text of the Articles, 135
delay, for
and see below
comment, 139
general note, 139–141
text of the Articles, 137–138
exclusion, 156
expenses of litigation, and
comment, 153–154
text of the Articles, 153
historical background
Montreal, 19
Warsaw, 16
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
personal injury to passenger, for
and see below
comment, 135–136
general note, 136–137
text of the Articles, 135
stipulation, 156
Limits on liability for damage to baggage or cargo
aggregation of claims, and
comment, 163
text of the Articles, 162–163
comment, 139
Limits on liability for damage to baggage or cargo—*cont.*
expenses of litigation, and
comment, 153–154
text of the Articles, 153
general note
"actual payment", 140
"affecting the value of other packages", 141–142
"checked baggage", 139
"declared sums", 140
"package concerned", 141
"registered baggage", 139
"special declarations", 139–140
"sum that can be awarded", 139
"weight of baggage or cargo", 140–141
"weight of parts", 141
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
stipulation on limits, 156
text of the Articles, 137–138
Limits on liability for death or personal injury
aggregation of claims, and
comment, 163
text of the Articles, 162–163
carrier, 136
comment, 135–136
expenses of litigation, and
comment, 153–154
text of the Articles, 153
general note
"carrier", 136
"monetary limit", 136–137
"special contracts", 137
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
monetary limit, 136–137
special contracts
form, 137
generally, 137
stipulation on limits, 156
text of the Articles, 135
Limits on liability for delay
aggregation of claims, and
comment, 163
text of the Articles, 162–163
comment, 139
expenses of litigation, and
comment, 153–154
text of the Articles, 153

Limits on liability for delay—*cont*.
general note
"actual payment", 140
"affecting the value of other packages", 141–142
"checked baggage", 139
"declared sums", 140
"package concerned", 141
"registered baggage", 139
"special declarations", 139–140
"sum that can be awarded", 139
"weight of baggage or cargo", 140–141
"weight of parts", 141
intentional damage, and
comment, 142–144
general note, 144–153
text of the Articles, 142
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
stipulation on limits, 156
text of the Articles, 137–138
Literal interpretation
embarking, and, 100
Litigation expenses
comment, 153–154
text of the Articles, 153
Location
embarking, and, 101–102
Loss
baggage check, and, 58
damage to baggage and cargo, and, 109–110

Making out
description of air waybill, and, 62
Mandatory application
comment, 195–196
text of the Articles, 195
Measure of damage
damage to baggage and cargo, and, 109
Mechanical failure
delay to baggage, cargo and passengers, and, 121
Mental injury
bodily injury, and, 79
Method of calculating
limitation of actions, and, 185
Minimum liability rule
comment, 156
general note
"application", 157
"inherent defect, quality or vice", 157–158
"tending to relieve the carrier of liability", 157
text of the Articles, 156
Misconduct
accident, and, 97
Misdelivery
in the charge of the carrier, and, 116
Monetary limit
compensation for death or personal injury, and, 136–137
Monetary limit—*cont*.
conversion of
comment, 155
text of the Articles, 154–155
stipulation on, 156
Montreal Convention (MC), 1999
generally, 15
historical background
limits on liability, 19
streamlining, 20
scheme of liability
baggage, 5–6
cargo, 6
delay, 6
hand baggage, 6
introduction, 4–5
personal injury and death, 5
registered baggage, 5–6
unregistered baggage, 6
scope and application
carriage, 13–14
carriers, 14
conflict of laws, 7
exclusivity, 7–13
text
combined carriage, 211
contracting carriers, 211–212
documents of carriage, 202–205
final provisions, 213–215
liability of carrier, 205–210
other provisions, 212–213
recitals, 201
scope, 201–202
Montreal Protocol, 1975
generally, 15
Multimodal carriage
comment, 192–193
text of the Articles, 193
Multiple packages of cargo
comment, 63
text of the Articles, 63
Mutual liability
carriage performed by person other than the contracting carrier actual carrier, and, 193–194
Mutual relations
carriage performed by person other than the contracting carrier actual carrier, and, 195

Notice of complaints
baggage, 165
cargo, 165
comment, 164–165
complaints, 165–166
damage complained of
introduction, 166–167
partial loss, 167–169
total loss, 167
general note
"baggage", 165
"cargo", 165
"carrier", 169–170

Notice of complaints—*cont.*
general note—*cont.*
"complaints", 165–166
"damage complained of", 166–169
"days from the date", 170
"dispatch of notice", 171
"disposal", 170
"forthwith, 170
"fraud", 171
"no action shall lie", 171
"notice in writing separate", 170–171
"person entitled to take delivery", 169
"*prima facie* evidence", 166
partial loss
contents of single piece of luggage, 167–168
introduction, 167
separate units under single waybill, 169
unit loads assembled by consignor, 168–169
prima facie evidence, 166
text of the Articles, 163–164
total loss, 167

Object and purpose of Conventions
generally, 26–27
harmonisation, 27
Occurrence
damage to baggage and cargo, and, 112
Octroi, formalities of
comment, 78
general note, 78
text of the Articles, 77–78
Operations incidental
international carriage, and, 36
Ordinary meaning of Conventions
context, in, 23–25
different texts, of, 22–23
Ordinary residence
jurisdiction, and, 177–178
Outage
delay to baggage, cargo and passengers, and, 121
Overbooking
delay to baggage, cargo and passengers, and, 124
Own law
exoneration, and, 134

Package concerned
limits of liability in relation to delay, baggage and cargo, and, 141
Packing
evidentiary value of waybill, and, 68
Pacta sunt servanda
interpretation of conventions, and, 25
Partial loss
contents of single piece of luggage, 167–168
introduction, 167
separate units under single waybill, 169
unit loads assembled by consignor, 168–169
Parties, the
carriage undertaken by more than one carrier, and, 45
Passenger activity
embarking, and, 101

Passenger ticket
comment, 49
content, 50
delivery
introduction, 51
proof, 51
time, 51
embarkation, 53
form, 49–50
general note
"delivery of the ticket", 51
"embarkation", 53
"Hague notice", 52–53
"indications required", 52
"places of destination and departure", 52
"stopping places", 52
"ticket", 49–51
Hague notice, 52–53
indications required, 52
intelligibility, 50–51
meaning, 49
places of destination and departure, 52
stopping places, 52
text of the Articles, 47–48
Passengers
death
and see Death of passenger
comment, 79–80
general note, 80–103
text of the Articles, 78–79
delay
and see Delay
comment, 118
general note, 118–124
text of the Articles, 118
personal injury
and see Personal injury to passenger
comment, 79–80
general note, 80–103
text of the Articles, 78–79
Performance outside an airport
airport, 117–118
introduction, 116
performance, 116–117
Performing carrier
successive carriers, and, 188
Person other than the contracting carrier, carriage performed by
actual carrier
generally, 193
liability, 193–194
mutual relations, 195
additional jurisdiction, 194–195
addressee of claims, 194
addressee of complaints and instructions, 194
aggregation of damages, 194
comment, 193
contracting carrier
generally, 193
liability, 193–194
mutual relations, 195
invalidity of contractual provisions, 195

Person other than the contracting carrier, carriage performed by—*cont*.
liability of carriers
generally, 193
mutual, 193–194
mutual liability of carriers, 193–194
mutual relations, 195
servants and agents, 194
text of the Articles, 193–195
Person suffering damage
exoneration, and, 134
Personal injury to passenger
accident
connection with carriage, 93–94
connection with carrier, 94–98
external events, 90–92
introduction, 90
advance payments, 159
basis of claims
comment, 160
general note, 160–162
text of the Articles, 159–160
bodily injury
evidence of injury, 86–87
interpretation, 83–85
introduction, 82
psychic injury, 87–89
range of injuries, 85–86
carrier, 80
causation, 98–99
comment, 79–80
compensation for
advance payments, 159
comment, 135–136
general note, 136–137
text of the Articles, 135
damage sustained
introduction, 80–81
meaning, 81–82
measure, 82
defence
and see All necessary measures defence
comment, 124
general note, 124–132
text of the Articles, 124
disembarking
introduction, 99–100
literal interpretation, 100
public areas, 102–103
tripartite test, 100–102
embarking
introduction, 99–100
literal interpretation, 100
public areas, 102–103
tripartite test, 100–102
exoneration of carrier
and see Exoneration
comment, 133
general note, 133–134
text of the Articles, 132–133
general note
"accident", 90–98
Personal injury to passenger—*cont*.
general note—*cont*.
"bodily injured", 82–90
"carrier", 80
"causation", 98–99
"damage sustained", 80–82
"disembarking", 99–103
"embarking", 99–103
"liability", 80
liability, 80
limits of liability
comment, 135–136
general note, 136–137
text of the Articles, 135
minimum liability rule, and
comment, 156
general note, 157–158
text of the Articles, 156
scheme of liability, and
Montreal Convention, 5
Warsaw Convention, 3
text of the Articles, 78–79
Persons carried
meaning, 37–38
Physical weakness
accident, and, 90–91
Places of destination and departure
air waybill, and, 60
passenger ticket, and, 52
Police, formalities of
comment, 78
general note, 78
text of the Articles, 77–78
Post traumatic stress disorder (PTSD)
bodily injury, and, 79
Postal items, carriage of
comment, 47
general note, 47
text of the Articles, 46–47
Practicality of measures
all necessary measures defence, and, 127
Prejudice to the others
disposition of cargo, and, 72
Preparatory work
interpretation of Conventions, and, 28–29
Presumptions
damage to baggage and cargo, and, 106
Prevention of delivery clause
all necessary measures defence, and, 124
Prima facie evidence
baggage check, and, 57
evidentiary value of waybill, and, 67
notice of complaints, and, 166
Principal and permanent residence
jurisdiction, and, 181–182
Principal place of business
jurisdiction, and, 178
Probable results
intentional damage, and, 151
Proof
damage to baggage and cargo, and, 106

Psychic injury
  associated with physical injury, 88–89
  caused by physical injury, 89
  incidental to physical injury, 89
  introduction, 87–88
  no recovery of damages, 88
PTSD
  bodily injury, and, 79
Public areas
  embarking, and, 102–103

Reasonable care
  all necessary measures defence, and, 131–132
Reckless damage
  awareness
    consequences, of, 147
    degree, 147–148
    introduction, 146
    objective evidence, 148–150
    wrong, of, 146–147
  cargo neglect, 150–151
  comment, 142–144
  general note
    "intent to cause damage", 145
    "knowledge", 146–151
    "liability affected", 144–145
    "probable results", 151
    "recklessness", 145–146
    "result", 151–152
    "scope of employment", 152–153
  intent to cause damage, 145
  knowledge
    cargo neglect, 150–151
    consequences, of, 147
    degree of, 147–148
    introduction, 146
    objective evidence, 148–150
    wrong, of, 146–147
  liability affected, 144–145
  objective evidence
    England, in, 150
    introduction, 148
    US, in, 148–150
  probable results, 151
  recklessness, 145–146
  result, 151–152
  scope of employment, 152–153
  text of the Articles, 142
Recklessness
  intentional damage, and, 145–146
Registered baggage
  baggage check, and, 55–56
  damage, and
    generally, 111
    in the charge of the carrier, 115
  delay, and
    Montreal Convention, 6
    Warsaw Convention, 4
  limits of liability in relation to delay, baggage and cargo, and 139
  scheme of liability, and
    Montreal Convention, 5–6
Registered baggage—*cont.*
  scheme of liability, and—*cont.*
    Warsaw Convention, 3
Responsibility for particulars of waybill
  comment, 65
  general note, 65
  text of the Articles, 64
Restitution
  generally, 40
Result
  intentional damage, and, 151–152
Reward
  meaning, 39
Round trips
  international carriage, and, 36–37

Scheme of liability
  Montreal Convention
    baggage, 5–6
    cargo, 6
    delay, 6
    hand baggage, 6
    introduction, 4–5
    personal injury and death, 5
    registered baggage, 5–6
    unregistered baggage, 6
  Warsaw Convention
    baggage, 3–4
    cargo, 4
    delay, 4
    hand baggage, 4
    introduction, 3
    personal injury and death, 3
    registered baggage, 3
    unregistered baggage, 4
Scope of the Conventions
  aircraft, 38–39
  baggage, 38
  cargo, 38
  carriage of postal items
    comment, 47
    general note, 47
    text of the Articles, 46–47
  carriage performed by the state
    comment, 47
    general note, 47
    text of the Articles, 46–47
  carriage undertaken by more than one carrier
    comment, 44
    general note, 44–46
    text of the Articles, 44
  comment, 36
  general note
    aircraft, 38–39
    baggage, 38
    cargo, 38
    international carriage, 36–37
    persons carried, 37–38
    restitution, 40
    reward, 39
    transport undertaking, 39–40

Scope of the Conventions—*cont.*
international carriage
comment, 41–42
general note, 42–43
generally, 36–37
text of the Articles, 41
introductory note
carriage, 13–14
carriers, 14
conflict of laws, 7
exclusivity, 7–13
persons carried, 37–38
restitution, 40
reward, 40
text of the Articles, 35
transport undertaking, 39–40
Self-inflicted injury
accident, and, 91
Seriousness of loss
all necessary measures defence, and, 127
Servants
aggregation of claims, and
comment, 163
text of the Articles, 162–163
carriage performed by person other than the contracting carrier actual carrier, and, 194
introduction, 124–125
scope of employment, 125
Special contracts
form, 137
generally, 137
Special declarations
limits of liability in relation to delay, baggage and cargo, and, 139–140
Special Drawing Rights
conversion of monetary limits, and
comment, 155
text of the Articles, 154–155
Stages of a journey
international carriage, and, 42
Standard of care
all necessary measures defence, and, 127–128
State, carriage performed by the
comment, 47
general note, 47
text of the Articles, 46–47
Statements relating to condition
evidentiary value of waybill, and, 68
Statements relating to the cargo
responsibility for particulars, and, 65
States parties
international carriage, and, 43
Stopping places
air waybill, and, 60–61
baggage check, and, 57
international carriage, and, 43
passenger ticket, and, 52
Storage of cargo
in the charge of the carrier, and, 115
Sub-contractors
in the charge of the carrier, and, 114
Subject to obligations
disposition of cargo, and, 72
Subrogation
comment, 191
text of the Articles, 191
Subsequent practice
interpretation of Conventions, and, 29
Successive carriers
comment, 186–187
general note
"accident or delay occurs", 188
"assumption of liability", 189
"carriage to be performed", 187–188
"consignee", 189–191
"consignor". 189–191
"first carrier", 188–189
"last carrier", 189
"performing carrier", 188
liable carrier, and, 107
text of the Articles, 185–186
Sum that can be awarded
limits of liability in relation to delay, baggage and cargo, and, 139

Tags
baggage check, and, 56–57
Teleological approach
interpretation of Conventions, and, 26
Tending to relieve the carrier of liability
invalidity of contractual provisions, and, 157
Territory from which carrier operates
jurisdiction, and, 182
Terrorism
accident, and, 98
Three original parts
description of air waybill, and, 62
Ticket for passengers
comment, 49
content, 50
delivery
introduction, 51
proof, 51
time, 51
embarkation, 53
form, 49–50
general note
"delivery of the ticket", 51
"embarkation", 53
"Hague notice", 52–53
"indications required", 52
"places of destination and departure", 52
"stopping places", 52
"ticket", 49–51
Hague notice, 52–53
indications required, 52
intelligibility, 50–51
meaning, 49
places of destination and departure, 52
stopping places, 52
text of the Articles, 47–48
Total loss
notice of complaints, and, 167

Transhipment
damage to baggage and cargo, and, 118
Transport undertaking
meaning, 39–40

Undivided carriage
carriage undertaken by more than one carrier, and, 44–45
Unfair terms
delay to baggage, cargo and passengers, and, 122
Unregistered baggage
in the charge of the carrier, and, 116
scheme of liability, and
Montreal Convention, 6
Warsaw Convention, 4
Utmost care
all necessary measures defence, and, 132
Vienna Convention
interpretation of Conventions, and, 21–22

Waiver of defences
comment, 159
text of the Articles, 158–159
Warsaw Convention, 1929
French text, 217–226
historical background
introduction, 15
limits on liability, 16
scheme of liability
baggage, 3–4
cargo, 4
delay, 4
hand baggage, 4
introduction, 3
personal injury and death, 3
registered baggage, 3
unregistered baggage, 4
Warsaw Convention—*cont*.
scope and application
carriage, 13–14
carriers, 14
conflict of laws, 7
exclusivity, 7–13
unified text
baggage check, 237
cargo documentation, 237–239
combined carriage, 239
definitions, 231
documents of carriage, 231–235
final provisions, 239–240
liability of carrier, 236–239
passenger ticket, 236–237
scope, 231
Weight, dimensions and packing
evidentiary value of waybill, and, 68
Weight of baggage or cargo
limits of liability in relation to delay, baggage and cargo, and, 140–141
Weight of parts
limits of liability in relation to delay, baggage and cargo, and, 141
Where contract has been made
conclusion of contract, 179–180
establishment, 179
introduction, 179
Wilful misconduct
intentional damage, and, 142
Within the territory of the same state
carriage undertaken by more than one carrier, and, 45–46
Wrongful act or omission
exoneration, and, 134