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CHOICE OF FORUM IN

INTERNATIONAL AVIATION LITIGATION

by

David Cluxton

Submitted to Swansea University in fulfilment of the

requirements for the Degree of Doctor of Philosophy in Law

Swansea University

2019

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by

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THESIS SUMMARY

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Full title of thesis: **Choice of Forum in International Aviation Litigation**

Summary: By its nature, international air transport exposes carriers and their customers to risks that arise from crossing jurisdictional borders. For these reasons, treaties, such as the Montreal Convention 1999 (MC99), lay down provisions on jurisdiction aimed at securing uniformity while assuring an equitable balance of interests between stakeholders. However, these provisions have caused controversy and fuelled wasteful litigation over the matter of choice of forum in passenger claims. In this context, the common law doctrine of *forum non conveniens* (FNC) has been employed by defendants to defeat claimant passenger's choice of forum. This thesis critically examines whether FNC is consistent with MC99 and/or its policies. In so doing, the broader question of how to regulate choice of forum in international aviation litigation is analysed. It is argued that MC99, as the successor to the Warsaw Convention 1929, is predicated on an anachronistic understanding of itself as a discrete system grounded on the two-party paradigm of claimant passenger versus defendant carrier. It is demonstrated that this does not correspond to the reality of modern international aviation litigation where third-parties play a critical role. Claimant passengers now have access to alternative remedies and with it, additional choices as to forum. In turn, the liability relationships between carriers and third parties (such as aircraft manufacturers) have evolved and bound them together, often in opposition to the claimant passenger. Behind the carrier and third parties stands the aviation insurer, calling the shots and pulling the strings. MC99 is merely a component of a bigger aviation accident passenger compensation system, the interdependency of which means that evaluating choice of forum under MC99 requires understanding this system's organization and operation. This thesis puts forward a proposal for reform which takes account of this bigger picture and will regulate choice of forum more equitably and efficiently.

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed .... (candidate)

Date ....

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to outside organisations.

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Date ....

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Ambatielos Case (Jurisdiction) Judgment [1952] ICJ Reports 28
Anglo-Iranian Oil Co Case (Jurisdiction), Judgment [1952] ICJ Reports 93
Competence of Assembly regarding admission to the United Nations, Advisory Opinion [1950] ICJ Reports 4
Competence of the ILO to Regulate Agricultural Labour, Advisory Opinion (1922) PCIJ Series B Nos 2 and 3
Fisheries Jurisdiction (Spain v Canada) Jurisdiction of the Court, Judgment [1998] ICJ Reports 432
International Status of South-West Africa, Advisory Opinion [1950] ICJ Reports 128
Interpretation of the Convention of 1919 concerning the Employment of Women during the Night, Advisory Opinion (1932) PCIJ Series A/B No 50
Kasikili/Sedudu Island (Botswana/Namibia), Judgment [1999] ICJ Reports 1045
Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) Judgment [2002] ICJ Reports 303
Legal Status of Eastern Greenland, Judgment (1933) PCIJ Reports Series A-B No 53
Maritime Delimitation and Territorial Questions (Qatar v Bahrain) Jurisdiction and Admissibility, Judgment [1995] ICJ Reports 6
Nottebohm Case (Liechtenstein v Guatemala), Judgment [1955] ICJ Reports 4
Polish Postal Service in Danzig, Advisory Opinion (1925) PCIJ Series B No 11
Serbian and Brazilian Loans Cases, Judgment (1929) PCIJ Reports Series A Nos 20-21
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment [2002] ICJ Reports 625
Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment [1994] ICJ Reports 6
Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion (1932) PCIJ Series A/B No 44

Australia

Al-Ru Farm Pty Ltd v Hedleys Humpers Ltd [1991] SASC 2721
CSR Ltd v Cigna Insurance Ltd (1996) 189 CLR 345 (HCA)
Gulf Air Co GSC v Fattouh (2008) 230 FLR 311 (NSWCA)
Henry v Henry (1996) 185 CLR 571 (HCA)
Maritime Insurance Ltd v Geelong Harbor Trust Commissioners (1908) 9 CLR 194 (HCA)
Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 (HCA)
Rutt v Metropolitan Underwriters (Australasia) Ltd [1929] SASR 426 (SASC)
Telford Panel and Engineering Works Pty Ltd v Elder Smith Goldsbrough Mort Ltd [1969] VR 193 (VSC)
United Airlines Inc v Sercel Australia Pty Ltd [2012] NSWCA 24
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 (HCA)

Canada

Amchem Products Inc v (British Columbia) Workers Compensation Board [1993] 1 SCR 897
Connaught Laboratories Ltd v Air Canada (1978) 94 DLR 3d 586 (ON SC)
Connaught Laboratories Ltd v British Airways [2002] Carswell Ont 2910 (ON SC)
Gontcharov v Canjet & Imperial Group Int'l [2012] ONSC 2279
Johnson Estate v Pischke [1989] Carswell Sask 243 (SASK HC)
Rembrandt Jewelry Mfg Ltd v Air Canada [1985] 1382 OJ No (ON SC)
Roberts v Guyana Airways [1998] CanLII 14703 (ON SC)
Thibodeau v Air Canada [2014] SCC 67

European Union *(listed chronologically)*

Case C-129/92 Owens Bank Ltd v Bracco [1994] ECR I-00117
Case C-288/92 Custom Made Commercial Ltd v Stawa Metalbrau GmbH [1994] ECR I-02913
Case C-406/92 The Tatry [1994] ECR I-05439
Case C-163/95 Freifrau von Horn v Cinnamond [1997] ECR I-05451
Case C-387/98 Coreck Maritime GmbH v Handelsveem BV [2000] ECR I-09337
Case C-412/98 Group Josi Reinsurance Co SA v UGIC [2000] ECR I-05925
Case C-159/02 Turner v Grovit [2004] ECR I-03565
Case C-281/02 Owusu v Jackson [2005] ECR I-01383
Case C-73/04 Klein v Rhodos Management Ltd [2005] ECR I-08667

France *(listed chronologically)*

Cass Ch Réunies Arrêt du 13 février 1930 (Jand'heur)
Herfroy v Cie Artop (1962) 16 RFDA 177 (CA Paris 2 March 1962)
Cass Civ (1ère) Arrêt n 1201 du 7 décembre 2011, Antoine X c Newvac, n 10-30919
Cass Civ (1ère) Arrêt n 327 du 4 mars 2015, Airbus c Armavia, n 13-17392 [2015] RFDAS 92

Germany

Case Note, 'Jugement Du Tribunal Civil d'Emden (IV) (10 Mars 1926)' (1926) 10 Revue Juridique Internationale de la Locomotion Aérienne 503

Hong Kong

SPH v SA [2014] HKCFA 56
The Adhiguna Meranti [1988] 1 Lloyd's Rep 384 (CA)

India

Enercon India v Enercon GmbH [2014] INSC 95
Horlicks Ltd v Heinz India [2009] INDLHC 4339
Modi Entertainment Network v WSG Cricket Pte Ltd [2003] INSC 16
M/S Moser Baer India v Philips Electronics NV [2008] INDLHC 1341

Ireland

Hennessy v Aer Lingus [2012] IEHC 124
Intermetal & Trans-World (Steel) Ltd v Worslade Trading Ltd [1998] 2 IR 1 (SC)

Israel

Abu Attiya v Arabtisi (Case 300/84) (1985) 39(1) PD 365 (CA),
Ha-Geves A Sinai Ltd v The Lockformer Company (Case 2705/97) (1998) 52(1) PD 109 (SC)
Hakhamov v Schmidt (Case 280/57) (1958) 12 PD 59 (SC)
Perlmutter v Perlmutter (Case 100/76) (1976) 30(3) PD 355 (SC)

Malaysia

American Express Bank Ltd v Mohamed Toufic Al-Ozeir (1995) 1 Malayan LJ 160 (SC)

New Zealand

Arthur Barnett Ltd v National Insurance Co of New Zealand [1965] NZLR 874
Club Mediterranee NZ v Wendell [1989] 1 NZLR 216 (CA)

Philippines

Bank of America Int'l Ltd v Court of Appeals [2003] PHSC 195
Communication Materials & Design Inc v ASPAC Multi-Trade Inc [1996] PHSC 490
First Philippine Int'l Bank v Court of Appeals [1996] PHSC 17

Singapore

Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia [1992] 2 SLR 776 (CA)
CIMB Bank Bhd v Dresdner Kleinwort Ltd [2008] 4 SLR 543 (CA)
JIO Minerals FZC v Mineral Enterprises Ltd [2011] 1 Sing LR 391 (CA)
Rickshaw Investments Ltd v Nicolai Baron von Uexkull [2007] 1 SLR 377 (CA)

South Africa

Agri Wire (Pty) Ltd v Commissioner of the Competition Commission [2012] ZASCA 134
Bid Industrial Holdings (Pty) Ltd v Strang [2007] ZASCA 144
Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd [1990] ZASCA 39
Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd [2013] ZAGPPHC 261
Potgieter v British Airways plc [2005] ZAWCHC 5
Weissglass NO Savonnerie Establishment [1992] ZASCA 95

United Kingdom

Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 WLR 964 (HL) (appeal taken from Scot)
Air Transworld Ltd v Bombardier Inc [2012] 1 CLC 145 (Com Ct)
Alderslade v Hendon Laundry Ltd [1945] KB 189 (CA)
Al-Koronky v Time Life Entertainment Group Ltd [2006] EWCA Civ 1123
Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50 (HL)
Amiri Flight Authority v BAE Systems Plc [2003] 2 CLC 662 (CA)
Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd [1990] 2 QB 649 (Com Ct)
A Siohn & Co Ltd and Academy Garments (Wigan) Ltd v RH Hagland & Son (Transport) Ltd [1976] 2 Lloyd's Rep 428 (QB)
Aston v Heaven (1797) 2 Esp 533; 170 ER 445 (Assizes)
Astro Exito Navegacion SA v WT Hsu (The "Messinaiaki Tolmi") [1983] 1 Lloyd's Rep 666 (Com Ct)
Baghlaf al Zafer Factory Co v Pakistan National Shipping Co (No 2) [2000] 1 Lloyd's Rep 1 (CA)
Battersey's Case [1622] Winch 48; 124 ER 41
Belfast Ropework Co Ltd v Bushell [1918] 1 KB 210 (KB)
Bradburn v Great Western Railway Co [1874] LR 10 Ex 1
British South Africa Co v Companhia de Moçambique [1893] AC 602 (HL)
Brown v Cartwright (1883) 10 R 1235 (Sess IH) (Scot)
Brown's Trustees v Palmer (1830) 9 S 224 (Sess IH) (Scot)
Burnand v Rodocanachi Sons & Co (1882) 7 App Cas 333 (HL)
Caledonia North Sea Ltd v British Telecommunications PLC [2002] 1 Lloyd's Rep 553 (HL)
Canada Steamship Lines Ltd v The King [1952] AC 192 (HL) (appeal taken from Canada)
Carpue v London & Brighton Railway Co (1844) 5 QB 747; 114 ER 1431 (QB)
Castanho v Brown & Root (UK) Ltd [1981] AC 557 (HL)
Castellain v Preston (1883) 11 QBD 380 (CA)
Centrax Ltd v Citibank NA [1999] 1 All ER 557 (CA)

Christie v Griggs (1809) 2 Camp 79; 170 ER 1088
Clarke v West Ham Corp [1909] 2 KB 858 (CA)
Clements v Macaulay (1866) 4 M 583 (Sess IH) (Scot)
Coggs v Bernard (1703) 2 Ld Raym 909; 92 ER 107 (KB)
Col Brog's Heir (1639) Mor 4816 (Sess) (Scot)
Collingridge v Royal Exchange Assurance Corp (1877) 3 QBD 173 (QB)
Connelly v RTZ Corp [1998] AC 854 (HL)
Corocraft Ltd v Pan American World Airways Inc [1968] 3 WLR 714 (QB)
Credit Agricole Indosuez v Unicof Ltd (No 2) [2004] 1 Lloyd's Rep 196 (QB)
Crédit Chimique v James Scott Engineering Group Ltd [1982] SLT 131 (Sess OH) (Scot)
Dairy Containers Ltd v Tasman Orient Line CV [2005] 1 WLR 215 (PC) (appeal taken from New Zealand)
Darrell v Tibbitts (1880) 5 QBD 560 (CA)
De Dampierre v De Dampierre [1988] AC 92 (HL)
De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd [1967] 2 Lloyd's Rep 550 (Com Ct)
Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Com Ct)
Dingle v Associated Newspapers Ltd [1961] 2 QB 162 (CA)
Donoghue v Stevenson [1932] AC 562 (HL) (appeal taken from Scot)
Donohue v Armco Inc [2001] UKHL 64
Eastern Shipping Co Ltd v Quah Beng Kee [1924] AC 177 (PC) (appeal taken from Straits Settlements)
Elvies v Vernor (1610) Mor 4833 (Sess) (Scot)
Farr v Motor Traders Mutual Insurance Society Ltd [1920] 3 KB 669 (CA)
Feest v South West Strategic Health Authority [2016] QB 503 (CA)
Fish & Fish Ltd v Sea Shepherd UK [2015] 2 WLR 694 (SC)
FKI Engineering Ltd v Stribog Ltd [2011] 1 WLR 3264 (CA)
Fothergill v Monarch Airlines Ltd [1981] AC 251 (HL)
Ford v Malaysian Airline Systems Berhad [2014] 1 Lloyd's Rep 301 (CA)
Fosbroke-Hobbes v Airwork Ltd [1937] 1 All ER 108 (KB)
Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] UKHC 1502 (Com Ct)
Gallin v London & North Western Railway Co [1875] LR 10 QB 212 (Div Ct)
Gard Marine and Energy Ltd v China National Chartering Company Ltd (The Ocean Victory) [2017] UKSC 35
George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803 (HL)
George v Eagle Air Services Ltd [2009] 1 WLR 2133 (PC) (appeal taken from St Lucia)
Gibbon v Paynton (1769) 4 Burr 2298; 98 ER 199 (KB)
Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd [1973] QB 400 (CA)
Grein v Imperial Airways Ltd [1937] 1 KB 50 (CA)
Grupo Torras SA v Al-Sabah [1995] 1 Lloyd's Rep 374 (QB)
Grupo Torras SA v Al-Sabah [1996] 1 Lloyd's Rep 7 (CA)
Hair & Skin Trading Co Ltd v Norman Airfreight Carriers Ltd [1974] 1 Lloyd's Rep 443 (QB)
Haji-Ioannou v Frangos [1999] 2 Lloyd's Rep 337 (CA)
Hamed el Chiaty & Co v Thomas Cook Group Ltd (the 'Nile Rhapsody') [1994] 1 Lloyd's Rep 382 (CA)
Heaven v Pender (1883) 11 QBD 503 (CA)
Herd v Clyde Helicopters Ltd [1997] AC 534 (HL)
Hindocha v Gheewala (2004) 1 CLC 502 (PC) (appeal taken from Jersey)
Hobbs v Marlowe [1978] AC 16 (HL)
Hollingworth v Southern Ferries Ltd (The 'Eagle') [1977] 2 Lloyd's Rep 70 QB
Homburg Houtimport BV v Agrosin Private Ltd (The 'Starsin') [2004] 1 AC 715 (HL)
Ingate v Christie (1850) 3 Car & K 61; 175 ER 463 (Assizes)
Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL)
In re Harrods (Buenos Aires) Ltd [1992] Ch 72 (CA)
In re Norton's Settlement [1908] 1 Ch 471 (CA)
Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896 (HL)
IP Metal Ltd v Ruote OZ SpA [1992] 2 Lloyd's Rep 60 (QB)
Jacobs & Turner Ltd v Celsius Sarl [2007] SLT 722 (Sess OH) (Scot)
John Edwards & Co v Motor Union Insurance Co Ltd [1922] 2 KB 249 (KB)
Kingspan Environmental Ltd v Borealis A/S [2012] EWHC 1147 (Com Ct)
Konkola Copper Mines plc v Coromin [2005] EWHC 898
Lane v Cotton (1706) 12 Mod 472; 88 ER 1458 (KB)

La Société du Gaz de Paris v La Société Anonyme de Navigation 'Les Armateurs Français' (No 2) [1926] SC (HL) 13 (appeal taken from Scot)
Le Lievre v Gould [1893] 1 QB 491 (CA)
Logan v Bank of Scotland (No 2) [1906] 1 KB 141 (CA)
Longmeid v Holliday [1851] 6 Ex 761; 155 ER 752
Longworth v Hope (1865) 3 M 1044 (Sess IH) (Scot)
Lubbe v Cape plc [2000] 1 WLR 1545 (HL)
Macadam v Macadam (1873) 11 M 860 (Sess IH) (Scot)
MacMaster v MacMaster (1833) 11 S 685 (Sess IH) (Scot)
MacShannon v Rockware Glass Ltd [1978] AC 795 (HL)
MacShannon v Rockware Glass Ltd [1977] 1 WLR 376 (CA)
Mason v Sainsbury (1782) 3 Douglas 61; 99 ER 538 (KB)
McHenry v Lewis (1882) 22 Ch D 397 (CA)
Mecklermedia Corp v DC Congress GmbH [1998] Ch 40 (Ch)
Merryweather v Nixan (1799) 8 Term Rep 186; 101 ER 1337
Miles Platt Ltd v Townroe Ltd [2003] 2 CLC 589 (CA)
Milor v British Airways plc [1996] QB 702 (CA)
Mineral Import Export v Eastern Mediterranean Maritime Ltd (The 'Golden Leader') [1980] 2 Lloyd's Rep 573 (Com Ct)
Mir Steel UK Ltd v Morris [2013] 2 All ER 54 (CA)
M'Kay v Scottish Airways Ltd [1948] SLT 402 (Sess IH) (Scot)
M'Morine v Cowie (1845) 7 D 270 (Sess IH) (Scot)
Morley v Moore [1936] 2 KB 359 (CA)
Morris v Ford Motor Co [1973] QB 792 (CA)
Morris v KLM Royal Dutch Airlines [2001] EWCA Civ 790
Morris v KLM Royal Dutch Airlines [2002] 1 AC 628 (HL)
Mohammed v Bank of Kuwait and the Middle East KSC [1996] 1 WLR 1483 (CA)
Napier v Hunter [1993] AC 713 (HL)
Osborne v Eales (No 2) [1862] 2 Moo NS 125; 15 ER 849 (PC) (appeal taken from Australia)
Owners of the Motor Vessel 'Atlantic Star' v Owner of the Motor Vessel 'Bona Spes' [1973] QB 364 (CA)
Owusu v Jackson (2003) 1 CLC 246 (CA)
Page v Scottish Insurance Corp Ltd (1929) 33 Ll L Rep 134 (CA)
Parken v Royal Exchange Assurance Co (1846) 8 D 365 (Sess IH) (Scot)
Peek v North Staffordshire Railway (1863) 10 HL Cas 473; 11 ER 1109 (HL)
Persimmon Homes Ltd v Ove Arup & Partners Ltd [2017] EWCA Civ 373
Phillips Products Ltd v Hyland [1987] 1 WLR 659 (CA)
Photo Production v Securicor Transport Ltd [1980] AC 827 (HL)
Pindell Ltd v AirAsia Bhd [2012] 2 CLC 1 (Com Ct)
Price & Co v The Union Lighterage Co [1904] 1 KB 412 (CA)
Rahman v Arearose Ltd [2001] QB 351 (CA)
R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 WLR 321 (CA)
Readhead v Midland Railway Co (1867) LR 2 QB 412 (Ex Ch)
Re Ballast plc, St Paul Travellers Insurance v Dargan [2007] Lloyd's Rep IR 742 (Ch)
Research in Motion UK Ltd v Visto Corp [2008] EWCA Civ 153
Riley v Horne (1828) 5 Bing 217; 130 ER 1044 (CCP)
Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp [1981] QB 368 (CA)
Sarrio SA v Kuwait Investment Authority [1997] 1 Lloyd's Rep 113 (CA)
Sidhu v British Airways plc [1997] AC 430 (HL)
Sim v Robinow (1892) 19 R 665 (Sess IH) (Scot)
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 (PC) (appeal taken from Brunei)
Scottish Union & National Insurance Co v Davis [1970] 1 Lloyd's Rep 1 (CA)
Southcote's Case (1600) 4 Co Rep 83; 76 ER 1061 (KB)
S & W Berisford v New Hampshire Insurance [1990] 2 QB 631 (QB)
Simpson & Co v Thomson (1877) 3 App Cas 279 (HL)
Smith v South Wales Switchgear Co Ltd [1978] 1 WLR 165 (HL)
Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (HL)
Stott v Thomas Cook Tour Operators [2014] AC 1347 (SC)
St Pierre v South American Stores (Gath & Chaves) Ltd [1936] 1 KB 382 (CA)
Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] CLY 906 (Com Ct)
Swiss Bank Corp v Brink's-MAT Ltd [1986] QB 853
The Abidin Daver [1984] AC 398 (HL)

The Al Battani [1993] 2 Lloyd's Rep 219 (Adm Ct)
The Alexandros T [2013] UKSC 70
The Atlantic Star v Bona Spes [1974] AC 436 (HL)
The Christiansborg (1885) 10 PD 141 (CA)
The Devonshire v The Barge Leslie [1912] AC 634 (HL)
The Koursk [1924] P 140 (CA)
The Linda [1988] 1 Lloyd's Rep 175 (QB)
The Po [1991] 2 Lloyd's Rep 206 (CA)
The Polessk [1996] 2 Lloyd's Rep 40 (Adm Ct)
The Vishva Ajay [1989] 2 Lloyd's Rep 558 (Adm Ct)
The Woodrop-Sims [1815] 2 Dods 83; 165 ER 1422
Theobald v Railway Passengers Assurance Co [1854] 10 Ex Rep (WH&G) 45; 156 ER 349
Thompson v London CC [1899] 1 QB 840 (CA)
Thompson v T Lohan (Plant Hire) Ltd [1987] 1 WLR 649 (CA)
Thomson v North British & Mercantile Insurance Co (1868) 6 M 310 (Sess IH) (Scot)
Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2009] 1 CLC 490 (CA)
Tulloch v Williams (1846) 8 D 657 (Sess IH) (Scot)
Unilever Plc v Gillette (UK) Ltd [1989] RPC 583 (CA)
Vernor v Elvies (1610) Mor 4788 (Sess) (Scot)
Virgin Aviation Services Ltd v CAD Aviation Services [1991] IL Pr 79 (QB)
Webster v Wedderburn (1842) 4 D 924 (Sess IH) (Scot)
William Hare Ltd v Shepherd Construction Ltd [2010] EWCA Civ 283
Williamson v North-Eastern Railway Co (1884) 11 R 596 (Sess IH) (Scot)
Wilson v Raffalovich [1881] 7 QBD 553 (CA)
Winterbottom v Wright [1842] 10 M & W 109; 152 ER 402
Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173

United States of America

Abad v Bayer Corp 563 F 3d 663 (7th Cir 2009)
Adelson v Hananel 510 F 3d 43 (1st Cir 2007)
Aguinda v Texaco Inc 142 F Supp 2d 534 (SDNY 2001)
Ahmed v Boeing Co 720 F 2d 224 (1st Cir 1983)
Aikpitanhi v Iberia Airlines of Spain 553 F Supp 2d 872 (ED Mich 2008)
Alcoa Steamship Co v M/V Nordic Regent 654 F 2d 147 (2d Cir 1980)
Allianz Global Corporate & Specialty v EMO Trans California Inc No 09-CV-4893, 2010 WL 2594360 (ND Cal 22 June 2010)
American Dredging Co v Miller 510 US 443 (1994)
American Home Assurance Co v Jacky Maeder (Hong Kong) Ltd 969 F Supp 184 (SDNY 1997)
American Home Assurance Co v Kuehne & Nagel (AG & Co) KG 544 F Supp 2d 261 (SDNY 2008)
Andrews v United Airlines Inc 24 F 3d 39 (9th Cir 1994)
Anglo-American Provision Co v Davis Provision Co (No 1) 191 US 373 (1903)
Arik v Boeing Co, No 1-10-0750, 2012 WL 6944131 (Ill App 1 Dist 10 Jan 2012)
Atlantic Marine Construction Co Inc v District Court for Western District of Texas 134 S Ct 568 (2013)
Baah v Virgin Atlantic Airways Ltd 473 F Supp 2d 591 (SDNY 2007)
Bagdon v Philadelphia & Reading Coal & Iron Co 165 NYS 910 (App Div 1917)
Bakeer v Nippon Cargo Airlines Co Ltd No 09-CV-3374, 2011 WL 3625103 (EDNY 2011)
Bank of Kentucky v Adams Express Co 93 US 174 (1876)
Bapte v West Caribbean Airways 560 US 952 (2010)
Bassam v American Airlines 287 F App'x 309 (5th Cir 2008)
Baumgart v Fairchild Aircraft Corp 981 F 2d 824 (5th Cir 1993)
Bell v Kerzner International Ltd 503 Fed Appx 669 (11th Cir 2012)
Bergquist v Medtronic Inc 379 NW 2d 508 (Minn 1986)
Berner v United Airlines Inc 157 NYS 2d 884 (1956)
Block v Compagnie Nationale Air France 386 F 2d 323 (5th Cir 1967)
Boulineaux v Knoxville 99 SW 2d 849 (Ark 1935)
Borges-Santiago v American Airlines Inc 685 F Supp 2d 289 (DPR 2010)
Bowen v US 570 F 2d 1311 (7th Cir 1978)
Boyar v Korean Air Lines 664 F Supp 1481 (DC Cir 1987)

Brauner v British Airways plc No 12-CV-343, 2012 WL 1229507 (EDNY 12 April 2012)
Breard v Greene 523 US 371 (1998)
BRI Coverage Corp v Air Canada 725 F Supp 133 (EDNY 1989)
Broderick v Rosner 294 US 629 (1935)
Buonocore v Trans World Airlines Inc 900 F 2d 8 (2d Cir 1990)
Burford v Sun Oil Co 319 US 315 (1943)
Byrne v Japan Airlines Inc No 83-CV-9162, 1984 WL 1343 (SDNY 18 Dec 1984)
Canada Malting Co Ltd v Paterson Steamships Ltd 285 US 413 (1932)
Canales Martinez v Dow Chemical Co 219 F Supp 2d 719 (ED La 2002)
Capital Currency Exchange NV v National Westminster Bank PLC 155 F 3d 603 (2d Cir 1998)
Chan v Korean Air Lines Ltd 490 US 122 (1989)
Chhawchharia v Boeing Co 657 F Supp 1157 (SDNY 1987)
Choctaw Nation of Indians v United States 318 US 423 (1943)
Christian v Smith 276 Neb 867 (2008)
Chubb Insurance Co of Europe SA v Menlo Worldwide Forwarding Inc [2008] Av L Rep 10988806 (CCH), 2008 WL 10988806 (CD Cal 14 Jan 2008)
Chubb Insurance Co of Europe SA v Menlo Worldwide Forwarding Inc 634 F 3d 1023 (9th Cir 2011)
Chukwu v Air France 218 F Supp 2d 979 (ND Ill 2002)
Clerides v Boeing Co 534 F 3d 623 (7th Cir 2008)
Cofrode v Gartner 79 Mich 332 (Mich Sup Ct 1890)
Cohens v Virginia 19 US 264 (1821)
Collard v Beach 87 NYS 884 (1904)
Continental Motors Inc v Jewell Aircraft Inc No 12-CV-0221, 2013 WL 5498264 (SD Ala 02 Oct 2013)
Cortez v Palace Resorts Inc 123 So 3d 1085 (Fla 2013)
Cox v Northwest Airlines Inc 379 F 2d 893 (7th Cir 1967)
Coyle v PT Garuda Indonesia 180 F Supp 2d 1160 (D Oregon 2001)
Dahl v United Technologies Corp 472 F Supp 696 (D Del 1979)
Data General Corp v Air Express Int'l Co 676 F Supp 538 (SDNY 1988)
De Cespedes v Prudence Mutual Casualty Co of Chicago 193 So 2d 224 (1966)
Delgado v Delta Air Lines Inc 43 F Supp 3d 1261 (SD Fla 2013)
Delgado v Shell Oil Co 890 F Supp 1324 (SD Tex 1995)
Delta Air Lines Inc v Chimet 619 F 3d 288 (3d Cir 2010)
Diaz v Avianca SA No 90 CV-1215, 1991 WL 35855 (SDNY 12 March 1991)
Disconto Gesellschaft v Terlinden 106 NW 821 (Wis Sup Ct 1906)
Doe v Etihad Airways PJSC 870 F 3d 406 (6th Cir 2017)
Domangue v Eastern Air Lines Inc 722 F 2d 256 (5th Cir 1984)
Dordieski v Austrian Airlines AG No 15-CV-00180, 2016 WL 4437958 (ND Ill 23 Aug 2016)
Douglas v New York, New Haven & Hartford Railway Co 279 US 377 (1929)
Eck v United Arab Airlines Inc 360 F 2d 804 (2d Cir 1966)
Ehrlich v American Airlines Inc 360 F 3d 366 (2d Cir 2004)
Eldeeb v Delta Air Lines Inc, No 18-CV-1128, 2018 WL 6435739 (D Minn 07 Dec 2018)
Ellis v AAR Parts Trading Inc 357 Ill App 3d 723 (2005)
Empres Lineas Maritimas Argentinas SA v Schichau-Unterveser AG 955 F 2d 368 (5th Cir 1992)
Erie Railroad Co v Erie & Western Trans Co 204 US 220 (1907)
Escobar v European Aeronautic Defence & Space Co No 13-CV-598, (D Hawaii filed 11 June 2013)
Esheva v Siberian Airlines 499 F Supp 2d 493 (SDNY 2007)
Espinoza v Evergreen Helicopters Inc 359 Or 63 (2015)
Farmanfarmaian v Gulf Oil Corp 437 F Supp 910 (SDNY 1977)
Farmanfarmaian v Gulf Oil Corp 588 F 2d 880 (2d Cir 1978)
Fatkhiboyanovich v Honeywell Int'l Inc, No 04-CV-4333, 2005 WL 2475701 (DNJ 05 Oct 2005)
Feng Zhen Lu v Air China Int'l Corp No 92-CV-1254, 1992 WL 453646 (EDNY 16 Dec 1992)
First Nat Bank of Meadville, Pa v Niagara Therapy Mfg Corp 229 F Supp 460 (WD Pa 1964)
Fischer v Magyar Államvasutak ZRT 777 F 3d 847 (7th Cir 2015)
Fitzgerald v Texaco Inc 521 F 2d 448 (2d Cir 1975)
Floyd v Eastern Airlines Inc 499 US 530 (1991)
Founding Church of Scientology of Washington v Verlag 536 F 2d 429 (DC Cir 1976)
Galbert v West Caribbean Airways 715 F 3d 1290 (11th Cir 2013)
Galli v Re-Al Brazilian International Airlines 29 Misc 2d 499 (NY 1961)
Gambra v International Lease Finance Corp 377 F Supp 2d 810 (CD Cal 2005)
Garcia v Aerovias de Mexico SA de DV (Inc) No 18-CV-05517, 2018 WL 6570461 (ND Ill 13 Dec

2018)
Harpalani v Air India Inc 622 F Supp 69 (ND Ill 1985)
Gardner v Thomas 14 Johns 134 (NY 1817)
Giro Inc v Malaysian Airline System Berhad 2011 WL 2183171 (SDNY 2011)
Glenn v Compania Cubana de Aviacion SA 102 F Supp 631 (SD Fla 1952)
Gonzalez v Chrysler Corp 301 F 3d 377 (5th Cir 2002)
Great Western Railway Company of Canada v Miller 19 Mich 305 (Mich Sup Ct 1869)
Grodinsky v Fairchild Industries Inc 507 F Supp 1245 (D Md 1981)
Gulf Oil Corp v Gilbert 330 US 501 (1947)
Haldimann v Delta Airlines Inc 168 F 3d 1324 (DC Cir 1999)
Higginbotham v Mobil Oil Corp 545 F 2d 422 (5th Cir 1977)
Hoffmann v Goberman 420 F 2d 423 (3d Cir 1970)
Hornsby v Lufthansa German Airlines 593 F Supp 2d 1132 (CD Cal 2009)
Hosaka v United Airlines Inc 305 F 3d 989 (9th Cir 2002)
Howe v Goldcorp Investments Ltd 946 F 2d 944 (1st Cir 1991)
Hunter v Deutsche Lufthansa AG 863 F Supp 2d 190 (EDNY 2012)
Ingham v Eastern Air Lines Inc 373 F 2d 227 (2d Cir 1967)
In re Air Crash at Lexington, Kentucky, August 27, 2006, No 06-CV-316, 2007 WL 2915187 (ED Ky 2007)
In re Air Crash at Little Rock, Arkansas, on June 1, 1999, 291 F 3d 503 (8th Cir 2002)
In re Air Crash at Madrid, Spain, on August 20, 2008, 893 F Supp 2d 1020 (CD Cal 2011)
In re Air Crash Disaster near New Orleans, Louisiana on July 9, 1982, 821 F 2d 1147 (5th Cir 1987)
In re Air Crash Disaster over Makassar Strait, Sulawesi, No 09-CV-3805, 2011 WL 1290835 (ND Ill 11 Jan 2011)
In re Air Crash near Athens, Greece on August 14, 2005, 479 F Supp 2d 792 (ND Ill 2007)
In re Air Crash near Bombay, India on January 1, 1978, 531 F Supp 1175 (WD Wash 1982)
In re Air Crash near Nantucket, Massachusetts on October 31, 1999, 340 F Supp 2d 240 (EDNY 2004)
In re Air Crash near Peggy's Cove, Nova Scotia on September 2, 1998, [2005] AMC 183, 2004 WL 2486263, (ED Penn 2004)
In re Air Crash near Peixoto de Azeveda, Brazil, on September 29, 2006, 574 F Supp 2d 272 (EDNY 2008)
In re Air Crash off Long Island New York, on July 17, 1996, 65 F Supp 2d 207 (SDNY 1999)
In re Air Crash over Taiwan Straits on May 25, 2002, 331 F Supp 2d 1176 (CD Cal 2004)
In re Air Crash over the Mid-Atlantic on June 1, 2009, 760 F Supp 2d 832 (ND Cal 2010)
In re Air Crash over the Southern Indian Ocean, on March 8, 2014, No 16-CV-1184, 2018 LEXIS 198598 (DC Cir 21 Nov 2018)
In re Disaster at Riyadh Airport, Saudi Arabia on August 19, 1980, 540 F Supp 1141 (DC Cir 1982)
In re Air Disaster near Cove Neck, New York on January 25, 1990, 774 F Supp 718 (EDNY 1991)
In re Bridgestone/Firestone 190 F Supp 2d 1125 (SD Ind 2002)
In re Disaster at Riyadh Airport, Saudi Arabia on August 19, 1980, 540 F Supp 1141 (DC Cir 1982)
In re Mexico City Aircrash of October 31st, 1979, 708 F 2d 400 (9th Cir 1983)
In re Montreal Maine & Atlantic Railway Ltd 574 BR 381 (D Maine 2017)
In re One Hundred and Ninety-Four Shawls 18 Fed Cas 703 (SDNY 1848)
In re Ski Train Fire in Kaprun Austria on November 11, 2000, 499 F Supp 2d 437 (SDNY 2007)
In re West Caribbean Airways SA 616 F Supp 2d 1299 (SD Fla 2007)
Intel Corp v Malaysian Airline System 652 F Supp 1101 (ND Cal 1987)
Interface Partners Int'l Ltd v Hananel 575 F 3d 97 (1st Cir 2007)
International Shoe Co v Washington 326 US 310 (1945)
Ionescu v EF Hutton & Co (France) SA 465 F Supp 139 (SDNY 1979)
Iragorri v International Elevator Inc 203 F 3d 8 (1st Cir 2000)
Iragorri v United Technologies Corp 274 F 3d 65 (2d Cir 2001)
Irish National Insurance Co Ltd v Aer Lingus Teoranta 739 F 2d 90 (2d Cir 1984)
Islamic Republic of Iran v Pahlavi 62 NY 2d 474 (1984)
Ison v DuPont de Nemours & Co Inc 729 A 2d 832 (Del 1999)
Jack v Trans World Airlines Inc 820 F Supp 1218 (ND Cal 1993)
Kapar v Kuwait Airways Corp 845 F 2d 1100 (DC Cir 1988)
Kelley v Societe Anonyme Belge d'Explotation de la Navigation Aerienne (Sabena) 242 F Supp 129 (EDNY 1965)
Kennecott Holdings Corp v Liberty Mutual Insurance Co 578 NW 2d 358 (Minn 1998)

Khan v Delta Airlines Inc No 10-CV-2080, 2010 WL 3210717 (EDNY 12 Aug 2010)
King v Cessna Aircraft Co 505 F 3d 1160 (11th Cir 2007)
Kinney System Inc v Continental Insurance Co 674 So 2d 86 (Fla 1996)
Koehler v Scandinavian Airlines Systems (SAS) 285 Ill App 3d 520 (1996)
Kohr v Allegheny Airlines Inc 504 F 2d 400 (7th Cir 1974)
Koster v (American) Lumbermens Mutual Casualty Co 330 US 518 (1947)
La Seguridad v Transytur Line 707 F 2d 1304 (11th Cir 1983)
Langenhorst v Norfolk Southern Railway Co 219 Ill 2d 430 (2006)
LB Smith Inc v Circle Air Freight Corp 488 NYS 2d 547 (1985)
Lewis v Terry 111 Mass 143 (1870)
Liverpool & GW Steam Co v Phenix Insurance Co 129 US 397 (1889)
Lueck v Sundstrand Corp 236 F 3d 1137 (9th Cir 2001)
Macedo v Boeing Co 693 F 2d 683 (7th Cir 1982)
MacPherson v Buick Motor Co 217 NY 382 (1916)
Marshall v Boeing Co 940 F Supp 2d 819 (ND Ill 2013)
Martinez v DuPont de Nemours & Co Inc 86 A 3d 1102 (Del 2014)
Mason v The Blaireau 6 US 240 (1804)
Matz v North Eastern Airlines No 07-CV-13447, 2008 WL 2064800 (ED Mich 13 May 2008)
McCarthy v Canadian National Railways 322 F Supp 1197 (D Mass 1971)
McLane v Marriott International Inc 547 Fed Appx 950 (11th Cir 2013)
McLoughlin v Comm Airways (Pty) Ltd (Comair) 602 F Supp 29 (EDNY 1985)
Melgares v Sikorsky Aircraft Corp 613 F Supp 2d 231 (D Conn 2009)
Mercier v Sheraton International 935 F 2d 419 (1st Cir 1991)
Michell v General Motors Corp 439 F Supp 24 (ND Ohio 1977)
Mitchell, Shackleton & Co Ltd v Air Express Int'l Inc 704 F Supp 524 (SDNY 1989)
Mizokami Bros of Arizona Inc v Baychem Corp 556 F 2d 975 (9th Cir 1977)
Mobil Tankers Co SA v Mene Grande Oil Co 363 F 2d 611 (3d Cir 1966)
Monarch Ins Co of Ohio v Castellano 176 Ill App 3d 849 (1988)
Morales v Ford Motor Co 313 F Supp 2d 672 (SD Tex 2004)
Morris v Missouri Pacific Railway Co 14 SW 228 (Tex Sup Ct 1890)
Morrison v Le Tourneau Co 138 F 2d 339 (5th Cir 1943)
Motorola Inc v MSAS Cargo Int'l Inc 42 F Supp 2d 952 (ND Cal 1998)
Myers v Boeing Co 115 Wash 2d 123 (1990)
Navarette de Pedrero v Schweizer Aviation Corp 635 F Supp 2d 251 (WDNY 2009)
Nolan v Boeing Co 762 F Supp 680 (ED La 1989)
Nolan v Boeing Co 919 F 2d 1058 (5th Cir 1990)
Norex Petroleum Ltd v Access Industries Inc 416 F 3d 146 (2d Cir 2005)
Norton v Sewall 106 Mass 143 (1870)
Norwood v Kirkpatrick 349 US 29 (1955)
Nowak v Tak How Investments Ltd 94 F 3d 708 (1st Cir 1996)
Olympic Corp v Société Générale 333 F Supp 121 (SDNY 1971)
Olympic Corp v Société Générale 462 F 2d 376 (2d Cir 1972)
Osborne v British Airways PLC Corp 198 F Supp 2d 901 (SD Tex 2002)
Osorio v Dole Food Co 665 F Supp 2d 1307 (SD Fla 2009)
Pain v United Technologies Corp 637 F 2d 775 (DC Cir 1980)
Pakistan International Airlines v Boeing Co 575 F 2d 1268 (9th Cir 1978)
Paper Operations Consultants Int'l Ltd v SS Hong Kong Amber 513 F 2d 667 (9th Cir 1975)
Patricia v Boeing Co, No 09-CV03728, 2010 WL 3861077 (ND Ill 28 Sep 2010)
Pennoyer v Neff 95 US 714 (1877)
Pflug v Egyptair Corp (2000) 961 F 2d 26 (2d Cir 1992)
Piamba Cortes v American Airlines Inc 177 F 3d 1272 (11th Cir 1999)
Picketts v International Playtex Inc 215 Conn 490 (1990)
Pierre-Louis v Newvac Corp 584 F 3d 1052 (11th Cir 2009)
Piper Aircraft Co v Reyno 454 US 235 (1981)
Polanco v HB Fuller Co 941 F Supp 1512 (D Minn 1996)
Pollux Holding Ltd v The Chase Manhattan Bank 329 F 3d 64 (2d Cir 2003)
Quackenbrush v Allstate Insurance Co 517 US 706 (1996)
Rea v Hayden 3 Mass 24, 25 (1807)
Recumar v KLM Royal Dutch Airlines 608 F Supp 795 (SDNY 1985)
Reed v Wiser 414 F Supp 863 (SDNY 1976)
Reed v Wiser 555 F 2d 1079 (2d Cir 1977)
Reyno v Piper Aircraft Co 479 F Supp 727 (MD Pa 1979)
Reyno v Piper Aircraft Co 630 F 2d 149 (3d Cir 1980)

Rivas v Ford Motor Co, No 02-CV-676, 2004 WL 1247018 (MD Fla 19 April 2004)
Robert Bosch Corp v Air France 712 F Supp 688 (ND Ill 1989)
Robert C Herd & Co Inc v Krawill Machinery Corp 359 US 297 (1959)
Rogers v Guaranty Trust Co 288 US 123 (1933)
Rolls-Royce Inc v Garcia 77 So 3d 855 (Fla 2012)
Royal Insurance v Amerford Air Cargo 654 F Supp 679 (SDNY 1987)
Royal Insurance Co v Emery Air Freight Corp 834 F Supp 633 (SDNY 1993)
Rozmajzl v Northland Greyhound Lines 242 Iowa 1135 (1952)
Ryan Stevedoring v Pan-Atlantic Steamship 350 US 124 (1955)
Sabatino v Boeing Corp, No 09-CV-1551, 2009 WL 1635670 (ND Ill 05 June 2009)
Sabena Belgian World Airlines v United Airlines Inc 773 F Supp 1117 (ND Ill 1991)
Saks v Air France 724 F 2d 1383 (9th Cir 1984)
Saks v Air France 470 US 392 (1985)
Satz v McDonnell Douglas Corp 244 F 3d 1279 (11th Cir 2001)
Schopenhauer v Compagnie Nationale Air France 255 F Supp 2d 81 (EDNY 2003)
Seales v Panamanian Aviation Co Ltd 2009 WL 395821 (EDNY 18 Feb 2009)
Sinochem Int'l Co Ltd v Malaysia Int'l Shipping Corp 549 US 422 (2007)
Slater v Mexican National Railroad Co 194 US 120 (1904)
Slattery v Marra Bros Inc 186 F 2d 134 (2d Cir 1951)
SME Racks Inc v Sistemas Mecanicos Para Electronica SA 382 F 3d 1097 (11th Cir 2004)
Smith v Canadian Pacific Airways Ltd 452 F 2d 798 (2d Cir 1971)
Société Nationale Industrielle Aérospatiale (SNIA) v US District Court for the Southern District of Iowa 482 US 522 (1987)
Sompo Japan Insurance Inc v Nippon Cargo Airlines Co Ltd 522 F 3d 776 (7th Cir 2008)
Split End Ltd v Dimerco Express (Phils) Inc No 85-CV-1506, 1986 WL 2199 (SDNY 11 Feb 1986)
Stangvik v Shiley Inc 54 Cal 3d 744 (1991)
Strawbridge v Curtiss 7 US (3 Cranch) 267 (1806)
Sumitomo Shoji America Inc v Avagliano (1982) 457 US 176
Sun Valley Airlines Inc v Avco-Lycoming Corp 411 F Supp 598 (D Idaho 1976)
Swaminathan v Swiss Air Transport Co Ltd 962 F 2d 387 (5th Cir 1992)
Swift & Co Packers v Compania Colombiana del Caribe SA 339 US 684 (1950)
Tazoe v Airbus SAS 631 F 3d 1321 (11th Cir 2011)
The Belgenland 114 US 355 (1885)
The Hudson 15 F 162 (SDNY 1883)
The Maggie Hammond 76 US 435 (1866)
The Schooner Catharine 58 US 170 (1854)
Thomas v Winchester 6 NY 397 (1852)
Thomson v Palmieri 355 F 2d 64 (2d Cir 1966)
Trans World Airlines Inc (TWA) v Franklin Mint Corp 466 US 243 (1984)
Transunion Corp v PepsiCo Inc 811 F 2d 127 (2d Cir 1987)
Triguero v Consolidated Rail Corp 932 F 2d 95 (2d Cir 1991)
Tseng v El Al Israel Airlines Ltd 525 US 155 (1999)
United Airlines Inc v Hosaka 537 US 1227 (2003)
US v National City Lines Inc 334 US 573 (1948)
US v Reliable Transfer Co Inc 421 US 397 (1975)
University of Maryland Medical System Corp v Kerrigan, No 24-C-2333, 2017 WL 5711857 (Md App 28 Nov 2017)
Van Cauwenberghe v Biard 486 US 517 (1988)
Van Schijndel v Boeing Co 434 F Supp 2d 766 (CD Cal 2006)
Vanity Fair Mills Inc v T Eaton Co Ltd 234 F 2d 633 (2d Cir 1956)
Vargas v Insurance Co of North America 651 F 2d 838 (2d Cir 1981)
Vergara v Aeroflot Soviet Airlines 390 F Supp 1266 (D Neb 1975)
Vivas v Boeing Co 392 Ill App 3d 644 (2009)
Volkswagenwerk Aktiengesellschaft v Schlunk 486 US 694 (1988)
Walton v Avco Corp 530 Pa 568 (1992)
Weiss v El Al Israel Airlines Ltd 433 F Supp 2d 361 (SDNY 2006)
Willendson v Forsoket 29 F Cas 1283 (D Pa 1801)
Williams v Green Bay & Western Railway Co 326 US 549 (1946)
Wright v American Airlines Inc, No 08-CV-660, 2010 WL 446077 (ND Tex 08 Feb 2010)
Zermeno v McDonnell Douglas Corp 246 F Supp 2d 646 (SD Tex 2003)
Zicherman v Korean Air Lines Co Ltd 516 US 217 (1996)

TABLE OF LEGAL INSTRUMENTS

International Conventions *(listed chronologically)*

Convention Internationale concernant le Transport des Marchandises par Chemins de Fer (signed 14 October 1890) (CIM 1890)

Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, (adopted 23 September 1910) (Collision Convention)

International Convention for the Unification of certain Rules relating to Bills of Lading (Hague Rules) (signed 25 August 1924 entered into force 02 June 1931) 120 LNTS 155 (Hague Rules 1924)

Convention concernant le transport des marchandises par chemins de fer (signed 12 October 1924, entered into force 1 October 1928) 77 LNTS 367 (CIM 1924)

Convention concernant le transport des voyageurs et des bagages par chemins de fer (signed 23 October 1924, entered into force 1 October 1928) 78 LNTS 17 (CIV 1924)

Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11, 49 US 3000 (Warsaw Convention)

Treaty Establishing the European Economic Community (signed 25 March 1957 entered into force 01 January 1958) (Treaty of Rome)

Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (opened for signature 28 September 1955, entered into force 1 August 1963) 478 UNTS 373 (Hague Protocol)

Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (signed 18 September 1961, entered into force 1 May 1964) 500 UNTS 31 (Guadalajara Convention)

Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968) (consolidated version) [1998] OJ C 27/1 (Brussels I Convention)

Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention)

International Convention on Civil Liability for Oil Pollution Damage (opened for signature 29 Nov 1966, entered into force 19 June 1975) 973 UNTS 3 (CLC 1969)

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 (opened for signature 8 March 1971) 10 ILM 613, ICAO Doc 8932 (Guatemala City Protocol or GCP)

Athens Convention relating to the Carriage of Passengers and Luggage by Sea (opened for signature 13 December 1974, entered into force 28 April 1987) 1463 UNTS 19 (Athens Convention)

Additional Protocol No 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 (opened for signature 25 September 1975, entered into force 15 February 1996) 2097 UNTS 23 (MAP1)

Additional Protocol No 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 (opened for signature 25 September 1975, entered into force 15 February 1996) 2097 UNTS 63 (MAP2)

Additional Protocol No 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (opened for signature 25 September 1975) ICAO Doc 9147 (MAP3)

Additional Protocol No 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955 (opened for signature 25 September 1975, entered into force 14 June 1998) 2145 UNTS 31 (MAP4)

Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, 1969 (opened for signature 27 Nov 1992, entered into force 20 May 1996) 1956 UNTS 255 (CLC Protocol 1992)

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (opened for signature 03 May 1996, not yet in force) (HNS 1996)

Convention for the Unification of Certain Rules for International Carriage by Air 2242 UNTS 309 (signed 28 May 1999, entered into force 04 November 2003) (MC99)
Convention on Compensation for Damage Caused by Aircraft to Third Parties (opened for signature 02 May 2009, not yet in force) DCCD Doc No 42 (General Risks Convention)
Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (opened for signature 02 May 2009, not yet in force) ICAO Doc 9920 (Unlawful Interference Convention).
Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Protocol 2010)

European Union Legislation *(listed chronologically)*

Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing on air carriers [1992] OJ L 240/1
Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1
Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L 138/1
Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (recast) [2008] 293 OJ L 3
Commission Regulation (EU) No 285/2010 of 6 April 2010 amending Regulation (EC) No 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators [2010] OJ L 87/19
Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1

National Legislation

Australia

Civil Aviation (Carrier's Liability) Act 1959, Compilation No 29
Workers Compensation Act 1987 (NSW)

Canada

Québec Civil Code 2001

France

Code Civil
Code de Commerce
Code de Procédure Civile
Loi du 17 mars 1905 Dite Rabier sur la Responsabilité du Transporteur (Loi Rabier)
Loi du 31 mai 1924 relative à la navigation aérienne

South Africa

Insolvency Act 1936
Admiralty Jurisdiction Act 1983

Switzerland

Arrêté Du Conseil Fédéral Concernant La Réglementation de La Circulation Aérienne en Suisse du 27 Janvier 1920

United Kingdom

Carriers Act 1830
Fatal Accidents Act 1846
Railway and Canal Traffic Act 1854
Carriage by Air Act 1932
Law Reform (Married Women and Tortfeasors) Act 1935
Carriage by Air (Non-International Carriage) (United Kingdom) Order (SI 1952, No 158)
Carriage by Air Act 1961
Unfair Contract Terms Act 1977
Civil Liability (Contribution) Act 1978
Civil Jurisdiction and Judgments Act 1982

United States of America

Restatement (Second) of Torts (American Law Institute 1965)
New York Consolidated Laws, Civil Practice Law and Rules (McKinney 1972)
Restatement (Third) of Torts: Products Liability (American Law Institute 1998)
Louisiana Civil Code of Procedure art 123 (1999)
Restatement (Third) of Torts: Apportionment of Liability (American Law Institute 2000)
Foreign Sovereign Immunities Act (FSIA) 28 USC §1602 (2016)
Florida Rules of Civil Procedure Rule (2018)
California Code of Civil Procedure (2018)

BIBLIOGRAPHY

Books and Contributed Chapters to Books

Abraham KS, *The Liability Century* (Harvard University Press 2008)

Berlingieri F, *International Maritime Conventions*, vol 1 (Informa 2014)

Birds J, *Bird's Modern Insurance Law* (10th edn, Sweet & Maxwell 2016)

Birds J, Lynch B and Milnes S, *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015)

Boyle RP, 'The Warsaw Convention - Past, Present and Future' in A Kean (ed), *Essays in Air Law* (Martinus Nijhoff 1982)

Brand RA and Jablonski SR, *Forum Non Conveniens: History, Global Practice and Future Under the Hague Convention on Choice of Court Agreements* (OUP 2007)

Briggs A, *The Conflict of Laws* (Kindle edn, OUP 2008)

Cane P, *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013)

Christou R, *Drafting Commercial Agreements* (6th edn, Sweet & Maxwell 2016)

Clarke MA, 'Insurance' in A Burrows (ed), *English Private Law* (OUP 2013)

Clerk JF and Lindsell WHB, *The Law of Torts* (2nd edn, Sweet & Maxwell 1896)

Courtney W, *Contractual Indemnities* (Hart 2015)

Derham SR, *Subrogation in Insurance Law* (Law Book Co 1985)

Dicey AV and Berriedale Keith A, *A Digest of the Law of England with Reference to the Conflict of Laws* (4th edn, Stevens & Son 1927)

Disney HW, *The Law of Carriage by Railway* (Stevens & Son 1905)

Dobie AM, *Handbook on the Law of Bailment and Carriers* (West 1914)

Drion H, *Limitation of Liabilities in International Air Law* (Springer 1954)

Einhorn T, *Private International Law in Israel* (Kluwer Law 2009)

Erskine J and Nicolson JB, *An Institute on the Law of Scotland*, vol 1 (Bell & Bradfute 1871)

Fawcett JJ, 'General Report' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995)

Fawcett JJ and Carruthers JM, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008)

Freedman W, Product Liability Actions by Foreign Plaintiffs in the United States (Kluwer Law 1988)

Gaudemet-Tallon H, 'France' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995)

Gilman J and others, *Arnould's Law of Marine Insurance and Average* (17th edn, Sweet & Maxwell 2008)

Goedhuis D, *National Air Legislations and the Warsaw Convention* (Springer 1937)

Goff R and Jones G, *The Law of Restitution* (2nd edn, Sweet & Maxwell 1978)

Goldhirsch LB, *The Warsaw Convention Annotated - A Legal Handbook* (2nd edn, Kluwer Law 2000)

Goldstein G, 'Canada (Québec)' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995)

Goldstein S, 'Israel' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995)

Haanappel PPC, *The Law and Policy of Air Space and Outer Space* (Kluwer Law 2003)

Harris DJ, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004)

Hatzimihail NE, 'Cyprus' in P Beaumont and others (eds), *Cross-Border Litigation in Europe* (Bloomsbury 2017)

Hazeltine HD, *The Law of the Air* (University of London Press 1911)

Horner RC and Legrez D (trs), *Second International Conference on Private Aeronautical Law, October 4-12, 1929 Warsaw: Minutes* (Fred B Rothman 1975)

Jones M, Dugdale A and Simpson M (eds), *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell 2017)

Jones W, *An Essay on the Law of Bailments* (4th edn, Sweet & Maxwell 1833)

Kahn-Freund O, *The Law of Carriage by Inland Transport* (4th edn, Stevens & Son 1965)

Kames HH, *Historical Law - Tracts* (2nd edn, A Millar 1761)

Karayanni M, *Conflicts in a Conflict* (OUP 2014)

Kostal RW, *Law and English Railway Capitalism 1825-1875* (OUP 1994)

Leloudas G and Soyer B, 'Temporal Limits of the Athens Regime - Potential Conflicts between International and Domestic Legal Regimes' in A Tettenborn and B Soyer (eds), *Maritime Liabilities in a Global and Regional Context* (Informa Law from Routledge 2019)

Lobban M, ‘Personal Injuries’ in W Cornish and others (eds), *The Oxford History of the Laws of England*, vol 12 (OUP 2010)
Lowenfeld AF, *Aviation Law: Cases and Materials* (2nd edn, Matthew Bender 1981)
Malanczuk P, *Akehurst’s Modern Introduction to International Law* (7th edn, Routledge 1997)
Mankiewicz RH, *The Liability Regime of the International Air Carrier* (Kluwer Law 1981)
Margo RD, *Margo on Aviation Insurance* (K Posner, T Marland and P Chrystal eds, 4th edn, LexisNexis 2011)
Matte NM, *Treatise on Air-Aeronautical Law* (Carswell 1981)
McLachlan C, *Lis Pendens in International Litigation* (Brill 2014)
McClean D (gen ed), *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019)
McClean D and Ruiz Abou-Nigm V, *Morris on The Conflict of Laws* (8th edn, Sweet & Maxwell 2012)
McNair AD, *The Law of the Air* (Butterworth & Co 1932)
Mendes de Leon PMJ, ‘Jurisdiction under the Exclusivity of Private International Law Agreements on Air Carrier Liability: The Case of Airbus versus Armavia Airlines (2013)’ in *From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law (Essays in Honour of John Balfour)* (Martinus Nijhoff 2013)
Merkin R, *Colinvaux’s Law of Insurance* (10th edn, Sweet & Maxwell 2014)
Merkin R and Steele J, *Insurance and the Law of Obligations* (OUP 2013)
Milde M, *International Air Law and ICAO*, vol 4 (Eleven International 2008)
Milde M and Dempsey PS, *International Air Carrier Liability: The Montreal Convention of 1999* (Centre for Research in Air and Space Law McGill University 2005)
Miller G, *Liability in International Air Transport* (Kluwer Law 1977)
Müller-Rostin W, ‘Insurance’ in S Hobe, N von Ruckteschell and D Heffernan (eds), *Cologne Compendium on Air Law in Europe* (Carl Heymanns Verlag 2013)
Peel E, *Treitel: The Law of Contract* (12th edn, Sweet & Maxwell 2007)
Prosser WL, *Law of Torts* (3rd edn, West Publishing 1964)
Russell JA (ed), *Chitty’s Treatise on the Law of Contracts* (6th edn, G & C Merriam 1860)
Salmond JW, *Jurisprudence* (GL Williams ed, 10th edn, Sweet & Maxwell 1947)
Schack H, ‘Germany’ in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995)
Schouler J, *The Law of Bailments* (Little, Brown & Co 1905)
Shaw M, *International Law* (5th edn, CUP 2003)
Stallybrass W, *Salmond’s Law of Torts* (10th edn, Sweet & Maxwell 1945)
Story J, *Commentaries on the Law of Bailments* (8th edn, Little, Brown & Co 1870)
Tobolewski A, *Monetary Limitations of Liability in Air Law* (De Daro Publishing 1986)
Tompkins GN jr, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (Wolters Kluwer 2010)
Traynor J, *Latin Phrases and Maxims: Collected from the Institutional and Other Writers on Scotch Law* (William Paterson 1861)
Viccars PJC, *Aviation Insurance: A PlaneMan’s Guide* (2nd edn, Witherby Insurance & Legal 2012)
Videla Escalada FN, *Aeronautical Law* (Sijthoff & Noordhoff 1979)
Whittaker, S, *Liability for Products: English Law, French Law and European Harmonization* (OUP 2005)
——, ‘The Law of Obligations’ in J Bell, S Boyron and S Whittaker (eds), *Principles of French Law* (OUP 2008)
Williams GL, *Joint Torts and Contributory Negligence* (Stevens & Son 1951)
Williston S, *Law of Contracts* (Baker, Voorhis & Co 1920–1924)
Wright CA and others, *Federal Practice and Procedure*, vol 13E (3rd edn, 2008)
Wright CA, *The Law of Federal Courts* (5th edn, 1994)
Zweigert K and Kötz H, *An Introduction to Comparative Law* (T Weir tr, 2nd edn, Clarendon Press 1987)

Journal Articles

—, ‘Article 28 of the Warsaw Convention: A Suggested Analysis’ (1966) 50 *Minn L Rev* 697
—, Comment, ‘The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages’ (1955) 64 *Yale LJ* 878
Abbott RT, ‘The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish,

English and United States Applications' (1985) 18 *Vanderbilt J Transnat'l L* 111
Adeline S, 'The Forum Non Conveniens Doctrine Put to the Test of Uniform Private International Law in Relation to Air Carriers' Liability: Lack of Harmony between US and French Decisional Outcomes' (2013) 18 Unif L Rev 313
Adams JJ, 'Note: Liability of Supplier of Chattels to Third Persons' (1939) 38 *Mich L Rev* 116
Anderson W, 'Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation' (2001) 10 *J Transnat'l L & Pol'y* 183
Atiyah PS, 'Collateral Benefits Again' (1969) 32 *Mod L Rev* 397
Baker T, 'Insurance in Sociolegal Research' (2010) 6 *Annual Rev L & Soc Sci* 433
Baldwin SE, 'Liability for Accidents in Aerial Navigation' (1910) 9 *Mich L Rev* 20
Barrett EL, 'The Doctrine of Forum Non Conveniens' (1947) 35 *Cal L Rev* 380
Beaumont KM, 'Some Anomalies Requiring Amendment in the Warsaw Convention of 1929' (1947) 14 *J Air L & Com* 30
Benson BF and Dahlman Rosa J, 'The Status of Pending Air Carrier Litigation' (2001) 66 *J Air L & Com* 1367
Berger E, 'Contribution Between Tortfeasors' (1934) 9 *Indiana LJ* 229
Bickel AM, 'The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty' (1949) 35 *Cornell LQ* 12
Bies J, 'Conditioning Forum Non Conveniens' (2000) 67 *U Chi L Rev* 489
Blair P, 'The Doctrine of Forum Non Conveniens in Anglo-American Law' (1929) 29 *Colum L Rev* 1
Bogert GG, 'Problems in Aviation Law' (1920) 6 *Cornell LQ* 271
Bohlen FH, 'Contributory Negligence' (1908) 21 *Harv L Rev* 233
——, 'Liability of Manufacturers to Persons Other than Their Immediate Vendees' (1929) 45 *LQR* 343
Boyce D, 'Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno' (1985) 64 *Tex L Rev* 193
Brand RA, 'Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments' (2002) 37 *Tex Int'l LJ* 467
——, 'Challenges to Forum Non Conveniens' (2013) 45 *NYU J Int'l L & Politics* 1003
Braucher R, 'The Inconvenient Federal Forum' (1947) 60 *Harv L Rev* 908
Briggs A, 'Forum Non Conveniens - Now We Are Ten' (1983) 3 *Legal Studies* 74
——, 'Spiliada and the Brussels Convention' [1991] *LMCLQ* 10
——, 'Decisions of the British Courts During 1996 - Private International Law' (1997) 67 *Brit YB Int'l L* 577
——, 'Decisions of the British Courts During 1999 - Private International Law' (2000) 70 *Brit YB Int'l L* 319
——, 'Decisions of the British Courts During 2000 - Private International Law' (2001) 71 *Brit YB Int'l L* 435
——, 'Decisions of the British Courts During 2002 - Private International Law' (2003) 73 *Brit YB Int'l L* 453
——, 'Forum Non Conveniens and Ideal Europeans' [2005] *LMCLQ* 378
Carney PJ, 'International Forum Non Conveniens - "Section 1404.5" - A Proposal in the Interest of Sovereignty, Comity, and Individual Justice' (1995) 45 *Am U L Rev* 415
Cha LH, 'The Air Carrier's Liability to Passengers in International Law' (1936) 7 *Air L Rev* 25
Chassot L, 'Le Domaine de La Responsabilité Du Transporteur Aérien International à La Lumière de Deux Dédisions Rédentes' [2016] *RFDAS* 5
Cheng B, 'The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part I)' (2000) 49 *ZLW* 287
——, 'The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part II)' (2000) 49 *ZLW* 484
——, 'A New Era in the Law of International Carriage by Air - From Warsaw (1929) to Montreal (1999)' (2004) 53 *Int'l & Comp LQ* 833
——, 'Fifty Years of the Warsaw Convention: Where Do We Go from Here?' (1979) 28 *ZLW* 373
Cleminson HM, 'International Unification of Maritime Law' (1941) 23 *J Comp Legislation & Int'l L* 163
Cluxton D, 'Getting FNC Back on the Right Track: A Critical Re-Evaluation of the Federal Doctrine of Forum Non Conveniens' (2019) 41 *U Hawai'i L Rev* ____
Coffey H, 'Jurisdiction Over Foreigners in Admiralty Courts' (1925) 13 *Cal L Rev* 93
Collier JG, 'Staying of Actions and Forum Non Conveniens: English Law Goes Scotch' (1987) 46 *Cambridge LJ* 33
Collins L, 'Forum Non Conveniens and the Brussels Convention' (1990) 106 *LQR* 535

G Cuniberti 'Forum Non Conveniens and the Brussels Convention' (2005) 54 Int'l & Comp L Q 973
Currie B, 'Change of Venue and the Conflict of Laws' (1955) 22 *U Chi L Rev* 405
Dahl HS, 'Forum Non Conveniens, Latin America and Blocking Statutes' (2003) 35 *U Miami Inter-Am L Rev* 21
Dainow J, 'The Inappropriate Forum' (1935) 29 *Ill L Rev* 867
Davis EE, 'Indemnity Between Negligent Tortfeasors: A Proposed Rationale' (1952) 37 *Iowa L Rev* 517
Duval-Major J, 'One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' (1992) 77 *Cornell L Rev* 650
Estrella Faria JA, 'Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules' (2009) 44 *Tex Int'l LJ* 277
Fawcett JJ, 'Lis Alibi Pendens and the Discretion to Stay' (1984) 47 *Mod L Rev* 481
——, 'Trial in England or Abroad: The Underlying Policy Considerations' (1989) 9 *Oxford J Legal Stud* 205
Feldman KN and Vella SM, 'The Evolution of "Forum Conveniens": Its Application to Stays of Proceedings and Service Ex Juris' (1989) 10 *Advoc Q* 161
Figueroa D, 'Are There Ways out of the Current Forum Non Conveniens Impasse between the United States and Latin America?' [2005] *Bus L Brief* 42
——, 'Conflicts of Jurisdiction between the United States and Latin America in the Context of Forum Non Conveniens Dismissals' (2005) 37 *U Miami Inter-Am L Rev* 119
Fike LR, 'The CITEJA' (1939) 10 *Air L Rev* 169
Fitzgerald GF, 'The Revision of the Warsaw Convention' (1970) 8 *Can YB Int'l L* 284
Fleming JG, 'The Collateral Source Rule and Loss Allocation in Tort Law' (1966) 54 *Cal L Rev* 1478
Fleming J jr, 'Social Insurance and Tort Liability: The Problem of Alternative Remedies' (1952) 27 *NYU L Rev* 537
——, 'Vicarious Liability' (1954) 28 *Tul L Rev* 161
Foster RS, 'Place of Trial in Civil Actions' (1930) 43 *Harv L Rev* 1217
——, 'The Place of Trial: Interstate Application of Intrastate Methods of Adjustment' (1930) 44 *Harv L Rev* 41
Fumarola CE, 'Stratospheric Recovery: Recent And Forthcoming Changes In International Air Disaster Law And Its Effect On Air Terrorism Recovery' (2003) 36 *Suffolk U L Rev* 821
Garnett R, 'Stay of Proceedings in Australia: A "Clearly Inappropriate Test"?' (1999) 23 *Melb U L Rev* 30
Gaudemet-Tallon H, 'Le "Forum Non Conveniens", Une Menace Pour La Convention de Bruxelles?' (1991) 80 *Revue critique de droit international privé* 491
Gillam CW, 'Products Liability in a Nutshell' (1957) 37 *Or L Rev* 119
Goepel R and Batkin S, 'Apportionment of Damages between Multiple Tortfeasors' (2009) 67 *The Advocate Vancouver* 53
Gordon MW, 'Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl' (2006) 38 U Miami Inter-Am L Rev 141
Gorman FJ, 'Indemnity and Contribution under Maritime Law' (1981) 55 *Tul L Rev* 1165
Gray A, 'Forum Non Conveniens in Australia: A Comparative Approach' (2009) 38 *Common L World Rev* 207
Greer RA, 'The Civil Liability of an Aviator as Carrier of Goods and Passengers' (1930) 1 *J Air L* 241
Hare C, 'Forum Non Conveniens in Europe: Game over or Time for "Reflexion"?' [2006] *JBL* 157
Harriman EA, 'Carriage of Passengers by Air' (1930) 1 *J Air L* 33
Harris J, 'Stays of Proceedings and the Brussels Convention' (2005) 54 *ICLQ* 933
Hartley TC, 'The European Union and the Systematic Dismantling of the Common Law of Conflicts of Law' (2005) 54 *Int'l & Comp LQ* 813
Heinonen J, 'The Warsaw Convention Jurisdiction and the Internet' (2000) 65 *J Air L & Com* 453
Heiser WW, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 *U Kan L Rev* 609
Hodges GM, 'Contribution and Indemnity Among Tortfeasors' (1947) 26 *Tex L Rev* 150
Huger A, 'The Proportional Damage Rules in Collisions at Sea' (1926) 13 *Cornell LQ* 531
Hughes H, 'Aircraft Manufacturer Warranties - Protection for the Manufacturer or the Purchaser?' (1977) 2 *Air Law* 71
Ide JJ, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (CITEJA)' (1932) 3 *J Air L* 27
International Law Association 'Air Law' (1980) 59 *Int'l L Ass'n Rep Conf* 471

——, ‘Air Law’ (1982) 60 *Int’l L Ass’n Rep Conf* 553
Jackson RH, ‘Full Faith and Credit: The Lawyer’s Clause of the Constitution’ (1945) 45 *Colum L Rev* 1
Jennings RY, ‘General Course on Principles of International Law’ (1967) 121 *Recueil des Cours* 323
Josserand L, ‘La Loi Du 31 Mai 1924 Relative a La Navigation Aérienne et Le Droit Commun de La Responsabilité’ (1926) 10 *Revue Juridique Internationale de la Locomotion Aérienne* 137
Joyce JW, ‘Forum Non Conveniens in Louisiana’ (1999) 60 *La L Rev* 293
Kaftal A, ‘Liability and Insurance - the Relation of Air Carrier and Passenger’ (1934) 5 *Air L Rev* 157
Kennett W, ‘Forum Non Conveniens in Europe’ (1995) 54 *Cambridge LJ* 552
Kimball SL and Davis DA, ‘The Extension of Insurance Subrogation’ (1962) 60 *Mich L Rev* 841
King K, ‘Open “Borders” - Closed Courts: The Impact of Stangvik v. Shiley, Inc.’ (1994) 28 *Univ San Fran L Rev* 1113
Lachs M, ‘The Development and General Trends of International Law in Our Time’ (1980) 169 *Recueil des Cours* 9
Latchford S, ‘The Warsaw Convention and the CITEJA’ (1935) 6 *J Air L* 79
——, ‘The Growth of Private International Air Law’ (1944) 13 *Geo Wash L Rev* 276
Lauterpacht H, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 28 *Brit YB Int’l L* 48
Laski HJ, ‘The Basis of Vicarious Liability’ (1916) 26 *Yale LJ* 105
Leflar RA, ‘Contribution and Indemnity between Tortfeasors’ (1932) 81 *U Pa L Rev* 130
Levi EH, ‘An Introduction to Legal Reasoning’ (1948) 15 *U Chi L Rev* 501
Logan GB, ‘The Nature of the Right to Fly’ (1930) 1 *Air L Rev* 94
Lowenfeld AF and Mendelsohn AI, ‘The United States and the Warsaw Convention’ (1967) 80 *Harv L Rev* 497
Maclean A, ‘Foreign Collisions and Forum Conveniens’ (1973) 22 *Int’l & Comp LQ* 748
Mankiewicz RH, ‘Judicial Diversification of Uniform Private Law Conventions’ (1972) 21 *Int’l & Comp LQ* 718
McBain G, ‘Time to Abolish the Common Carrier’ [2005] *JBL* 545
McEvoy JP, ‘International Litigation: Canada, FNC and the Anti-Suit Injunction’ (1995) 17 *Advoc Q* 1
McKenry CEB, ‘Judicial Jurisdiction under the Warsaw Convention’ (1963) 29 *J Air L & Com* 205
Mendelsohn, AI and Lieux R, ‘The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff’ (2003) 68 *J Air L & Com* 75
Mendelsohn AI and Ruiz C, ‘US Court Rebuffs French High Court’s Attack on Forum Non-Conveniens Doctrine’ (2012) 37 *Air & Space L* 325
Mendelsohn AI, ‘The Warsaw Convention and Where We Are Today’ (1997) 62 *J Air L & Com* 1071
Mercer AG, ‘The 1999 Montreal Convention: An Airline Perspective’ (2002) 27 *Annals Air & Space L* 451
Mole AC and Wilson LP, ‘A Study of Comparative Negligence’ (1932) 17 *Cornell LQ* 333
Morse CGJ, ‘Not in the Public Interest? Lubbe v. Cape PLC’ (2002) 37 *Tex Int’l LJ* 541
Ortino F and Jurgens GRE, ‘The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation’ (1999) 64 *J Air L & Com* 377
O’Ryan JF, ‘Limitation of Aircraft Liability’ (1932) 3 *Air L Rev* 27
Osterhout H, ‘The Doctrine of Res Ipsa Loquitur as Applied to Aviation’ (1931) 2 *Air L Rev* 9
Owen DR, ‘Origins and Development of Marine Collision Law’ [1977] *Tul L Rev* 759
Peel E, ‘Forum Non Conveniens and European Ideals’ [2005] *LMCLQ* 363
Pitel SGA, ‘The Canadian Codification of Forum Non Conveniens’ (2011) 7 *J Private Int’l L* 251
Pradhant D, ‘The 5th Jurisdiction under the Montreal Liability Convention: Wandering American or Wandering Everybody?’ (2003) 68 *J Air L & Com* 717
Prince P, ‘Bhopal, Bougainville and OK Tedi: Why Australia’s Forum Non Conveniens Approach Is Better’ (1998) 47 *ICLQ* 573
Prosser WL, ‘The Assault Upon the Citadel (Strict Liability to the Consumer)’ (1960) 69 *Yale LJ* 1099
——, ‘Joint Torts and Several Liability’ (1937) 25 *Cal L Rev* 413
Ray JT jr, ‘The Loan Receipt and Insurers’ Subrogation - How to Become the Real Party in Interest Without Really Lying’ (1975) 50 *Tul L Rev* 115
Reath TW, ‘Contribution Between Persons Jointly Charged with Negligence - Merryweather v. Nixan’ (1898) 12 *Harv L Rev* 176
Reed A, ‘To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-

American Courtroom Stages' (2000) 29 *Ga J Int'l Comp L* 31
Reus A, 'Judicial Discretion - A Comparative View of the Doctrine of Forum Non Conveniens' (1994) 16 *Loyola Los Angeles Int'l Comp LJ* 455
Ripert G, 'Responsabilité Du Transporteur Aérien' (1923) 7 *Revue Juridique Internationale de la Locomotion Aérienne* 353
——, 'La Responsabilité Du Transporteur Aérien d'après Le Projet de La Conférence Internationale de Paris de 1925' (1926) 10 *Revue Juridique Internationale de la Locomotion Aérienne* 1
Rittenberg SN, 'Limitation of Airline Passenger Liability' (1935) 6 *J Air L* 365
Robbins CE, 'Jurisdiction Under Article 28 of the Warsaw Convention' (1963) 9 *McGill LJ* 352
Robertson DW, 'Forum Non Conveniens in America and England: A Rather Fantastic Fiction' (1987) 103 *LQR* 398
Rodriguez B, 'Recent Developments in Aviation Liability Law' (2000) 66 *J Air L & Com* 21
Rogers CP, 'Scots Law in Post-Revolutionary and Nineteenth Century America: The Neglected Jurisprudence' (1990) 8 *Law Hist Rev* 205
Sack AN, 'Unification of Private Law Rules on Air Transportation and the Warsaw Convention' (1933) 4 *Air L Rev* 345
Schröder AC, 'The Berne Railway Transport Convention 1890' (1905) 22 *Int'l L Ass'n Rep Conf* 220
Schulz R, 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass Ltd' (1986) 35 *Int'l & Comp LQ* 374
Schulze HCAW, 'Forum Non Conveniens in Comparative Private International Law' (2001) 118 *South African Law Journal* 812
Shapiro DL, 'Jurisdiction and Discretion' (1985) 60 *NYU L Rev* 543
Slater AG, 'Forum Non Conveniens: A View from the Shop Floor' (1988) 104 *LQR* 554
Smith SK, 'Forum Non Conveniens and Foreign Policy' (2012) 90 *Tex L Rev* 743
Sold JA, 'Inappropriate Forum or Inappropriate Law? A Choice-of-Law Solution to the Jurisdictional Standoff between the United States and Latin America' (2011) 60 *Emory LJ* 1437
Soyer B, 'Injury to Passengers - Contribution Claim - Scope of the Athens Convention' (2016) 22 *J Int'l Maritime* L 87
Spiro E, 'Forum Non Conveniens' (1980) 13 *Comparative & Int'l LJ of South Africa* 333
Stein AR, 'Forum Non Conveniens and the Redundancy of Court-Access Doctrine' (1985) 133 *U Pa L Rev* 781
Steinberg DE, 'The Motion to Transfer and the Interests of Justice' (1990) 66 *Notre Dame L Rev* 443
Sullivan GR, 'Codification of Air Carrier Liability by International Convention' (1936) 7 *J Air L* 1
Sundvall SA and Andolina MC, 'The Status of Pending Air Carrier Litigation' (2000) 66 *J Air L & Com* 167
Szalma J, 'Solidary and Divided Liability of Joint Tortfeasors - with Special Regards to the Provisions of the New Hungarian Civil Code' (2017) 8 *J Euro Hist L* 66
Talpis J and Kath SL, 'The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point' (2000) 34 *Revue Juridique Themis* 761
Tompkins GN jr, 'The Continuing Development of the Montreal Convention' (2012) 37 *Air & Space L* 259
——, 'Are the Objectives of the 1999 Montreal Convention in Danger of Failure' (2014) 39 *Air & Space L* 203
van Rossum M, 'Concurrency of Contractual and Delictual Liability in a European Perspective' (1995) 4 *Euro Rev Priv L* 539
Villiger ME, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After' (2009) 344 *Recueil des Cours* 9
Wegman PL, 'Recent Developments in Aviation and Space Law' (2010-2011) 46 Tort Trial & Ins Prac LJ 225
Weiler JHH, 'Forum Non Conveniens - An English Doctrine?' (1978) 41 *Mod L Rev* 739
Whalen TJ, 'The Warsaw Convention: Historical Background and International Efforts to Modernize the Liability Regime of Air Carriers' (1997) 2 *Unif L Rev* 347
——, 'The New Warsaw Convention: The Montreal Convention' (2000) 25 *Air & Space L* 12
Whittaker S, 'Privity of Contract and the Law of Tort: The French Experience' (1995) 15 *Oxford J Legal Stud* 327
Wikoff H, 'Uniform Rules for Air Passenger Liability' (1930) 1 *J Air L* 512
Wilberforce RO, 'The International Technical Committee of Experts in Air Law' (1947) 1 *Int'l LQ* 498
Wolinsky MO, 'Forum Non Conveniens and American Plaintiffs in the Federal Courts' (1980) 47 *U Chi L Rev* 373

Yeates MR, Dye PB jr and Garcia R, 'Contribution and Indemnity in Maritime Litigation' (1990) 30 *S Tex L Rev* 215
Yellen JD, 'Forum Non Conveniens: Standards for Dismissal of Actions From United States Federal Courts to Foreign Tribunals' (1982) 5 *Fordham Int'l LJ* 533
Yiannopolous AN, 'Unification of Private Maritime Law by International Conventions' (1965) 30 *Law & Contemp Probs* 370
Zamora S, 'Carrier Liability for Damage or Loss to Cargo in International Transport' (1975) 23 *Am J Comp L* 391
Zollmann C, 'Liability of Aircraft' (1919) 53 *Am L Rev* 879

Other Documents *(listed alphabetically)*

Air Accidents Investigation Branch (AAIB), 'Report on the Accident to Boeing 737-400 G-OBME near Kegworth, Leicestershire on 8 January 1989 Aircraft Accident Report 4/90' (1990)
Black's Law Dictionary (9th edn, West 2009)
Collier AN and Brie SN, 'The Battle over Air France: Does the Montreal Convention Apply to Manufacturer Claims for Carrier Indemnity' <www.fitzhunt.com/sites/default/files/news/The%20Battle%20Over%20Air%20France%20Does%20the%20Montreal%20Convention%20Apply%20to%20Manufacturer%20Claims%20for%20Carrier%20Indemnity-Collier-Brie.pdf> accessed 28 February 2017
'Compte-Rendu de La Deuxieme Session Du Comité International Techniques d'Experts Juridiques Aériens (CITEJA) (Avril 1927)'
'Compte-Rendu de La Troisième Session Du Comité International Techniques d'Experts Juridiques Aériens (CITEJA) (Mai 1928)'
Conférence Internationale de Droit Privé Aérien (Paris 27 Octobre - 6 Novembre 1925) (Imprimerie Nationale 1926)
Cour de Cassation, 'Annual Report 2011' (2011)
Department of Trade - Accidents Investigation Branch, 'Piper PA E23 (Aztec) Series 250 G-AYSF: Report on the Accident 7 n.m. North East of Moffat Dumfriesshire, Scotland on 27 July 1976' (1978) Report 3/78 <https://assets.digital.cabinet-office.gov.uk/media/5422f54bed915d1374000545/3-1978_G-AYSF.pdf> accessed 7 June 2016
Deuxième Conférence Internationale de Droit Privé Aérien (4 - 12 Octobre 1929 Varsovie)
Ellsworth E and Forero J, '160 Die in Crash of Airliner in Venezuela' New York Times (17 August 2005) <www.nytimes.com/2005/08/17/world/americas/160-die-in-crash-of-airliner-in-venezuela.html?_r=0> accessed 22 February 2019
'English Translation of the Main Text of Venezuelan Accident Report JIAAC-9-058-2005' <www.skybrary.aero/bookshelf/books/1930.pdf> accessed 22 February 2019
European Group on Tort Law, 'Principles of European Tort Law' (*www.egtl.org*) <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf> accessed 26 June 2018
Fiorino F, 'West Caribbean Crash Probe' (2005) 163(8) *Aviation Week & Space Technology* 50
'French Civil Code (English Translation)' <www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf> accessed 23 February 2019.
'Grim Find at Venezuela Crash Site' (BBC News, 17 August 2005) <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4158126.stm> accessed 22 February 2018
Hennigan T, 'Holiday Jet Crashes after Engines Fail, Killing 160' The Times (London, 17 August 2005)
Huarte AM, 'Korean Air Flight 801: Warsaw and the FTCA' <www.mcmc-law.com/korean-air-flight-801-warsaw-and-the-ftca/> accessed 14 April 2017
IATA, 'Essential Documents on International Air Carrier Liability' (3 Edn Issued October 2012)
International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999, Doc 9775-DC/2 (Volume 1: Minutes) (ICAO 1999)
International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999 Doc 9775-DC/2 (Volume 2: Documents) (ICAO 1999)
International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999 Doc 9775-DC/3 (Volume 3: Preparatory Material) (ICAO 1999)
International Conference on Air Law - Guatemala City, February-March 1971 ICAO Doc 9040-LC/167/1, vol 1 (ICAO 1971)

International Conference on Air Law - Guatemala City, February-March 1971 ICAO Doc 9040-LC/167/2, vol 2 (ICAO 1971)

International Conference on Private Air Law (Guadalajara 1961) ICAO Doc 8301/LC/149 (Volume I - Minutes) (ICAO 1963)

International Conference on Private Air Law (Guadalajara 1961) ICAO Doc 8301/LC/149 (Volume II - Documents) (ICAO 1963)

International Conference on Private Air Law (The Hague September 1955) Doc 7686-LC/140 (Volume 1: Minutes) (ICAO 1956)

International Law Commission, 'Reports of the Commission to the General Assembly' (1966) 2 *YBILC* 169

Interstate Aviation Committee, 'Final Report on the Investigation into the Accident Involving the Armavia A320 near Sochi Airport on 3 May 2006' (English Translation, 2006) <www.bea.aero/docspa/2006/ek-9060502/pdf/ek-9060502.pdf>accessed 25 February 2019

Joint Standing Committee on Treaties, 'Treaties Tabled on 7 December 2004 (3) and 8 February 2005' (2005) Report 65, <www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/jsct/8february2005/report.htm> accessed 22 July 2016

Law Commission, *Exemption Clauses: Second Report* (Law Com Rep No 69, 1975)

——, *Insurance Contract Law* (Law Com No 353, 2014)

'Legislative Fact Sheet - Apportionment of Tort Responsibility Act' (*uniformlaws.org*)

'Letter of Submittal (Strobe Talbott)' (2000) Senate Treaty Document 146-45 (106th Congress, 2d Session)

'Message from the President of the United States Transmitting the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999' (2000) Senate Treaty Document 146-45 (106th Congress, 2d Session)

National Conference of Commissioners on Uniform State Laws, 'Uniform Apportionment of Tort Responsibility Act' (2003)

'Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Jenard Report)' [1979] OJ C 59/1

'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice ('Schlosser Report')' [1979] OJ C 59/71

Senate Committee on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen Exec Doc G 73d Cong 2d Sess 3-4 (1934)

Uniform Law Conference of Canada, 'Court Jurisdiction and Proceedings Transfer Act' <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/739-jurisdiction/civil-jurisdiction/1730-court-jurisdiction-proceedings-transfer-act> accessed 15 June 2016

ABBREVIATIONS

AICG	Aviation Insurance Clauses Group
ALI	American Law Institute
BEA	Bureau d'Enquêtes et d'Analyses pour la Sécurité de l'Aviation Civile
CIM	Convention Concernant le Transport des Marchandises par Chemins de Fer
CIV	Convention Concernant le Transport des Voyageurs et des Bagages par Chemins de Fer
CJEU	Court of Justice of the European Union
CITEJA	Comité International Technique d'Experts Juridiques Aériens
ECJ	European Court of Justice
FCG	Friends of the Chairman Group
FNC	Forum Non Conveniens
GCP	Guatemala City Protocol
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILC	International Law Commission
IUAI	International Union of Aviation Insurers
LNTS	League of Nations Treaty Series
LAUA	Lloyd's Aviation Underwriting Association
MAP	Montreal Additional Protocol 1975
MC99	Montreal Convention 1999
NTSB	National Transportation Safety Board
PCIJ	Permanent Court of International Justice
SDR	Special Drawing Rights
SGMW	Special Group on the Modernization of the Warsaw System
SSG	Secretariat Study Group
ULC	Uniform Law Commission
UNTS	United Nations Treaty Series
WCS	Warsaw Convention System

PART ONE
INTRODUCTION

Chapter 1: Introduction

1.1 The Crash of West Caribbean Airways Flight 708

On 16 August 2005, West Caribbean Airways Flight 708 took off from Tocumen International Airport in Panama set for Aimé Césaire International Airport in Fort-de-France, the capital city of the French overseas region of Martinique. A little over an hour later, it crashed near Machiques, Venezuela, killing everyone on board.[1] In addition to the 8 Colombian crew members, Flight 708 was carrying 152 passengers, mostly civil servants from Martinique and their families who had been vacationing in Panama. The charter flight was operated by the Colombian airline, West Caribbean Airways (WCW) which was established in 1998 and ceased operations following the crash. The aircraft, a McDonnell-Douglas MD82, manufactured in 1986, was owned by a US leasing corporation in Nevada called MK Aviation and had been delivered to WCW on 10 January 2005.[2]

The report[3] of the Venezuelan accident investigation authority concluded that the aircraft had been airworthy at the time. It had passed a complete inspection by Colombian authorities the same week as the accident and had also been subjected to two recent inspections by French authorities in Martinique.[4] Flight 708 was WCW's second fatal accident of 2005. The earlier crash had occurred on 26 March 2005 in Colombia and resulted in the deaths of 6 passengers and 2 crew.[5] Three months prior, the airline had been fined by the Civil Aviation Authority of Colombia for 14 violations of airline regulations, including failures to provide required pilot training.[6] The financial situation of the airline was dire and the report concluded that this had contributed to the accident by generating an atmosphere of uncertainty and stress for its employees. The pilots had not been paid in several months and the report even noted that the captain had been moonlighting during his off hours by running a bar. These and various other psycho-emotional factors were identified as contributing negatively to the pilots' performance.

The cause of the accident was ultimately determined to be human factors. The disaster had resulted from the flight crew operating the aircraft at conditions beyond its capability due to the inappropriate configuration of the flight settings and the use of the de-icing system. In simple terms, the aircraft was flown too high. Due to a lack of situational awareness, a failure to utilize

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[1] 'Grim Find at Venezuela Crash Site' *BBC News* (17 August 2005) <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4158126.stm> accessed 28 February 2019.

[2] Complaint for Damages (Doc 1) at [28]-[30], [38], *In re West Caribbean Airways SA* 616 F Supp 2d 1299 (SD Fla 2007) (No 06-CV-22748).

[3] See 'English Translation of the Main Text of Venezuelan Accident Report JIAAC-9-058-2005' <www.skybrary.aero/bookshelf/books/1930.pdf> accessed 22 February 2019.

[4] 'Grim Find at Venezuela Crash Site' (n 1).

[5] F Fiorino 'West Caribbean Crash Probe' (2005) 163(8) *Aviation Week & Space Technology* 50.

[6] E Ellsworth and J Forero '160 Die in Crash of Airliner in Venezuela' *New York Times* (17 August 2005) <www.nytimes.com/2005/08/17/world/americas/160-die-in-crash-of-airliner-in-venezuela.html?_r=0> accessed 22 February 2019.

crew resource management and the absence of effective communication, the flight crew failed to take the correct remedial measures to recover. In fact, the captain's interventions had only contributed to worsening the situation.

In the wake of an aviation accident, such as that of WCW-708, although compensation is rarely the immediate concern of the representatives of the victims, the issue will inevitably arise at an early stage. Law firms specialising in aviation litigation are quick to respond, sending agents to offer their services to the families and representatives of the deceased and/or injured victims. The competition to sign-up clients is fierce amongst these law firms, mostly of US origin but also from the UK and other jurisdictions. One hears shocking stories (albeit from defence lawyers) of all forms of skulduggery and unethical behaviour. Not all victims are alike, a seriously burned victim is worth more than a dead one since a jury's sympathies are more easily aroused by the disfigured visage of a living victim on the stand than the idea of one in the grave. This is not to say that the law firms representing the airlines and other interested parties do not participate in the post-accident free-for-all. Claimant lawyers also point the finger at defence lawyers, recounting similar stories of questionable practices, such as greasing the wheels for quick settlement by offering televisions and other inducements to victims from poor and unsophisticated backgrounds.

In speaking to aviation lawyers from both sides, it becomes immediately apparent that there is little love lost between the claimant and defence sides. The question as to what extent these anecdotal horror stories have been exaggerated is not a question that this research will address. However, it does demonstrate the emotive and morally charged backdrop against which the matter of aviation litigation unfolds. It is always important to remember that these cases involve terrible events in which lives have been lost in violent and often terrifying circumstances. These is loss and suffering on all sides, not only for the families and friends of those injured or killed, but also for the carrier involved, for whom the accident will likely be the worst moment in its history and in which it too has suffered tragic human losses. Conscious and respectful of this context, this work explores jurisdictional aspects of the legal regime by which those suffering loss arising from passenger death or injury during international carriage by air seek compensation.

1.2 Jurisdiction and West Caribbean Airways

Under the Montreal Convention 1999 (MC99),[7] the applicable instrument governing the liability of the carrier for passenger death or injury arising during most international carriage by air, there exists a presumption of fault on the carrier in the event of an accident. The burden of proof rests, not on the claimant to prove fault, but on the carrier to prove the absence of fault. Where a carrier can make out this defence, it is entitled to limit the maximum extent of its liability. Otherwise, as in WCW-708, the carrier faces unlimited liability. On the facts of WCW-708, the negligence of the carrier was incontestable and thus the question of liability was not truly at issue. In a case like this, indeed in most aviation litigation—especially under MC99—the real crux of the matter is the question of damages. Claimant lawyers consider themselves duty bound to secure for their clients the largest award possible. Since the ultimate quantum recoverable is often dictated by the forum

[7] Convention for the Unification of Certain Rules for International Carriage by Air (signed 28 May 1999, entered into force 04 November 2003) 2242 UNTS 309 (MC99).

in which one sues, it is not surprising that choice of forum is the key factor in international aviation litigation. The quantum recoverable varies substantially from one forum to another. For instance, one jurisdiction might allow for the determination of damages by a jury rather than a judge and/or the recoverable heads of damage may be broader in one forum than in the other.

Under MC99, a claimant does not have complete freedom of choice when it comes to deciding where to bring an action. In all cases, the claimant is constrained to bringing his claim before the courts of one of a limited number of specified forums. Under Article 33 of MC99, there are five grounds provided for jurisdiction, which on application to a given case will generally yield a choice between the courts of two or three different States. In the case of WCW, the choice of forums available to the majority of the claimants would have been between Colombia, Martinique (i.e. France), and the USA. Unsurprisingly, claimant lawyers chose to sue in a US federal court, specifically the District Court for the Southern District of Florida.

Given that WCW-708 was a flight between Panama and Martinique, operated by a Colombian airline, which had crashed in Venezuela, with only French and Columbian nationals on board, it might seem perplexing that any resulting litigation would find its way before a court in the US. Plaintiff counsel listed multiple defendants to the actions, including WCW, its insurer, Asegurados Colseguros SA (an Allianz corporation), a Martinique travel agent called Globe Trotters de Riviere Salee Travel (hereinafter “Globe Trotters”), as well as the owners/lessors of the aircraft, MK Aviation.[8] In addition, Newvac Corp and Go 2 Galaxy Inc, both Florida based, were listed as defendants. The two corporations, along with another defendant, Jacques Cimetier, a French national resident in Florida who owned and controlled both corporations, were, for the purposes of the case, treated as one and referred to in common as Newvac. It was through Newvac’s connections to Florida that the claimants were able to ground jurisdiction within the US. In simple terms, although WCW was the operating carrier, Newvac was the contractual carrier and being both incorporated and having its principal place of business in the US, MC99 permitted the action to be brought against Newvac in US.

Whilst the claimants had overcome the initial hurdle of establishing jurisdiction in the US under MC99, the defendant had an ace up its sleeve in the form a common law doctrine known as *forum non conveniens* (FNC). Under this doctrine, a court may, on the request of the defendant and at the discretion of the court, decline to exercise jurisdiction over a dispute, not for lack of competence, but because an alternative forum is considered to be the more appropriate one for resolving the dispute. Although a feature of the legal systems of many common law States (see Chapter 2), the doctrine is virtually absent from civilian legal systems who generally view it with contempt (civilian attitudes to FNC are addressed in Chapter 3).

The defendant’s motion for FNC dismissal emphasized the preponderance of connecting factors between the case and Martinique while noting the relative poverty of the links to the US.[9] The only link to the US that the defendants acknowledged was the incorporation of Newvac in Florida. The plaintiffs and decedent passengers were residents of Martinique, evidence and witnesses as to damages was primarily located there and the substantive legal issues would be

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[8] Complaint for Damages (Doc 1) at [16], [22], *West Caribbean Airways* (n 2). Ultimately, MK Aviation and Globe Trotters were removed from the proceedings.

[9] Defendant’s Refiled Motion to Dismiss on Grounds of Forum Non Conveniens (Doc 164) at 3-4, ibid.

governed by its law. The defendants argued that they would be prejudiced by trial in the US since the court would be unable to compel the appearance of certain witnesses and some evidence would be unobtainable. In light of these considerations, the defendants argued that the balance of private and public interest factors overwhelmingly indicated that the courts of Martinique should be preferred. Martinique, they argued, was the more convenient forum for resolution of the dispute. Defendants were willing to make the following concessions, they agreed to submit to the jurisdiction of the Martinique courts, to concede liability, to waive any statute of limitations, and not to invoke any defence under Article 21(2) of MC99.[10] This is a tactic frequently employed by defendants in aviation litigation. By giving these and other commitments they effectively limit the scope of litigation to the matter of damages, in so doing the FNC analysis is reframed and the likelihood of dismissal is greatly increased.

The plaintiffs resisted dismissal. If dismissal were granted then they would be forced to pursue their claims against a US domiciled defendant in one of the other jurisdictions permitted under MC99 (most likely Martinique). They argued that Article 33 of MC99 gives the plaintiff an unqualified right to choose which of the available forums to bring an action in. Having exercised that choice, it should be inviolable, i.e. the defendant should not be able to undermine it by means of FNC. Plaintiffs challenged the legitimacy of the doctrine of FNC within the MC99 regime, arguing that not only is it nowhere referenced in the Convention, it is patently inconsistent with the regime's goal of uniformity and its emphasis on consumer protection.

Claimants relied heavily on the decision of the Court of Appeals for the Ninth Circuit in *Hosaka v United Airlines Inc.*[11] The *Hosaka* decision had held that under the Warsaw Convention[12] (the predecessor to MC99) a court has mandatory jurisdiction over a dispute properly brought before it and is precluded from declining jurisdiction on grounds of FNC. However, in *West Caribbean Airways*, the judge (Ungaro J) determined that the *Hosaka* decision was of 'limited precedential value',[13] because in that case the Ninth Circuit had specifically stated that it was not expressing an opinion on the availability of FNC under MC99, an entirely new treaty with its own drafting history. For these reasons, although the text of Article 33 of MC99 was very similar to that of Article 28 of the Warsaw Convention, Ungaro J decided that she was faced with resolving the availability of FNC under MC99, 'apparently as a matter of first impression'.[14]

Judge Ungaro found the text of Article 33 to be 'unambiguous and dispositive'[15] in providing that questions of procedure shall be governed by the law of the forum. Although not containing any express mention of FNC, the court resolved that because FNC was so firmly entrenched in the procedural law of the US at the time at which MC99 was drafted that the text clearly permitted it. Furthermore, Ungaro J found that the availability of FNC was consistent with the purpose of MC99 and its drafting history.[16]

With the question of the applicability of FNC under MC99 resolved, the court next had to apply

[10] Defendant's Refiled Motion to Dismiss on Grounds of Forum Non Conveniens (Doc 164) 2-3, ibid.
[11] 305 F 3d 989 (9th Cir 2002) cert denied 537 US 1227 (2003). See Chapter 5 for further analysis.
[12] Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention).
[13] *West Caribbean Airways* (n 2) 1309.
[14] ibid.
[15] ibid 1310.
[16] ibid 1328.

the doctrine to the case at hand. Although the doctrine varies between jurisdictions—sometimes substantially—and the manner of its application is highly specific to facts and circumstances of each case, it is worthwhile giving a high-level summary of how it was applied in the *West Caribbean Airways* case. Not only will this give an indicative impression of how the FNC is applied generally (specific doctrines will be examined in detail in Chapter 2) it will enrich the context for consideration of the issues raised in *West Caribbean Airways*, issues to be tackled throughout this thesis.

Given the facts involved, it was not surprising that Ungaro J took the prima facie view that there was obviously a strong case for FNC dismissal.[17] To begin with, Ungaro J was satisfied that the courts of Martinique were available, insofar as they had jurisdiction over the dispute in question, and that there was no reason to doubt their adequacy.[18] The plaintiffs had sought to challenge the adequacy of the courts on grounds, *inter alia*, that the judicial system in Martinique consisted only of a single four-chamber court and that the proceedings would therefore be highly inefficient due to delay. Ungaro J was unpersuaded.[19] In considering FNC dismissals, courts do not require that the alternative forum be perfect or offer a superior service or remedy.

Next, Ungaro J noted that none of plaintiffs or decedent passengers were US citizens and all were (or had been) resident in Martinique. The various sources of proof likely to be required in the litigation, e.g. damages evidence, were localized in Martinique, not the US, so it would undoubtedly be more convenient for the parties that the collection of such evidence be through the local Martinique court.[20] A very practical consideration was the issue of translation costs. If the litigation were to be held in the US, much of the evidence would have to be translated from French into English; such cost would be avoided if the litigation took place in Martinique.[21] This neatly demonstrates how practical the perspective of courts can be in applying FNC.

A group of factors taken into consideration in FNC dismissals by US courts are those pertaining to the convenience/appropriateness of trial from the perspective of the court itself and of the general public in the locality. As we shall see in Chapter 2, these "public interest factors" are not an express factor under the English doctrine of FNC. In *West Caribbean Airways*, Ungaro J was convinced that the public interest was much greater in Martinique (for many of the same reasons as discussed above). Generally speaking, there is an interest in having local disputes resolved in the local forum.[22] The burden on a US court and taxpayer of hearing what it regarded as a foreign dispute was unjustifiable in the circumstances. The live testimony of more than a hundred witnesses may have been required, for which translation services would be necessary in a US court.[23] Lastly there was the question of the application of French law to some of the issues involved. It is generally regarded as more appropriate for a French court (e.g. Martinique) to apply French law than a US court. However, Ungaro J did accept that some issues would be governed by US law for which it would be more appropriate for a US court to apply.[24] On balance, the factor

[17] Order Granting FNC Dismissal (Doc 184) at 4, *West Caribbean Airways* (n 2).
[18] Order Granting FNC Dismissal (Doc 184) at 6-7, ibid.
[19] Order Granting FNC Dismissal (Doc 184) 7-8, ibid.
[20] Order Granting FNC Dismissal (Doc 184) at 8-9, ibid.
[21] Order Granting FNC Dismissal (Doc 184) at 11-12, ibid.
[22] Order Granting FNC Dismissal (Doc 184) at 13, ibid.
[23] Order Granting FNC Dismissal (Doc 184) at 14, ibid.
[24] Order Granting FNC Dismissal (Doc 184) at 14, ibid.

of the application of foreign law was not decisive. It is not uncommon that some of the factors in the FNC analysis will be evenly balanced. However, it is to the overall balance of factors that the court will look to make its final determination. In *West Caribbean Airways*, Ungaro J decided that the balance laid in favour of dismissal to Martinique.[25]

In 2009, the Court of Appeals for the Eleventh Circuit affirmed Ungaro J's decisions and then, in 2010, a petition for a writ of certiorari was denied by the US Supreme Court.[26] Surprisingly, the story did not end there. There was to be a twist in the tale which would see the plaintiffs back before Ungaro J in 2012, seeking to have the 2007 FNC dismissal vacated.

Immediately after the 2007 FNC order, the plaintiffs had commenced proceedings in Martinique against Newvac. Unexpectedly, the Newvac action was not commenced with a view to resolving their claims for damages. Instead, the plaintiffs had petitioned the Tribunal de Grande Instance (TGI) in Fort-de-France, Martinique, to declare itself without jurisdiction to hear such a claim. The plaintiffs maintained that they had not chosen Martinique as their forum and only appeared before it because they were forced to do so on account of the FNC dismissal from the US district court. It was their view, per Article 33(1) MC99, that jurisdiction could only vest in a court by act of the plaintiff's choice and, regardless of Article 33(4), this choice of forum cannot be nullified and substituted by a rule of internal procedural law, such as FNC. The plaintiff's maintained that the choice of the US district court effectively preempted and precluded the Martinique TGI from hearing the dispute.

The TGI rejected the claimant's petition and ordered them to submit proof of damages to the court. At this point in time, WCW and its insurer had conceded liability and surrendered €450 million to provide for full compensation in accordance with French law.[27] Over 400 claims had been submitted to the court in Martinique, of which more than 100 had been settled.[28] Despite the ready availability of full compensation, the claimants sought to appeal the decision of the TGI to the Cour d'Appel de Fort-de-France which duly affirmed the TGI's decision.[29] As a last throw of the dice, the claimants sought review of the decision by the Cour de Cassation in Paris, France.

On 7 December 2011, the Cour de Cassation found in favour of the claimants and quashed the decision of the Cour d'Appel.[30] The Cour de Cassation concluded that it is the exclusive right of the claimant to choose their forum from those available under MC99 and that an internal rule of procedure, such as FNC, cannot be invoked to disturb that choice. For the Cour de Cassation, this interpretation was necessary to meet MC99's objectives of predictability, certainty and uniformity.[31] In consequence, jurisdiction of the chosen forum is mandatory under MC99. Once the chosen forum is seised of the case, the courts of any other State identified by Article 33 lose their jurisdiction over the dispute. The Cour de Cassation held that by assuming jurisdiction, the

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[25] Order Granting FNC Dismissal (Doc 184) at 15, ibid.

[26] *Pierre-Louis v Newvac Corp* 584 F 3d 1052 (11th Cir 2009) cert denied sub nom *Bapte v West Caribbean Airways* 560 US 952 (2010).

[27] Order on Motion to Vacate (Doc 301) at 10, *West Caribbean Airways* (n 2).

[28] ibid.

[29] Certified English Translation of Cour d'Appel Decision 10/239 (Doc 289.4) at 9, *West Caribbean Airways* (n 2).

[30] *Cass Civ (1ère) Arrêt n 1201 du 7 décembre 2011, Antoine X c Newvac, n 10-30919*. For an English translation, see Certified English Translation of Cour de Cassation Judgment (Doc 289.8), *West Caribbean Airways* (n 2).

[31] *Antoine X* (n 30). The Court's ruling is considered further in Chapter Five of this work (see Chapter 5.5.3).

court of Martinique had, in the circumstances, acted contrary to the terms of MC99.

Seemingly vindicated by the Cour de Cassation, the plaintiffs returned to Florida seeking to have the FNC order vacated. Judge Ungaro took an unsurprisingly dim view of what she described as 'the latest offensive in Plaintiffs' four-year campaign to subvert the *forum non conveniens* dismissal.'[32] Unfazed, Ungaro J voiced her disagreement with the conclusion reached by the Cour de Cassation, noting that a US court was not bound by the analysis of the French Court[33] and need not blindly abide by it.[34] With a warning of possible sanctions should they launch yet another assault on the FNC order,[35] Ungaro J denied the motion to vacate, stating:

> [T]he Court can only marvel at [Plaintiffs'] relentless four-year campaign to subvert this Court's order dismissing their case pursuant to *forum non conveniens*. Although none are United States citizens, what they hope to gain apparently is a more financially generous forum. The [Plaintiffs] are not content with receiving 100 percent of their Montreal Convention damages from a French court—they would rather play their hand here. But, their transparent avarice hardly suffices as a fair, just or equitable reason to vacate the earlier FNC Order. … [T]o undo the *forum non conveniens* dismissal would sanction Plaintiffs' disrespect for the lawful order of this United States court and encourage other litigants to engage in similar conduct.[36]

In its 2011 annual report, the Cour de Cassation made the following statement in respect of its decision in the case, it said, 'by adopting [its] position, the Supreme Court of France brings into the international legal order the "dialogue of judges" required by the absence of an international jurisdiction capable of securing a uniform interpretation of said Convention (between all State Parties).'[37] The French Court's statement is open to interpretation. It could be taken as an example of French judicial chauvinism, a thinly veiled cliché aimed at implying that, unlike US courts, the French courts understand the value of judicial cooperation. On the other hand, rather than just shield itself behind an unequivocal statement as to the veracity of its decision, the Court may have been earnestly leaving the door open for further dialogue. To date, the US courts have not picked up the baton and responded to this invitation to parley. Instead, they have continued to apply the doctrine of FNC to dismiss cases under MC99.[38] The views from the courts of other jurisdictions, common law and civilian, are eagerly anticipated but the opportunity has not yet arisen for such consideration. How will future claimants, in similar circumstances to those in *West Caribbean Airways*, be perceived by these courts? As avaricious forum shoppers, or as deserving victims seeking the fullest vindication of their rights?

It is clearly a worrying and undesirable state of affairs that so essential a matter as jurisdiction under an international treaty aimed at achieving uniformity of law is the subject of such radically opposed interpretations by two of its most influential State parties. Nonetheless, the matter remains in a juridical limbo while the deadlock persists.

1.3 Overview

This catalyst for this research was the compelling doctrinal conundrum posed by the controversy

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[32] Order on Motion to Vacate (Doc 301) at 3, *West Caribbean Airways* (n 2).

[33] Order on Motion to Vacate (Doc 301) at 16, ibid citing *Osorio v Dole Food Co* 665 F Supp 2d 1307, 1325–1326 (SD Fla 2009).

[34] Order on Motion to Vacate (Doc 301) at 16, *West Caribbean Airways* (n 2).

[35] Order on Motion to Vacate (Doc 301) at 25, ibid.

[36] Order on Motion to Vacate (Doc 301) at 24-25, ibid.

[37] Cour de Cassation, 'Annual Report 2011' (2011) 514, quoted in S Adeline 'The Forum Non Conveniens Doctrine Put to the Test of Uniform Private International Law in Relation to Air Carriers' Liability: Lack of Harmony between US and French Decisional Outcomes' (2013) 18 *Unif L Rev* 313, 327.

[38] See Chapter 5.

surrounding the *West Caribbean Airways* case. The immediate question was whether the doctrine of FNC was available under MC99 to begin with. Starting with the text of MC99 and looking at in light of its context and purpose of the treaty as a whole, a host of questions presented themselves: Is it fair to deny the claimant his/her choice of forum under MC99? Conversely, is it fair to the defendant carrier to subject it to litigation in an inappropriate forum? Is the doctrine consistent with, and conducive to, the furtherance of, MC99's policy objectives? Should the jurisdictional provisions of MC99 make it possible for claimant passengers to secure windfall recoveries in foreign forums? The exploration of these questions raised various issues pertaining to the jurisdictional scheme of MC99 but they ultimately boiled down to the confrontation of the competing interests of the parties to the litigation of MC99 passenger claims. Interests which drive both parties' choice of forum. Whilst it is the claimant who has the initiative in choosing his forum under MC99, the defendant can, through the use of FNC, turn the choice of forum into a dialectical process. In so doing, the jurisdictional question of forum becomes a litigational battleground.

In the field of MC99 passenger claims litigation, both the claimant lawyers and defendant lawyers devote much time and effort to jurisdictional strategizing. Because the US is currently the focal point for such litigation, a core pillar of that strategy is FNC (whether as a question of securing dismissal or resisting it). The determination of the jurisdictional question is, in many cases, the most important because it is often outcome determinative. In other words, once the issue of forum has been decided, the parties will frequently settle the action. For this reason, both sides will employ tactics that range from the ingenious to the utterly disingenuous—often both—all in order to secure, through the selection of a particular forum, a jurisdictional advantage that can ultimately be translated into a pecuniary gain. The resulting litigation on the matter of jurisdiction is both time-consuming and expensive.

That FNC motions are outcome determinative means that the parties essentially agree on, or at least do not sufficiently dispute, other matters, most notably the question of liability. The irony is obvious. What this also demonstrates is that by and large MC99 has been successful in lessening the amount of litigation on the essential matter of liability. Much less litigation over liability is seen under MC99 that under its predecessor regime, the Warsaw Convention System (WCS).[39] The changes made to the liability provisions have undoubtedly benefitted the claimant passenger and greatly reduced the amount of litigation. Lawyers for both sides jokingly complain that MC99 has deprived them of the steady stream of business that they enjoyed under WCS. However, it is the preponderance of litigation over the question of jurisdiction, particularly the recurring incidence of FNC motions, that sets the alarm bells ringing and strongly suggests that all is not well with MC99.

If only this jurisdictional predicament could be overcome then MC99 would surely become an even greater success. The answer may seem as simple as jettisoning FNC altogether from MC99. However this may be achieved, the express exclusion of the possibility for a court to decline to exercise jurisdiction properly vested in it by MC99 is certainly an option to consider. FNC is, after all, only a common law doctrine and so many of the world's legal systems appear to do just fine without it. Attractive though this solution might be, it fails to consider at least one crucial factor. At

[39] The Warsaw Convention System (WCS) consists of the Warsaw Convention of 1929 and the various amending protocols, a supplementary Convention and a number of inter-carrier agreements.

this particular point in time, it is the common law courts (specifically those of the US) which are the primary locations for aviation litigation. That being so, FNC plays an important role in keeping down the cost of aviation accidents. This is clearly advantageous to the aviation industry, the benefit of which is ultimately felt by the fare-paying public, albeit at the expense of the claimant. However, does the claimant really suffer by having his compensation assessed by the court with the closest connection to, and greatest interest in, the accident and its litigation? In the case of *West Caribbean Airways*, was it not more equitable for all concerned that the courts of the plaintiffs' domicile (i.e. Martinique) assess the level of damages rather than a foreign court with little or no connection to the dispute? Resolving this jurisdictional dilemma is clearly much more than a cold doctrinal exercise, it entails grappling with deeply divisive ethical considerations.

Overcoming the stalemate reached in the *West Caribbean Airways* case entails understanding the place of FNC within the jurisdictional scheme of MC99. At its simplest, FNC is ultimately just a doctrinal mechanism for resolving a dispute between the litigants regarding choice of forum. It presupposes the existence of concurrent jurisdiction. Where only a single forum is available then FNC has no part to play. However, once there is a choice between available forums, then the space is created for conflict between the interests of the litigants. Where the interests of the defendant are better served by trial in a foreign forum, then the doctrine provides an avenue by which the defendant can petition the court to show preference for its choice of forum. FNC is thus a stage upon which is played out the drama arising from the conflicting interests of claimant and defendant with respect to choice of forum. Taking FNC as the prism through which to examine choice of forum grants insight into the interests driving the claimant's initial choice, as well as those manifested in the defendant's opposition. It is at the level of this interests analysis that a bigger picture is revealed, one which takes us beyond MC99.

This bigger picture consists of two inter-related aspects. First, the availability of alternative remedies for passenger claims, that is, alternatives to a claim against the carrier under MC99.[40] Second, the influence of other stakeholders, specifically third parties to the passenger-carrier relationship. Let us look at each aspect in turn.[41]

The typical claimant in the event of an aviation accident is not limited to solely pursuing the carrier through MC99. In fact, this is just one option from amongst many. Due to the nature of aviation accidents—which typically involve a multitude of contributing factors—the aviation claimant will usually have several options to choose from. There will often exist the possibility of bringing a claim against a number of alternative defendants, typically aircraft or component manufacturers, or, as has become fashionable of late, an aircraft lessor. These actions are not based on the cause of action governed by MC99 but arise independently, usually under national law. Whilst an MC99 action represents a highly attractive option to a claimant, what American claimant lawyers colloquially refer to as a "slam-dunk", the reality is that there has been a proliferation in aviation litigation outside MC99. Why? The answer comes down to choice of forum.

The claimant's choice of defendant is frequently driven by the choice of forum in which to litigate. This is because the forums available to a claimant depend on and often differ between the various potential defendants. For example, the claimant passenger might only have the option

[40] The topic of Chapter 6.
[41] These will be explored in detail in Chapters 7 and 8.

of suing the carrier under MC99 in either Cyprus or Greece, whereas, if the claimant decides to sue the manufacturer then the action could be taken in the US.[42] The decision of which defendant to sue is often driven by interests of forum selection. In simple terms, an action against the carrier under MC99 may not provide as advantageous a forum for the plaintiff as an action against the manufacturer or some other defendant.

There are many factors that make trial in the US desirable. The availability of contingency fees is a major advantage, without the possibility of which suing a rich corporate defendant would be beyond the means of many claimants. Likewise, the absence of the loser pays principles when it comes to legal costs makes US litigation less risky for the claimant. The broad general jurisdiction of US courts is attractive to claimant lawyers because it permits for unified litigation against multiple defendants in a single forum. The robustness of US judicial process, with its liberal and far-reaching pre-trial discovery rules, is the envy of many foreign litigators and also acts to augment the appeal of the US as a forum. In addition, a potential claimant can rely on the existence of (and competition between) highly qualified law firms with a wealth of experience and expertise in aviation litigation. These are among the most compelling factors which make trial of passenger aviation accident litigation in the US desirable, but, once we get down to the crux of the matter, the decisive factor behind the choice of a US forum is quantum of damages.

The potential recovery in a US forum is likely to be far greater than in the claimant's home forum because of the right to trial by jury and the broad heads of damages available.[43] Even when the choice of law rules likely to be applied by those courts will call for the application of foreign law for the determination of damages, a jury award in the US will still nearly always be higher than if the foreign court were to make the determination. Provided a jury is given the task of determining damages of a general nature, then there is a good likelihood that they will award an amount far in excess than would have been granted by a judge in the claimant's home forum. For these reasons, the US is spoken of as the El Dorado for injured plaintiffs, the promised land in which they can expect an award akin in value to winning their national lottery.[44]

That a claimant will elect to forego a tailor-made remedy against a carrier under MC99 in favour of an alternative general remedy provokes searching questions about the efficacy of MC99 as a system for compensating passengers. As will be shown, this a reflection of the very different legal landscape within which MC99 exists, comparative to that which existed at the time of the Warsaw Convention's drafting. One has to ask if MC99 (as successor to WCS) has failed to appreciate its place in the bigger picture of modern international aviation litigation. The existence of alternative remedies has also played a part in the emergence of the second aspect of the bigger picture, i.e. the involvement of third parties.

Turning to this second aspect. The natural tendency is to look upon MC99 litigation as being only two-party in form. However, an analysis of the interests actually involved brings to light a complex web of devices by which third parties can affect the litigation. The truth is that disputes

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[42] See e.g., *Clerides v Boeing Co* 534 F 3d 623 (7th Cir 2008). The plaintiff sued the US manufacturer of the aircraft in Illinois in relation to the death of a passenger in an air crash in Greece of a flight by the Cypriot airline Helios Airways between Larnaca, Cyprus, and Athens, Greece.

[43] W Freedman *Product Liability Actions by Foreign Plaintiffs in the United States* (Kluwer Law 1988) 13.

[44] MW Gordon 'Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl' (2006) 38 *U Miami Inter-Am L Rev* 141, 145.

between the nominal parties to MC99 litigation, i.e. the claimant passenger and the defendant carrier, represent only the tip of the iceberg. Beneath the surface is to be found the surreptitious involvement of third parties, linked to the carrier (qua nominal defendant) by numerous devices for risk allocation and loss spreading. These devices take many forms, either arising by force of law or by contractual agreement, but through each of which a third party gains considerable interest in and influence over the litigation. The most direct manifestation of which is something so patently obvious that it is staggering that it so frequently goes uncommented upon, that is, the fact that in the majority of cases the substantive and operative interests are those of the carrier's insurer. The truth is that it is not the defendant carrier who is calling the shots but its insurer. Through subrogation or contractual assignment, the insurer holds claims control in the vast majority of cases where airlines are being sued by passengers.

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

Common to both aspects is the tendency to focus on the two-party paradigm of passenger versus carrier. Although the court docket presents a simple picture, the reality is that on account of these risk allocation and loss spreading devices, the true litigation relationship does not conform to the two-party paradigm. Whilst the courts may be constrained to dealing with the parties appearing before them, the same constraint does not limit the policymaker, and yet, these third-party interests have not been given the consideration in the context of MC99 that they demand. The result has been the myopic exclusion of vital factors which contribute to making up the bigger picture within which MC99 is only a part. In consequence, MC99 is premised on a skewed appreciation of the interests actually involved. It has failed to keep pace with the developments of aviation litigation and in so doing has sown the seeds of its own eventual demise. The time is nigh for an evaluation of MC99 as an aviation accident passenger compensation system, considering its fairness, efficacy and social cost, in light of its systemic shortcomings with respect to choice of forum.

It is argued in this work that MC99, as the successor to WCS, is predicated on an anachronistic understanding of itself as a discrete system grounded on the two-party paradigm of claimant passenger versus defendant carrier. It is argued that this does not correspond to the reality in which MC99 is merely a component of a bigger, interdependent, aviation accident passenger compensation system. The interdependency between MC99 and this bigger system means that evaluating the fairness and efficacy of choice of forum under MC99 requires us to understand

how this system is organized and how it operates. This is achieved by identifying the third-party stakeholders, i.e. those beyond the claimant passenger and defendant carrier, and by elucidating the nature of their relationships and interests. In so doing, a fuller appreciation can be achieved of the wider issues involved. From this it will be concluded that the regulation of choice of forum under MC99 is fundamentally unfair to the claimant passenger and that it frustrates the policy objectives of MC99. In conclusion, a solution shall be proposed which will: (1) take account of the existence of alternative remedies and the influence of third parties; (2) regulate choice of forum in a manner which is fair to all parties, and; (3) promote the policy objectives of MC99 and that of the industry generally.

1.4 Structure

This work is divided into five parts and consists of nine chapters. This introductory chapter, amounting to the first part of this work, is followed by a second part containing two chapters addressing essential matters relating to jurisdiction and the doctrine of FNC. The third part focuses on the jurisdictional schemes of the Warsaw Convention and MC99 and the place of FNC therein. Part Four, which consists of three chapters, expands the scope of research by exploring the role of third-party interests and how they affect issues of choice of forum. The final part of the work will consist of a concluding chapter in which a summation of conclusions from the preceding chapters will inform a proposal for reform.

Chapter 2 commences by providing some core context by describing the origins, development and operation of FNC within key common law jurisdictions. Aside from doctrinal illumination, this chapter will inform subsequent chapters by exposing the lack of uniformity that exists with respect to the doctrine within the common law world. Chapter 3 examines the general approach adopted by civil law systems with respect to judicial competence and explores civilian attitudes to the doctrine of FNC.

Chapters 4 and 5 turn the attention to an examination of WCS and MC99 and the functioning of FNC therein. MC99 was preceded by almost ninety years' worth of jurisprudence built up surrounding WCS, so it is apt to firstly address what role FNC played under that system and to what extent its availability was challenged. Detailed consideration of WCS is also justified for the purpose of establishing and appreciating the policy objectives involved. This approach will establish a foundation upon which to conduct a similar analysis of MC99 in Chapter 5, where the issue of the availability and consistency of FNC within that system will be directly addressed.

The second and third parts of this work shall give ample evidence as to the existence of wider considerations affecting—to a very substantial degree—the resolution of matters relating to jurisdiction under MC99. A bigger picture will have emerged, one that will require us to venture beyond the two-party paradigm within which aviation litigation is traditionally framed. The influence of third parties on aviation litigation and choice of forum, exercised through devices such as subrogation and contractual indemnity, will be the focus of Part Four. A critical step in the analysis will be to establish how, and to what extent, this bigger picture impacts on MC99. A common theme throughout Part Four is an elucidation of the extent to which MC99 is embedded within a complex web of arrangements for risk allocation and loss spreading which undermine the balance of interests achieved by MC99 and may even provide for its circumvention.

Part Four will reveal the bigger picture of international aviation litigation by illuminating the complex interplay of liability relations between claimant passengers, defendant carriers and third parties. Chapter 6 examines the emergence of alternative litigation options for claimants seeking compensation for passenger death or injury. Chapter 7 develops on the preceding chapter by looking at the multi-party nature of aviation litigation and the impact of third-party actions for contribution or indemnification based legal principles of joint or concurrent liability. Chapter 8 shifts attention to devices of risk management and how they provide a further avenue for third party influence. This will be done firstly by examining the contractual indemnities agreed between commercial stakeholders to international air transport whereby they allocate the risk amongst themselves. And, secondly, by revealing the reality of aviation insurance which allows for risk to be spread and on account of which the insurer assumes the controlling interest in aviation litigation.

The fifth and final part of this work applies the lessons learned and conclusions reached in the preceding chapters and the argument will be made that reform of the aviation accident compensation system for passengers is both desirable and necessary.

1.5 Scope and Terminology

The scope of this work is liability for passenger death or injury during international carriage by air. Although private air law is not limited purely to liability for passenger death and injury, this work does not attend to liability for damage or loss to cargo or baggage, nor is it concerned with passenger losses arising from delay or other flight disruption. Since the focus is on passenger liability, liability to third parties on the ground necessarily falls outside the scope of this work.

It goes without saying that a work concerned with international aviation litigation inevitably implicates the involvement of multiple legal systems and jurisdictions, which, for obvious reasons of time and space, a comprehensive study of which is not possible. Therefore, the emphasis will be on the common law. This is not simply a result of the fact that the author hails from a common law jurisdiction, it is the product of the reality that aviation litigation is presently centred in common law States, most notably the US. The emphasis on the common law is also warranted by the special interest that the UK has in the area on account of London being the centre for much of the aviation insurance market. As will be shown, the role played by the insurer in the world of international aviation litigation cannot be underestimated and thus this work will be of particular interest to that section of the industry. Likewise, with its emphasis on the doctrine of FNC, this work will touch on areas and the ongoing controversy between the UK and the EU on the role of the doctrine within the Brussels I Regime. Its prospects seemed moribund but, with the imminent prospect of Brexit, there may be hope yet for FNC's future in Europe. Nevertheless, conscious of the international nature of the legal regime involved, careful attention has been paid to accommodating the civilian law perspective throughout. In addition, reference to international legal regimes governing comparable modes of transport has been made throughout.

PART TWO

FORUM CONVENIENS OR NON CONVENIENS?

Chapter 2: History and Doctrine

2.1 Introduction

This chapter consists of a journey through a selection of the various manifestations of the doctrine of FNC, both historical and contemporary. The journey commences in Scotland and has its principal ports of call in England and the United States with brief stops to be made in a handful of other jurisdictions, such as Australia and Canada. The primary goal of this chapter is to inform. It seeks to both acquaint the reader with the doctrinal substance of FNC and to familiarise them with the underlying policies and principles that account for its presence within the common law systems. In addition, this chapter aims to provide the international context and understanding of the doctrine necessary for its analysis within the specific field of international aviation litigation. Together with Chapter 3, which looks to civilian law attitudes to FNC, it is hoped that a sufficiently broad picture will have been painted to provide the necessary backdrop for the remaining chapters of this work and its conclusion.

This chapter dedicates a substantial part of its attention to the doctrine of FNC within the United States. Such emphasis is warranted on account of the fact that so much aviation litigation takes place there and FNC motions are routinely raised. Indeed, the majority of the cases to be analysed throughout this work hail from the US. However, a note of warning must here be issued. To speak of a singular US doctrine is a fallacy and it is a key objective of chapter to dispel any such notion and to demonstrate that the US is a jurisdiction of many doctrines of FNC.

2.2 Scotland

Prior to the union of the parliaments of England and Scotland in 1707, Scots law was predominantly influenced by the civil law tradition and a particularly strong affinity exists with Roman-Dutch law. Since 1707, Scots law has merged with English law to the extent that the modern Scottish legal system is regarded as a mixed system of civil law and common law. It remains a distinct legal system, but one over which English law has exerted influence. Modern Scots law thus owes its origins to a number of different historical sources.

2.2.1 Early Instances of a Judicial Discretion to Decline Jurisdiction

Two 17th century cases are frequently cited as the first instances of the FNC doctrine at work,[1]

[1] See EL Barrett 'The Doctrine of Forum Non Conveniens' (1947) 35 *Cal L Rev* 380, 387 n 45. See also RA Brand and SR Jablonski *Forum Non Conveniens: History, Global Practice and Future Under the Hague Convention on Choice of Court Agreements* (OUP 2007) 7 n 2; J Bies 'Conditioning Forum Non Conveniens' (2000) 67 *U Chi L Rev* 489, 493 n 20.

Vernor v Elvies[2] (1610) and *Col Brog's Heir*[3] (1639). However, it is submitted that the stronger view is that these two cases were not instances of the judicial exercise of a discretionary power to decline jurisdiction, but were instead cases in which the courts regarded themselves as lacking civil jurisdiction to begin with. The same doubt arises with respect to some later cases also cited as early evidence of a doctrine identifiable with FNC. In *Brown's Trustrees v Palmer* (1830) and *MacMaster v McMaster* (1833) the Scottish Court of Session considered cases involving claims against executors of foreign estates.[4] The language employed by the Court of Session in *Palmer* and *MacMaster* is suggestive that it viewed the matter as one of competence and not of discretion.[5] In each case, the court decided that, in the circumstances, arrestment was insufficient to establish the jurisdiction of the court over the defender. Therefore, it was for lack of competence and not as a matter of discretion that the courts did not exercise their jurisdiction.

Whatever the status of the court's jurisdiction in these early cases, by 1846, in *Tulloch v Williams*, the court clearly accepted that it not only had jurisdiction, but that it also had the discretionary power to decline to exercise it.[6] The case concerned a dispute relating to the mismanagement by the defender of the pursuer's affairs in Jamaica. The court stated that the Scottish forum was 'not an incompetent but an inconvenient forum',[7] the Lord President opining that it was 'a question of convenience whether we should sist (the Scots law equivalent of "stay") process so as to let an accounting go on in Jamaica, or proceed with the action ourselves.'[8] The issues of jurisdiction and *forum competens* (understood in the sense of convenience) were treated separately, the defender had initially challenged the jurisdiction of the courts of Scotland but abandoned that line of argument in favour of *forum competens*, arguing against the appropriateness of the forum. Reversing the decision of the lower court, the Court of Session elected to sist the proceedings so they could be taken in Jamaica. That the court was prepared to sist the action in itself demonstrates that unlike the dismissals in the earlier authorities, the court considered itself competent. This represented a clear shift from the question of competence to one of appropriateness. Thus, only with *Tulloch v Williams* (1846) can we reliably speak of a doctrine with the same essential characteristics as what would later come to be known as FNC.[9]

Longworth v Hope[10] (1854) concerned a Scottish resident who sued the publishers of a well-known London newspaper for libel resulting from an article published in London but which had also been distributed in Scotland. The defenders requested that the court exercise its discretion to decline jurisdiction and leave the pursuer to bring her claim in England. In unanimously rejecting the plea of *forum non competens*, the court stated that, 'the plea thus expressed does not mean

[2] [1610] Mor 4788 (Sess) (Scot).
[3] [1639] Mor 4816 (Sess) (Scot).
[4] *Brown's Trustees v Palmer* (1830) 9 S 224 (Sess IH) (Scot); *MacMaster v MacMaster* (1833) 11 S 685 (Sess IH) (Scot).
[5] The view also reached by R Braucher 'The Inconvenient Federal Forum' (1947) 60 *Harv L Rev* 908, 909.
[6] (1846) 8 D 657, 658 n 1 (Sess IH) (Scot).
[7] ibid 658.
[8] ibid.
[9] See Braucher (n 5) 909; see also RT Abbott 'The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish, English and United States Applications' (1985) 18 *Vanderbilt J Transnat'l L* 111, 114.
[10] (1865) 3 M 1044 (Sess IH) (Scot).

that the forum is one in which it is wholly incompetent to deal with the question',[11] but that the true issue was about the, 'consideration of the appropriate forum'.[12] Lord President Jervis-Woode opined that precedent showed that even in those cases where the jurisdiction of the court was beyond doubt, the courts had nonetheless declined jurisdiction.[13] Lord Ardmillan expressly recognized the inaccuracy of the word "*competens*"[14] and Lord Deas confirmed this when he stated that, 'the plea is really not that one forum is incompetent, but that the other forum ought to be preferred.'[15]

When it came to the determination of appropriateness, this was to be divined from a consideration of the interests of justice, such that refusing the plea would amount to, 'a hardship, and almost an injustice.'[16] Lord Deas made it clear that the onus was on the party raising the plea to prove that they would suffer an "unfair disadvantage" and that it was not enough to show that the party had a better chance of success in the other forum. "Unfair disadvantage" was to be understood as a state of affairs where, 'justice is not likely to be done.'[17] Of the various considerations to be taken into account, the court noted two, the location of evidence/witnesses and the applicable law.[18]

The defender in *Clements v Mcaulay*[19] had successfully pleaded *forum non competens* before the court of first instance, but on appeal to the Court of Session, a fundamental flaw in the defender's plea was exposed. His proposed alternative forum did not in fact have jurisdiction. Lord Justice Clerk Inglis explained that it was a prerequisite that an alternative forum be available before the plea could succeed.[20] As the defender had not proposed an available alternative forum, the Scottish Court was not at liberty to send the parties away. This represents one of the key ingredients of FNC without which there is no scope for the application of the doctrine.

In the 1868 case of *Thomson v North British & Mercantile Insurance Co*, Lord Benholme explained that the plea was not a question of the court's competence but really one of the relative convenience of competent courts,[21] suggesting that the plea of *forum non competens* ought instead to be termed *forum non conveniens*.[22] This was followed in 1873 by the case of *Macadam v Macadam,* where the court referred to the plea as *forum conveniens*.[23] The first reported case in which the Court actually considered a plea under the full name of *forum non conveniens* came in 1883 with *Brown v Cartwright.*[24] The court repelled the plea in that case but it was sustained in different case the following year in *Williamson v North-Eastern Railway Co*.[25]

From the early origins of FNC in Scots law it can be concluded that the doctrine emerged not from considerations pertaining to competence of the chosen forum but from questions of

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[11] ibid 1053.
[12] ibid.
[13] ibid.
[14] ibid 1059.
[15] ibid 1058.
[16] ibid 1053.
[17] ibid 1057.
[18] ibid 1053, 1057.
[19] (1866) 4 M 583 (Sess IH) (Scot).
[20] ibid 592.
[21] (1868) 6 M 310, 312, 315 (Sess IH) (Scot).
[22] ibid 315.
[23] (1873) 11 M 860, 862 (Sess IH) (Scot).
[24] (1883) 10 R 1235 (Sess IH) (Scot).
[25] (1884) 11 R 596, 598 (Sess IH) (Scot).

comparative convenience. Its operation was predicated on the existence of concurrent jurisdiction and its purpose was to ensure that the ends of justice were best secured. By 1883, the doctrine had been christened under its modern label of *forum non conveniens*. But, the essential ingredients of a doctrine for the discretionary declining of jurisdiction were already in place since 1846. The threshold for sustaining the plea was high, a hardship, or unfair disadvantage, amounting almost to an injustice was required and, as such, its successful pleading was to be exceptional.

2.2.2 The Settled Doctrine of FNC in Scots Law

What is regarded by some as the standard formulation of the doctrine in Scots law[26] was to be provided by the Court of Session in the 1892 case of *Sim v Robinow.*[27] A joint venture between Scottish businessmen concerning mines in Kimberley, South Africa, was at the heart of the dispute. At first instance, the Lord Ordinary had repelled the plea, not finding the considerations of convenience to be sufficiently strong.[28] The defender reclaimed, arguing that the plea of FNC ought to be granted where the balance of convenience lay in favour of the foreign forum. Lord Kinnear did not agree, stating that 'something more is required than mere practical inconvenience in order to sustain the plea of *forum non conveniens*.'[29] On a review of the authorities, the court laid down the classic articulation of the doctrine, and in so doing gave one of the most concise distillations of the spirit of the doctrine in the common law world:

> In all these cases there was one indispensable element present when the Court gave effect to the plea of *forum non conveniens*, namely, that the Court was satisfied that there was another Court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice.[30]

The court was not of the view that this indispensable element existed in the case before it. That it would cause the defender inconvenience and considerable expense was not sufficient justification to sustain the plea.[31] Inherent to which was the recognition that the plea was only to be granted in exceptional circumstances and that, on balance, the pursuer's choice of forum should stand, consistent with the judge's duty not to abdicate completely his own judgment (as expressed by the Latin maxim of *judex tenetur impertiri judicium suum)*.

The sinking of a ship carrying a consignment of coal from Dunston in the North of England to Rouen in France was the controversy at the centre of the litigation in *La Société du Gaz de Paris v La Société Anonyme de Navigation 'Les Armateurs Français' (No 2)*.[32] The pursuers, a Parisian gas company, sought to recover for the loss of their cargo, which they argued was due to its incorrect loading aboard the French defender's vessel. On the face of it, the centre of gravity of the dispute was firmly located in France. While some connection existed to England, there was next to nothing connecting the case to Scotland, except that the jurisdiction of the Scottish Court had been founded by way of arrestment of one of the defender's vessels there. At first instance,

[26] A Maclean 'Foreign Collisions and Forum Conveniens' (1973) 22 *Int'l & Comp LQ* 748, 752.
[27] (1892) 19 R 665 (Sess IH) (Scot).
[28] ibid 666 n 1.
[29] ibid 668.
[30] ibid.
[31] ibid.
[32] [1926] SC (HL) 13 (appeal taken from Scot).

the plea of FNC had been repelled but was sustained on appeal. When it came before the House of Lords, the Lord Chancellor remarked, '[f]rom the beginning to the end of the case there is not a breath of Scottish atmosphere,'[33] a state of affairs which made it hard for him to conceive of a stronger case for dismissal. Unsurprisingly, the House of Lords upheld the decision of the Inner House of the Court of Session to dismiss the action on the grounds of FNC. Citing *Sim v Robinow* and *Clements v Mcaulay*, the Lord Chancellor defined the Scottish plea of FNC as follows:

> [I]f in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court.[34]

The pursuer's motivation for bringing their action to Scotland was contemplated by Lord Sumner, he inclined to the view that they had done so purely to gain a tactical advantage.[35] Trial in Scotland would allow them to avoid a limit of liability which existed under French law. Not only does this demonstrate, by way of an early example, the strategic value of FNC, but it also provided Lord Sumner with the foundation for a salient point. Although he concurred in the outcome, he differed from the majority on the grounds for the judgment, opining that it was not profitable to give consideration to weighing up the interests of the parties, since what was advantageous to one would be disadvantageous to the other and vice versa. In Lord Sumner's view, the object of FNC 'is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends.'[36] The majority's formulation in *La Sociéte du Gaz* came to represent the ruling authority in Scotland and is cited by many commentators as the principal articulation of the doctrine in Scots Law.[37]

2.2.3 Concluding Remarks

By the mid 19th Century the doctrine of FNC was established in Scots law, not as a question of competence or convenience, as its various names might have suggested, but as a question of appropriateness of forum. Indeed, in *La Société du Gaz,* Lord Dunedin remarked that, in his 'view, "competent" is just as bad a translation for "*competens*" as "convenient" is for "*conveniens*". The proper translation for these Latin words, so far as this plea is concerned, is "appropriate".'[38]

In the case of *Crédit Chimique v James Scott Engineering Group Ltd* (reported in 1982) the Outer House of the Court of Session summarized four general principles of law applicable to the plea of FNC as laid down in *Clements v Macaulay*, *Sim v Robinow* and *La Sociéte du Gaz*.[39] First, that the burden of satisfying the Court rests upon the defender raising the plea; second, this burden demands weighty reasons why jurisdiction should not be exercised, mere balance of

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[33] ibid 17.
[34] ibid 16–17.
[35] ibid 22.
[36] ibid.
[37] See e.g. Brand and Jablonski (n 1) 9–10; P Blair 'The Doctrine of Forum Non Conveniens in Anglo-American Law' (1929) 29 *Colum L Rev* 1, 20; R Schulz 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass Ltd' (1986) 35 *Int'l & Comp LQ* 374, 377; J Dainow 'The Inappropriate Forum' (1935) 29 *Ill L Rev* 867, 882–883.
[38] *La Société du Gaz* (n 32) 18.
[39] [1982] SLT 131, 133 (Sess OH) (Scot).

convenience being insufficient; third, that there exists another available court of competent jurisdiction; fourth, consideration of the reasons leads to 'the conclusion that the interests of the parties can more appropriately be served and the ends of justice can more appropriately be secured in that other court.'[40]

2.3 England

FNC is a relatively new doctrine within English law, only gaining full acceptance in 1983. However, while the English courts were both resistant to incorporating a doctrine they regarded as an oddity of Scots law and disinclined to deter claims being brought before their courts, there did exist a comparable doctrine in English law whereby jurisdiction could be declined. This highly-restrictive doctrine, best known as the *St Pierre* rule, allowed for a stay of proceedings to be granted where a claimant sought to invoke the jurisdiction of the court in circumstances amounting to an abuse of process. The scheme of this section will be to chart the emergence of FNC in England, beginning with an examination of the *St Pierre* rule and then moving to show its progressive metamorphosis by the courts into the doctrine of FNC. The greater part of this section will focus on the current ruling authority for FNC in England, i.e. *Spiliada Maritime Corp v Cansulex Ltd*,[41] in which the House of Lords restated the doctrine and liberalized its application. *Spiliada* also carries the extra significance of being the guiding authority for the application of FNC in many other common law jurisdictions.

2.3.1 The Vexatious and Oppressive Test

The English courts have long maintained themselves as open to hearing actions concerning foreigners (provided the defendant had been properly served) and little doubt was entertained as to their competence or suitability in such matters. Unlike Scots law, the traditional position of the English courts was not to grant a stay of proceedings on the basis of appropriateness but instead required a higher standard, one of vexation and oppression amounting to injustice.[42] In 1906, in *Logan v Bank of Scotland (No 2)*, the Court of Appeal affirmed the power of the English courts to stay vexatious proceedings but warned that it 'should be exercised with great care',[43] since the courts of England are freely open to foreigners and such freedom ought not to be disturbed except in the case of abuse of process.[44]

The strictness of the English doctrine was reinforced in 1936 by the Court of Appeal in *St Pierre v South American Stores (Gath & Chaves) Ltd.*[45] The requirements for a stay were neatly summarized by Scott LJ. Firstly, he stated that 'a mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought.'[46] Secondly, to justify a stay, the defendant must satisfy the court

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[40] ibid.
[41] [1987] AC 460 (HL).
[42] AV Dicey and A Berriedale Keith *A Digest of the Law of England with Reference to the Conflict of Laws* (4th edn, Stevens & Son 1927) 357.
[43] [1906] 1 KB 141, 150 (CA).
[44] ibid 151.
[45] [1936] 1 KB 382 (CA). See also *In re Norton's Settlement* [1908] 1 Ch 471 (CA).
[46] ibid 398.

that not granting the stay would 'work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way',[47] and that granting the stay 'must not cause an injustice to the plaintiff.'[48] The *St Pierre* standard was thus a highly onerous burden, one which the defendant in that case was unable to overcome despite the overwhelming balance of convenience favouring the foreign forum. Based on the appropriate forum test described by the Scottish Court in *La Société du Gaz*, the difference between it and the *St Pierre* standard is clear to see.[49] The English courts apparent hostility to adopting FNC is explained by their openness to receiving foreign claimants, who, in the majority of cases, were commercial parties for whose business the English courts were partial.[50]

2.3.2 The Metamorphosis of *St Pierre*

The shift away from the *St Pierre* vexatious and oppressive test began in 1974 with *The Atlantic Star v Bona Spes*[51] and was continued by *MacShannon v Rockware Glass Ltd*[52] in 1978 and then by *The Abidin Daver*[53] in 1984. In this trio of cases, the House of Lords metamorphosed the burdensome and restrictive rule of *St Pierre* into a more flexible and liberal doctrine of *forum non conveniens*. The motivation for liberalising the *St Pierre* test was firstly to address the phenomenon of forum shopping by reducing the burden on the defendant to secure a stay. The second motivation was to make allowance for a change in judicial attitudes. In this trio of cases, the courts of England had given recognition to the fact that comity demanded greater deference be accorded the interests of foreign jurisdictions in resolving disputes over which they had a greater claim.

The Atlantic Star presented a case in which it was obvious that the dispute had almost no connection to England, that jurisdiction of the English court was entirely fortuitous, that the foreign forum was clearly more appropriate, and it was also plain to see that the claimant was forum shopping. Despite all of this, the trial court and the Court of Appeal thought the *St Pierre* rule precluded the possibility of a stay because the inconvenience involved did not amount to an injustice.[54] On further appeal to the House of Lords, the starkness of the case provided encouragement for their Lordships to dispense with the *St Pierre* rule and adopt the doctrine of FNC in its place. However, the majority were not prepared to take that step but they did endorse adopting a more liberal application of the existing rule.[55] Although sharing a common spirit, the Law Lords descriptions of the how the rule ought to be applied in its more liberal sense differed, both in terms of emphasis and terminology. Nevertheless, on application to the case at hand, their Lordships reached a common conclusion that the claimant's choice of England as the forum was indeed oppressive and vexatious (in the new liberal sense).[56] In so finding, the House managed

[47] ibid.
[48] ibid.
[49] For more discussion of *St Pierre*, see Abbott (n 9) 126–128.
[50] See comments of Lord Denning MR in *Owners of the Motor Vessel 'Atlantic Star' v Owner of the Motor Vessel 'Bona Spes'* [1973] QB 364, 382 (CA).
[51] [1974] AC 436 (HL).
[52] [1978] AC 795 (HL).
[53] *The Abidin Daver* [1984] AC 398 (HL).
[54] *Owners of the Motor Vessel 'Atlantic Star' v Owner of the Motor Vessel 'Bona Spes'* (n 50) 381.
[55] *The Atlantic Star* (n 51) 477–478.
[56] ibid 477–478.

to pay lip service to the vocabulary of *St Pierre* while simultaneously opening the semantic back door to a broader and more liberal doctrine approaching that of FNC.

The liberalising steps taken in *The Atlantic Star* were built a few years later in *MacShannon.*[57] Again, the foreign forum was clearly the more appropriate for resolution of the dispute but the courts had been unsure as to whether a stay was permitted. The House of Lords decision represented a key juncture in the emergence of FNC in English law and is particularly notable for discarding, once and for all, the *St Pierre* terms "vexatious and oppressive".[58] In their place, it attempted to define a doctrine tailored to address the ills posed by forum shopping. Unfortunately, the House strained itself to avoid expressly adopting FNC. Instead, it insisted on the necessity and prudence of developing an English doctrine for staying proceedings on the foundation of the rule from *St Pierre*. *MacShannon* had liberalized the test and brought it closer to the Scottish doctrine of FNC. However, subsequent case law showed that in practice the doctrine remained more favourable to the plaintiff with the consequence that stays were refused in circumstances where the foreign forum was clearly more appropriate.[59]

An additional problem with *MacShannon* was that there were differences between the approach described by Lord Diplock and that of Lord Salmon and Lord Keith, the two Lords' opinions were capable of yielding two seemingly irreconcilable approaches.[60] This contributed to subsequent uncertainty among the lower courts about how to apply the doctrine.[61] Indeed, taken together, *The Atlantic Star* and *MacShannon*, cases which yielded 10 speeches from the Law Lords, so it is unsurprising that they failed to deliver a fully coherent doctrine.

The third case in the trilogy, i.e. *The Abidin Daver*,[62] plays a prominent role in the history of FNC in England, largely because it was the case in which the House of Lords explicitly recognized the doctrine in English law under its Latin moniker and declared it to be indistinguishable from the Scottish doctrine. However, the case is also of relevance because it further liberalized the doctrine. It achieved this by expanding, beyond convenience and expense, the considerations to be taken into account and overtly paid greater regard to judicial comity.[63] Where foreign proceedings co-existed over the same subject matter there emerged a risk of conflicting decisions between the courts of those States. Lord Diplock thought such a situation anathema and opined that comity demanded that it not be permitted to arise.[64] This explicit invocation of comity (a term not used in *The Atlantic Star* nor in *MacShannon*) is representative of the further movement away from the traditional insular orientation of the English courts. Lord Diplock captured the zeitgeist when he stated:

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[57] *MacShannon* (n 52).

[58] DW Robertson 'Forum Non Conveniens in America and England: A Rather Fantastic Fiction' (1987) 103 *LQR* 398, 411–412.

[59] KN Feldman and SM Vella 'The Evolution of "Forum Conveniens": Its Application to Stays of Proceedings and Service Ex Juris' (1989) 10 *Advoc Q* 161, 167; Brand and Jablonski (n 1) 17–18.

[60] The difference between Lord Diplock's approach and that of Lord Salmon and Lord Keith is very clearly demonstrated by Schulz through a comparative analysis of how the approaches deal with a conflict between the two parts of the test. See Schulz (n 37) 395–397.

[61] See JHH Weiler 'Forum Non Conveniens - An English Doctrine?' (1978) 41 Mod L Rev 739, 743–744; A Briggs 'Forum Non Conveniens - Now We Are Ten' (1983) 3 *Legal Studies* 74, 77.

[62] *The Abidin Daver* (n 53).

[63] A Reus 'Judicial Discretion - A Comparative View of the Doctrine of Forum Non Conveniens' (1994) 16 *Loyola Los Angeles Int'l Comp LJ* 455, 478; JJ Fawcett 'Lis Alibi Pendens and the Discretion to Stay' (1984) 47 *Mod L Rev* 481, 484.

[64] *The Abidin Daver* (n 53) 412.

> My Lords, the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions … is that judicial chauvinism has now been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish doctrine of *forum non conveniens*.[65]

2.3.3 The *Spiliada* Test

The modern authority for FNC in English law comes from the 1986 decision of the House of Lords in *Spiliada,*[66] in which Lord Goff undertook a thorough re-examination of the doctrine and re-stated it in terms which have brought it such stability and gravitas that it has become the guiding authority for many common law jurisdictions.

With FNC now let out of the closet by Lord Diplock in *The Abidin Daver*, Lord Goff (giving the leading opinion in *Spiliada*) felt justified in having regard to the Scottish authorities and commenced his speech by endorsing Lord Kinnear's statement in *Sim v Robinow* as being the expression of the fundamental principle involved:

> [T]he plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.[67]

In Lord Goff's view, this was the principle applicable both in Scotland and England. Echoing the views of Lord Dunedin in *La Société du Gaz*, Lord Goff doubted the aptness of the term "*conveniens*" since the question involved was not one of convenience, but of suitability or appropriateness; Lord Goff stating: 'I feel bound to say that I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction.'[68] However, given how well established the doctrine was under that name in Scotland and the US it seemed the prudent course to retain the name in England. However, he suggested that when applying the doctrine in practice it was advisable to employ the term "appropriateness" instead of "convenience".[69]

Lord Goff did not think Lord Diplock's statement of principle from *MacShannon* was intended as 'an immutable statement of the law but rather as a tentative statement at an early stage of a period of development'.[70] Presumably, therefore, Lord Goff perceived himself as having the go-ahead to tweak and reformulate. In giving his own summary of the law, he began with a new version of the basic principle expressed by Lord Kinnear in *Sim v Robinow*, stating:

> The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[71]

This formulation of the basic principle differs only slightly from its predecessor. It expressly

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[65] ibid 411.
[66] *Spiliada* (n 41).
[67] ibid 474 citing *Sim v Robinow* (n 27) 668.
[68] *Spiliada* (n 41) 474.
[69] ibid 475.
[70] ibid.
[71] ibid 476.

provides that the foreign forum must be *available*[72] (no doubt implicit Lord Kinnear's wording) and it emphasizes the question as one of *appropriateness* (deftly avoiding use of the word convenience). These differences are not material alterations. Lord Goff was rewording the principle in a form consistent with the Scottish doctrine. Taking Lord Diplock's articulation from *MacShannon*, Lord Goff then translated this basic principle into a two-stage test.

2.3.3.1 Stage One: Availability and Appropriateness

In an application for a stay of proceedings on grounds of FNC, the burden of proof, in the first instance, rests on the defendant. As we shall see, under the second stage the burden may shift to the claimant. At stage one of the test, the burden on the defendant is not just to show that England is not the natural or appropriate forum but that there exists another available forum which is 'clearly or distinctly more appropriate'.[73] A mere balance of convenience will not be sufficient to warrant a stay of proceedings. Therefore, in circumstances where no forum (including England) is clearly more appropriate, then a stay ought not to be granted.

In order to establish appropriateness, a court should look at the factors pointing toward the other forum as the natural forum for the action.[74] Lord Goff endorsed the meaning ascribed to the term "natural forum" by Lord Keith in *The Abidin Daver* as 'that with which the action had the most real and substantial connection'.[75] The particular connecting factors to be looked for were identified by Lord Goff as those having a bearing on inconvenience and expense, as referred to by Lord Diplock in *MacShannon*.[76] However, consideration was not limited solely to these, but may include, *inter alia*, the governing law of the relevant transaction, the place of residence or business of the parties, etc. The range of possible connecting factors which could be considered by a court were thus left open. Indeed, Lord Templeman, stated that that factors which a court is entitled to take into account with regards to appropriateness are 'legion'. [77] This is not to say that no constraint was intended, Lord Goff clearly intended that the range of considerations under the first stage would be narrower than that under the second.

If at this first stage of consideration the court is not persuaded that there is another available forum which is clearly more appropriate for trial, then a stay of proceedings will normally be refused. However, where a defendant has satisfied the court that an alternative and available forum is clearly the more appropriate forum then the FNC enquiry moves to the second stage.

2.3.3.2 Stage Two: The Interests of Justice

Under the second stage of the *Spiliada* test, the onus shifts to the plaintiff 'to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take

[72] As to when a foreign forum will be considered *available* by the English courts, Lord Walker in *Hindocha v Gheewala* noted: '[an] alternative forum is not available (in the relevant sense) unless it is open to the plaintiff to institute proceedings as of right in that forum'. *Hindocha v Gheewala* [2004] 1 CLC 502, 513 (PC) (appeal taken from Jersey).
[73] *Spiliada* (n 41) 477. See also, *Connelly v RTZ Corp* [1998] AC 854, 871 (HL).
[74] *Spiliada* (n 41) 477.
[75] ibid 477–478 citing *MacShannon* (n 61) 415.
[76] *Spiliada* (n 41) 477.
[77] ibid 465.

place in this country.'[78] In assessing the second stage, a court will consider a broader range of factors than are available under the first stage. Lord Goff stated that the Court will consider 'all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.'[79] The second stage of the *Spiliada* test seeks to ascertain whether the requirements of justice demand that a stay should not be granted where the other forum is clearly the more appropriate. Broadly speaking, the case law suggests that two categories of cases exist; those in which the granting of a stay would result in the denial of justice and, more commonly, cases where the claimant would lose a legitimate personal or juridical advantage.[80]

Lord Goff returned to the topic of FNC in *Connelly v RTZ Corporation*[81] and, giving the majority judgment spoke directly on the matter of when a stay might be refused on the grounds that not doing so would result in a denial of justice. He reiterated that, in general, a claimant must take the clearly more appropriate forum as he finds it, a court will only refuse a stay where the claimant 'can establish that substantial justice cannot be done in the appropriate forum'.[82] The House of Lords reached the same view in the case of *Lubbe v Cape plc*.[83] However, these two cases involved exceptional circumstances and thus, in most cases, there is only a small likelihood of invoking denial of justice as grounds for resisting a stay where the natural forum lies abroad. Where the foreign forum is the clearly more appropriate forum, resisting a dismissal is much more likely to be secured on the grounds of the potential loss of a personal or juridical advantage.

When it came to the question of how to treat legitimate personal or juridical advantages, Lord Goff stressed that the mere existence of such an advantage should not be taken as decisive.[84] He took the view that, as a general rule, a court should not be deterred from granting a stay of proceedings merely on the basis that it entailed the loss of such an advantage for the claimant. The interests of both parties had to be taken into account. However, since what is disadvantageous to one party will be advantageous to the other (and vice versa) focusing solely on the relative positions of the parties will usually end in stalemate. The solution to such an impasse could be found by asking whether substantial justice could be done in the appropriate forum.[85] In other words—relying on the fundamental principle of FNC—one must ask if the deprivation of a legitimate personal or juridical advantage would prejudice the opportunity for substantial justice, where it would not, then the parties must take the natural forum as they find it.

The prime examples of legitimate personal or juridical advantages, as discussed by Lord Goff in *Spiliada*, concern rules for discovery, power to award interest, scale of damages and limitation periods.[86] Whilst differences between the systems governing these factors may differ quite substantially in some cases, the mere fact that granting a FNC stay would force the claimant into a less advantageous system will not suffice to resist its granting. The court must be satisfied that

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[78] ibid 476.
[79] *Spiliada* (n 41) 478.
[80] JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 436.
[81] *Connelly v RTZ Corp* (n 73).
[82] ibid 872.
[83] [2000] 1 WLR 1545, 1559 (HL).
[84] *Spiliada* (n 41) 482.
[85] ibid 482.
[86] ibid 482–484.

the loss of a personal or juridical advantage would mean that substantial justice will not, or may not, be done.[87] Even where the loss of an advantage could prejudice the securing of substantial justice, it can often be overcome by way of a conditional grant of stay, whereby the situation is effectively remedied by the defendant undertaking certain binding commitments, e.g. to waive a foreign time limitation.[88]

The purpose behind *Spiliada* was to establish a more even-handed approach toward the interests of both parties by defining a doctrine that would be more objective.[89] As a result, the substantial weight that was generally afforded a legitimate personal or juridical advantage of trial in England was reduced, thereby increasing the likelihood of dismissal. This approach was also justified by the desire of the English courts to avoid entering into the task of comparing the quality of justice between English courts and those of foreign jurisdictions. As observed in *Cheshire, North & Fawcett*, '[t]he emphasis in the House of Lords is now very much on chauvinism being replaced by judicial comity.'[90]

The liberal nature of *Spiliada* test, insofar as a stay on grounds of FNC is now more easily secured, is reinforced by the deferential stance taken by appellate courts towards a trial judge's determination. In *Spiliada*, Lord Templeman explained that when it comes to the weighting of the factors under consideration, clear guidance could not be provided and instead it must be left to the discretion of the trial judge.[91] As such, he opined that 'appeal should be rare and the appellate court should be slow to interfere.'[92] Once a stay is granted the chances for overturning the decision on appeal are slim.

2.3.4 Concluding Remarks

Given how intimately related the doctrine of FNC is with the common law, it is surprising that its appearance in England only occurred so late in the day. Prior to this, the English courts had consistently shown themselves reluctant to decline to exercise their jurisdiction, only doing so on the basis of a highly restrictive doctrine which required a showing of vexation or oppression. Claimants could rely on their choice of an English forum in all but the rarest of circumstances. This began to change in the 1970s when judicial attitudes shifted. The recognition of the need for greater international judicial comity, twinned with the perceived rise in forum shopping precipitated the metamorphosis of the restrictive *St Pierre* rule into the more liberal doctrine of FNC.

2.4 Other Jurisdictions

Although this chapter focuses on FNC in the United Kingdom and the United States, these are not the only States within whose legal systems the doctrine of FNC is to be found. FNC is not

[87] *The Polessk* [1996] 2 Lloyd's Rep 40, 49-51 (Adm Ct).
[88] As occurred in *Baghlaf al Zafer Factory Co v Pakistan National Shipping Co (No 2)* [2000] 1 Lloyd's Rep 1 (CA).
[89] JJ Fawcett 'Trial in England or Abroad: The Underlying Policy Considerations' (1989) 9 *Oxford J Legal Stud* 205, 218; JG Collier 'Staying of Actions and Forum Non Conveniens: English Law Goes Scotch' (1987) 46 *Cambridge LJ* 33, 35.
[90] Fawcett and Carruthers (n 80) 439.
[91] *Spiliada* (n 41) 465.
[92] ibid.

unique to the US, nor indeed to the UK, it has a presence in many jurisdictions throughout the world. This is a reality that has important implications for this work. Not only is it wise to understand the doctrinal diversity that exists, it is important to appreciate the extent of international support for FNC in general. Admittedly, the support for FNC within the specific context of aviation passenger actions should not be assumed from its wider acceptance, but it is certainly a factor to be taken into consideration when it comes to evaluating choice of forum within an international regime such as MC99. Proposals for reform should be made in light of the interests of the various States involved and this chapter, as well as the following chapter which looks at civilian attitudes to jurisdiction and FNC, aim to give a representative picture of these interests. Whilst it is beyond the scope of this work to provide an exhaustive cataloguing of the various versions of FNC or cognate doctrines, some brief notes and observations are appropriate.

2.4.1 *Spiliada* Jurisdictions and Others

Firstly, a large number of common law jurisdictions have endorsed and apply the House of Lords test and can thus be regarded as *Spiliada* jurisdictions, for example: Canada,[93] New Zealand,[94] Hong Kong,[95] Ireland,[96] Cyprus,[97] Malaysia,[98] Singapore,[99] and Brunei.[100] In the case of Canada, special mention should be made of Québec. As a jurisdiction with a heavy civil law component one might expect it to be hostile to the doctrine of FNC but, surprisingly, Article 3135 of the Québec Civil Code[101] provides a discretionary authority to decline jurisdiction, albeit only in exceptional circumstances.[102]

While *Spiliada* has become a stable ruling authority for a significant portion of the common law world, there are jurisdictions which have elected to chart a different path. Other versions of the doctrine may be found, for example, in India[103] and the Philippines.[104] In South Africa, the Dutch law influence appears to have won out over the English common law, where, aside from some

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[93] The leading authority on FNC in Canada is *Amchem Products Inc v (British Columbia) Workers Compensation Board* [1993] 1 SCR 897 (Canada).

[94] *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA) (New Zealand).

[95] *The Adhiguna Meranti* (n 99); *SPH v SA* [2014] HKCFA 56, [50]-[51].

[96] *Intermetal & Trans-World (Steel) Ltd v Worslade Trading Ltd* [1998] 2 IR 1 (SC) (Ireland).

[97] Hatzimihail cites the case of *Potavina v Potavin* (Limassol DCt 27.10.2014) as an example of the grant of a stay on grounds of FNC by a Cyprus court. NE Hatzimihail 'Cyprus' in P Beaumont and others (eds), *Cross-Border Litigation in Europe* (Bloomsbury 2017) 275.

[98] See *American Express Bank Ltd v Mohamed Toufic Al-Ozeir* (1995) 1 Malayan LJ 160, 167 (Malaysia SC).

[99] *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 Sing LR 391 (CA); *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 (CA) (Singapore); *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA) (Sing); *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 (CA) (Sing).

[100] *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC) (appeal taken from Brunei).

[101] Article 3135 of the Québec Civil Code 2001.

[102] Brand and Jablonski (n 1) 83–85. See generally J Talpis and SL Kath 'The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point' (2000) 34 *Revue Juridique Themis* 761.

[103] *Enercon India v Enercon GmbH* [2014] INSC 95; *Modi Entertainment Network v WSG Cricket Pte Ltd* [2003] INSC 16; *Horlicks Ltd v Heinz India* [2009] INDLHC 4339; *M/S Moser Baer India v Philips Electronics NV* [2008] INDLHC 1341.

[104] *Communication Materials & Design Inc v ASPAC Multi-Trade Inc* [1996] PHSC 490 (WorldLII) (Philippines). The existence of the doctrine is also confirmed by the Supreme Court in *Bank of America Int'l Ltd v Court of Appeals* [2003] PHSC 195 (WorldLII) (Philippines); *First Philippine Int'l Bank v Court of Appeals* [1996] PHSC 17 (WorldLII) (Philippines).

statutory exceptions, the doctrine has no place in its law.[105] This was recently affirmed by the Supreme Court of South Africa in *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission*, where it stated that 'our law does not recognize the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.'[106] However, the Supreme Court of South Africa has recognized that it does have the inherent power, in exceptional circumstances, to decline jurisdiction to prevent an abuse of process and thus some general scope for declining jurisdiction exists.[107]

Israeli courts, taking their lead from the English common law, initially followed a liberalized version of the *St Pierre* standard for FNC.[108] However, there was a shift in attitude in the 1980s which saw the courts adopt a flexible US standard of FNC.[109] Since then, the pendulum has swung back toward a more restrictive approach.[110]

The Australian doctrine of FNC is especially interesting because it offers an intriguing opportunity to explore a common law jurisdiction which is bucking the trend of liberalization of FNC and which has been outspoken and pragmatic in its criticisms of the more liberal approach to granting dismissals.

2.4.2 Australia

> Despite its Latin tag, *forum non conveniens* is far from a dry, legalistic issue. Indeed it is fair to say that a highly emotional debate has raged on this topic in recent years, with accusations of "parochialism", "naked and open chauvinism" and even outright racism on one side, and "chaotic transnational jurisprudence" and lack of clear guidance on the other.[111]

As the above quotation indicates, the recent history of FNC in Australia has been a heated one, full of controversy. Prior to this, there is evidence that the Australian courts, much like the English courts pre-*Atlantic Star*, adhered to a vexatious and oppressive standard for granting stays.[112] However, in 1988, the Australian High Court gave in-depth consideration to its position, post-*Spiliada*, in *Oceanic Sun Line Special Shipping Co Inc v Fay*.[113] One of the fundamental questions facing the court was whether to follow the trend of liberalization represented by *Spiliada*.

Three different approaches can be identified in *Oceanic*. Brennan J held fast to the existing standard of vexation and oppression, a benefit of which was that it did not call for the invidious task of comparing the quality of justice between the local and foreign forums, something he

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[105] E Spiro 'Forum Non Conveniens' (1980) 13 *Comparative & Int'l LJ of South Africa* 333, 337 n 44; HCAW Schulze 'Forum Non Conveniens in Comparative Private International Law' (2001) 118 *South African Law Journal* 812, 827–828; Spiro (n 122) 337–338.

[106] [2012] ZASCA 134, [19]; see also *Weissglass NO Savonnerie Establishment* [1992] ZASCA 95, [26].

[107] Spiro (n 105) 337–338.

[108] M Karayanni *Conflicts in a Conflict* (OUP 2014) 60. ibid at 84-85 citing *Hakhamov v Schmidt (Case 280/57)* (1958) 12 PD 59 (SC) (Israel); *Perlmutter v Perlmutter (Case 100/76)* (1976) 30(3) PD 355 (SC) (Israel).

[109] Karayanni (n 108) 86 referring to *Abu Attiya v Arabtisi (Case 300/84)* (1985) 39(1) PD 365 (CA).

[110] Karayanni (n 108) 95.

[111] P Prince 'Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach Is Better' (1998) 47 *ICLQ* 573.

[112] A Gray 'Forum Non Conveniens in Australia: A Comparative Approach' (2009) 38 *Common L World Rev* 207, 214.

[113] (1988) 165 CLR 197 (HCA Australia).

viewed as inevitable under the *Spiliada* approach.[114] The other four judges were split, Wilson and Toohey JJ would have adopted *Spiliada* and argued that the "vexatious and oppressive" test of *St Pierre* was an anachronism, ill-suited to the modern world.[115] Deane and Gaudron JJ were both in favour of liberalizing the vexatious and oppressive test and suggested applying a "clearly inappropriate forum" standard.[116] Unsurprisingly, given the divergence of approach, uncertainty reigned following *Oceanic* and it was not long before the High Court was once against faced with clarifying its stance. This came with the case of *Voth v Manildra Flour Mills Pty Ltd*,[117] wherein the court elected to buck the trend of liberalization and adopt a highly restrictive approach to FNC.

The *Voth* case involved two Australian companies who brought an action in New South Wales against a Missouri tax advisor for professional negligence which had resulted in financial loss in the USA and Australia. The court accepted that the high burden imposed by *St Pierre* test could lead to injustice so it considered the approaches of *Spiliada* and *Oceanic*. However, it was not prepared to follow the liberal approach of *Spiliada* and instead adopted the "clearly inappropriate forum" test of Deane and Gaudron JJ from *Oceanic*, which it described as a test which 'focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums.'[118]

The fundamental difference between the "clearly inappropriate forum" test and that of *Spiliada*, as well as other versions of the doctrine, is that it refuses to consider the appropriateness of the foreign forum and instead focuses itself solely on the appropriateness of the domestic forum. This approach means dismissal will be refused unless the Australian forum is clearly inappropriate, it matters not that the balance of convenience favours the foreign forum, or even that the foreign forum is clearly the more appropriate one.[119]

Any doubts that the Australian court was rejecting a liberal approach to FNC was clarified by the court statement that, the jurisdiction to grant a stay or dismiss the action is to be exercised "with great care" or "extreme caution".'[120] The restrictiveness of the approach has been demonstrated by subsequent cases, wherein stays have been granted in only a small minority. Indeed, some commentators have described Australia as the most difficult common law jurisdiction in which to attain a stay on the grounds of FNC.[121]

The strength of the Australian doctrine is that it takes account of the appropriateness of the plaintiff's choice of forum whilst simultaneously requiring a high—perhaps excessively high—burden for declining jurisdiction, such that provides a greater degree of certainty and predictability. As will be discussed in due course, the civil law systems generally place emphasis on the value accorded parties by legal certainty and predictability with respect to jurisdiction. This would certainly make it more attractive to civilian tastes than the liberal *Spiliada* doctrine of FNC or indeed that of the United States, to which we now turn our attention.

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[114] ibid 238–239.
[115] ibid 212.
[116] ibid 248.
[117] (1990) 171 CLR 538 (HCA Australia).
[118] ibid 558.
[119] ibid.
[120] ibid 554.
[121] Brand and Jablonski (n 1) 100.

2.5 United States of America

Seen by many as the forum of choice for civil litigation due to the habitual generosity of its juries, its far-reaching rules of discovery and much more besides, it should come as little surprise that recourse to the doctrine of FNC is widespread in US courts and, therefore, that there exists an abundance of case law and commentary to explore. This section will, first and foremost, provide a general description of the US doctrine's key features and principles, as well as reveal its underlying policies and principles. However, this section also pursues two critical secondary objectives; first, to expose an inconsistency that lies at the heart of accepted interpretation of the Supreme Court's jurisprudence on FNC and secondly, to dispel the notion that there exists a single doctrine of FNC within the US. To fully appreciate the special status of FNC within the US, one must accept the reality that the US is home to a large variety of divergent doctrines of FNC, both at state and federal levels.

2.5.1 Historical Origins

Whilst the modern doctrine of FNC began with two US Supreme Court cases decided on the same day in 1947,[122] there exists a long history leading up to that moment at both state and federal level, consideration of which provides a valuable frame of reference for emergence of the modern doctrine. While the US courts and commentators agree on the Scottish origins of the doctrine,[123] there is little evidence to support its direct importation from Scotland. The term *forum non competens* does not feature at all in US jurisprudence and *forum non conveniens* only begins to appear from early in the 20th century. Instead, it seems the doctrine developed in the US in a 'somewhat parallel, but separate and independent manner'[124] to Scotland, merging itself with the limited instances of the exercise of judicial discretion to decline jurisdiction by federal courts and some state courts.

From the beginning, a constitutional law question created a hurdle to the emergence of FNC, this was whether it was constitutionally possible for US courts to decline jurisdiction at all. Chief Justice Marshall stated, in the 1821 case of *Cohens v Virginia*: 'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given', further opining that, '[t]he one or the other would be treason to the Constitution.'[125] However, it seems clear, at least within admiralty, that federal courts had the power to decline jurisdiction.[126] The strength of opinion was of the view that any discretion to decline jurisdiction was unique to admiralty cases involving foreigners and that otherwise these courts were duty-bound to exercise jurisdiction. On the other hand, there were sufficient exceptions evidenced within the case law to support the argument for the possibility of a more general discretionary power of federal courts.[127] Uncertainty

[122] *Gulf Oil Corp v Gilbert* 330 US 501 (1947); *Koster v (American) Lumbermens Mutual Casualty Co* 330 US 518 (1947).

[123] The US Supreme Court noted the Scottish origins of the doctrine in *Piper Aircraft Co v Reyno* 454 US 235, 248 n 13 (1981) (*Reyno III*).

[124] CP Rogers 'Scots Law in Post-Revolutionary and Nineteenth Century America: The Neglected Jurisprudence' (1990) 8 *Law Hist Rev* 205, 211.

[125] *Cohens v Virginia* 19 US 264, 404 (1821) (1821).

[126] See *Mason v The Blaireau* 6 US 240 (1804); *Willendson v Forsoket* 29 F Cas 1283 (D Pa 1801); *The Maggie Hammond* 76 US 435, 451–452 (1866); *The Belgenland* 114 US 355, 363–364 (1885).

[127] See e.g., *In re One Hundred and Ninety-Four Shawls* 18 Fed Cas 703, 704 (SDNY 1848).

thus reigned over the issue of the power to decline jurisdiction. Firstly, the nature and extent of that power was obscure. Second, even within admiralty, the exercise of the discretion to decline jurisdiction eluded formalization.[128] For these reasons, it is impossible to discern from these early federal manifestations much more than the sense of a nascent concept resembling FNC in some of its fundamental features, but falling short of a formal doctrine.

Turning to state level jurisprudence, ample evidence exists of some state courts declining to exercise jurisdiction in non-admiralty cases, so much so that some commentators identify state courts as the origin of FNC in the US.[129] Not only do these state law cases show courts declining jurisdiction outside admiralty, some of the familiar features of FNC were present in the courts' decisions, i.e. discretion, availability of an alternative forum and considerations of convenience.[130] The invocation of docket congestion as a justification for declining jurisdiction must also be noted.[131] Although such overt consideration of issues of public policy are not characteristic of FNC in the Scottish or English experience, they would come to play a central role in the US doctrine.

In contrast to the federal courts, state courts provide evidence of a broader discretion to decline jurisdiction that admitted for greater formalization as a doctrine than its federal manifestation. However, much of the state law precedent for a doctrine approximating FNC came from a single source, i.e. the New York courts, who frequently declined jurisdiction in tort claims.[132] While, at least where foreigners were involved, case law can found for the same proposition from other courts, such as those of Michigan,[133] Wisconsin[134] and Texas,[135] it must be acknowledged that, in the main, only a small number of states actually adopted something akin to FNC, whereas many states had either not considered the matter or had expressly rejected it.[136]

Thus, at the beginning of the 20th century, the status of FNC within the US was far from clear. Some kindred notion existed in a vague form at federal level, and in a handful of states a more formal doctrine had found a foothold. Against this backdrop, in 1929, a Wall Street lawyer by the name of Paxton Blair published a law review article which would go on to have a considerable influence on the development of the doctrine of FNC in the US. Blair's article is credited with firmly attaching the Latin term, i.e. *forum non conveniens,* to the doctrine and it was his thesis that the US courts had been applying it for years without realizing. Blair declared:

> Upon an examination of the American decisions illustrative of the doctrine of *forum non conveniens*, it becomes apparent that the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Molière's M. Jourdain, who found he had been speaking prose all his life without knowing it.[137]

Blair's thesis arrived at an opportune moment when solutions were being sought to address the growing problem of docket congestion in large centres of population in the US, particularly New

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[128] Bies (n 1) 496 n 30.

[129] RA Brand 'Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments' (2002) 37 *Tex Int'l LJ* 467, 475 n 50; Braucher (n 5) 914.

[130] RS Foster 'The Place of Trial: Interstate Application of Intrastate Methods of Adjustment' (1930) 44 *Harv L Rev* 41, 53; Bies (n 1) 496 n 30.

[131] Noted by the court in *Collard v Beach* 87 NYS 884, 885-886 (NY App Div 1904).

[132] Braucher (n 5) 917.

[133] *Great Western Railway Company of Canada v Miller* 19 Mich 305, 315 (Mich Sup Ct 1869).

[134] *Disconto Gesellschaft v Terlinden* 106 NW 821 (Wis Sup Ct 1906).

[135] *Morris v Missouri Pacific Railway Co* 14 SW 228 (Tex Sup Ct 1890).

[136] Barrett (n 1) 388 n 40.

[137] Blair (n 37) 21–22.

York. Blair's article represented an invitation to formally adopt FNC but it also provided a convenient hook upon which to hang it. The need for new legislation could be avoided since it was allegedly already part of the 'inherent powers possessed by every court of justice.'[138]

At that time, the federal courts still considered themselves duty bound to exercise jurisdiction (except in admiralty) and this impeded the development of a general federal doctrine.[139] It is commonly accepted that the main reason behind the non-adoption of the doctrine at state level was largely down to doubts regarding its compatibility with the privileges and immunities clause of the US Constitution.[140] Blair's thesis provided powerful encouragement and support for those who wished to formally adopt FNC. However, it would not be until the federal matter was resolved that the path would be fully cleared. This began with a shift in the US Supreme Court's attitude toward accepting the doctrine beyond admiralty. First, in the 1932 case of *Canada Malting Co Ltd v Paterson Steamship Ltd*[141] and then developed further in subsequent judgments.[142] These cases edged the US Supreme Court closer and closer to the express recognition of a general federal doctrine of FNC which eventually came in 1947 with *Gulf Oil Corp v Gilbert* and *Koster v (American) Lumbermens Mutual Casualty Co.*[143]

This brief sojourn through the pre-history of FNC in the US courts demonstrates the obscurity of the doctrine's origins in that jurisdiction. While there was evidence for the exercise of a discretionary power to decline jurisdiction, exhibiting some of the key features of FNC, there was a manifest absence of doctrinal substance. Thus, when it came time for the US Supreme Court to address the status of FNC at federal level (from which the state courts would take their lead) it was not starting from a blank canvas, it had a vague proof of concept but had to find the criteria necessary to establish a general doctrine with practical utility.

2.5.2 A Federal Doctrine

In *Gilbert*, a Virginia resident brought an action in New York alleging negligence against a Pennsylvania oil company for the destruction of Gilbert's warehouse in Virginia. *Koster*, a companion case to *Gilbert* decided the same day, concerned a derivative action brought in New York against the defendant insurance company relating to the alleged breach of fiduciary duties by officers of the company. Koster (a New York resident) brought the action as a member and policyholder of Lumbermens Mutual Casualty (an Illinois insurance company) in the right of the company and on behalf of all the members and policyholders of the company. In both cases, the district courts had granted FNC dismissals, in *Gilbert*, the court of appeals had reversed, whereas in *Koster*, it had upheld the dismissal. The subsequent appeals gave the US Supreme Court the opportunity to have its say.

The first question, in ways the most essential, to be addressed in *Gilbert* was whether federal courts had the inherent power to decline jurisdiction. Giving the opinion for the majority, Jackson

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[138] ibid 1.
[139] Barrett (n 1) 394.
[140] ibid 389; Blair (n 37) 3.
[141] 285 US 413, 423 (1932).
[142] See e.g., *Rogers v Guaranty Trust Co* 288 US 123 (1933); *Williams v Green Bay & Western Railway Co* 326 US 549 (1946).
[143] *Gilbert* (n 122); *Koster* (n 122).

J stated that the Court, 'in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.'[144] Insofar as competence was concerned, the Supreme Court formally affirmed the intrinsic power of federal courts, whether in admiralty, law or equity, to decline jurisdiction.

Justice Jackson then identified the fundamental elements of the doctrine. He began by stating that FNC 'presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.'[145] In his view, '[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized.'[146] These are certainly vital elements to the core proposition of FNC and agree with the fundamental features shown by the earlier federal and state cases discussed above, but, they are essentially silent on the practical doctrinal content of FNC. In other words, what are the criteria for choice and against what standard are they assessed?

Jackson J considered it unwise to attempt to catalogue all the various circumstances in which dismissal would be warranted, opining that it was ultimately a discretionary matter for the court. While a precise itinerary of considerations or formula for their combination was beyond reach, the factors to be considered were broadly defined by the Supreme Court under the headings of private and public interest factors.[147] These were to provide the hitherto absent criteria necessary to guide a federal court in the exercise of its discretion when applying the doctrine of FNC.

2.5.2.1 Private Interest Factors

In its private interest factor analysis in *Gilbert*, the Supreme Court noted, in respect of the New York forum, that the plaintiff was not a resident of New York, that no event connected to the dispute occurred there and that no witnesses, except perhaps for experts, resided there either. In so doing, the Court was emphasizing the lack of connecting factors between the dispute and the forum insofar as it could indicate convenience for the plaintiff for trial in that forum. In fact, the only factor that explained the plaintiff's choice of trial in New York was the fact that a New York jury might be more comfortable with awarding the high damages sought-after than a jury in Lynchburg, Virginia. The district court had rejected this justification and the Supreme Court was similarly dismissive; from which it can be concluded that the private interest must be viewed as legitimate. In the end, therefore, the plaintiff had been unable to satisfactorily indicate any justifiable reason for his choice of forum; his legitimate private interest in trial in the New York forum, compared to that in Virginia, was weak. On the other side, the defendant was able to point to several factors connecting the case to Lynchburg; notably, the fact that the plaintiff and every other person who participated in the allegedly negligent acts, as well as most witnesses, resided in or around Lynchburg. The private interest factors thus pointed strongly toward the convenience of trial in Virginia.

By private interest factors, the court was referring specifically to the interests of the parties to the litigation and defined these as, 'practical problems that make trial of a case easy, expeditious

[144] *Gilbert* (n 122) 504.
[145] ibid 506–507.
[146] ibid 507.
[147] ibid 508.

and inexpensive'.[148] The Supreme Court provided a list of six important considerations, which have subsequently been adopted by courts as a guide for conducting the private interest analysis.[149] Those considerations are as follows. (1) Relative ease of access to sources of proof. In an aviation context, this encompasses access to documentation such as crew training or safety records.[150] (2) Availability of compulsory process for attendance of unwilling witnesses.[151] (3) The cost of obtaining the attendance of willing witnesses.[152] (4) Where appropriate, the possibility of viewing premises. In the specific case of aviation litigation, this usually encompasses accessibility to the crash site and wreckage.[153] (5) Questions as to the enforceability of a judgment.[154] (6) All other practical problems that make trial of a case easy, expeditious and inexpensive. Cleary, this final category of considerations is something of a catch-all under which a wide range of factors might be considered. For example, the relative costliness of litigation has been considered under this category in a number of aviation cases.[155] The ability to implead third parties (a topic addressed in Chapter 8 of this work) has also been identified under this category in aviation litigation.[156]

2.5.2.2 Public Interest Factors

Categories of public interest factors were not specifically defined in *Gilbert*. Instead, Jackson J elected to present indicative examples.[157] He referred to administrative difficulties arising from court congestion and the burden of imposing jury duty upon a community without a connection to the controversy involved. He remarked that some cases may be of wider interest to the community in which the cause of action arose and that there would thus be a local interest in having the case litigated in the locality. As noted in the Introduction, this was a factor in favour of FNC dismissal in *West Caribbean Airways* and is a frequent factor in aviation litigation given the international nature of the activity. In a diversity action, such as *Gilbert*, there was an interest in having the case heard by a forum familiar with the state law that would be applied rather than a forum to which the law may be foreign. Avoidance of complex conflict of laws questions was also regarded as a public interest factor. These latter two examples do not immediately conjure up the public interest, being questions of trial convenience for the court; however, the public interest involved here can be seen to be that of the public's interest in the efficient use of judicial resources. While

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[148] ibid.

[149] *Gilbert* (n 122) 508; *Reyno III* (n 123) 241 n 6.

[150] See e.g., *Chhawchharia v Boeing Co* 657 F Supp 1157, 1161 (SDNY 1987); *In re Air Crash off Long Island New York, on July 17, 1996,* 65 F Supp 2d 207, 216 (SDNY 1999.

[151] In an aviation context, see e.g., *Grodinsky v Fairchild Industries Inc* 507 F Supp 1245, 1250 (D Md 1981); *In re Air Crash Near Peixoto de Azeveda, Brazil, on September 29, 2006,* 574 F Supp 2d 272, 286–287 (EDNY 2008).

[152] See e.g., *In re Disaster at Riyadh Airport, Saudi Arabia on August 19, 1980,* 540 F Supp 1141, 1148–1149 (DC Cir 1982); *Coyle v PT Garuda Indonesia* 180 F Supp 2d 1160, 1176 (D Oregon 2001).

[153] See e.g., *Melgares v Sikorsky Aircraft Corp* 613 F Supp 2d 231, 247 (D Conn 2009); *Delgado v Delta Air Lines Inc* 43 F Supp 3d 1261, 1267 (SD Fla 2013).

[154] See e.g., *Air Crash Near Peixoto de Azeveda* (n 151) 287.

[155] For example, the administrative burden to the parties involved in translation services has been raised in a number of cases. See e.g., *Dahl v United Technologies Corp* 472 F Supp 696, 700 (D Del 1979); *Fatkhiboyanovich v Honeywell Int'l Inc* No 04-CV-4333, 2005 WL 2475701 *5 (DNJ 05 Oct 2005).

[156] See e.g., *Reyno III* (n 123) 259; *Pain v United Technologies Corp* 637 F 2d 775, 790 (DC Cir 1980); *Van Schijndel v Boeing Co* 434 F Supp 2d 766, 780 (CD Cal 2006).

[157] *Gilbert* (n 122) 508-509.

not attracting the same degree of attention, the public interest factors were also weighted in favour of dismissal in *Gilbert* and in *Koster*.[158]

The emphasis in *Gilbert* and *Koster* was on the private interest factors and as a result the exposition of the public interest factors was brief and lacking in detail. However, in the later Supreme Court judgment in *Piper Aircraft Co v Reyno*,[159] the Court would speak of public interest factors as those affecting 'the convenience of the forum' by impacting on 'the court's own administrative or legal problems'.[160] Distilling *Gilbert*, the Court in *Reyno* listed the following (non-exhaustive) factors.[161] (1) Administrative difficulties flowing from court congestion.[162] (2) Local interest in having localized controversies decided at home. This can be a compelling factor in aviation litigation cases as the courts will defer to the forum with which the accident has the closest connection, e.g. because of the location of the accident or the nationality of the victims.[163] Indeed, it is not uncommon in multi-party litigation for the defendant to settle with US plaintiffs in order to facilitate FNC dismissal against the foreign plaintiffs.[164] (3) Interest in having the trial in a forum familiar with the governing law. However, US courts have sometimes only regarded this as carrying minor weight for dismissal given the experience of their courts with international litigation.[165] (4) Avoidance of unnecessary problems of conflict of laws or in the application of foreign law.[166] For example, in a case involving 100 claims arising from a Spanish aviation accident, the Central District of California held that the difficulties involved in applying Spanish law to the great majority of the claims involved favoured dismissal.[167] (5) Unfairness of burdening local citizens in an unrelated forum with jury duty. To give an aviation example, the lack of local interest in a controversy relating to the crash occurring in Greece, to a Cypriot carrier, where all the decedents were non-US citizens were some of the factors justifying the court's conclusion that it would be unfair to press local jurors into service for the case.[168]

2.5.2.3 Balance of Convenience

Identifying the factors to be considered is only part of the FNC process, a process whose entire purpose, it should be remembered, is to facilitate a choice of forum in the event of concurrent jurisdiction. In order to arrive at a choice on the basis of considering these factors, some method of assessment is required. It was clear that *Gilbert* intended a balancing test to apply, but in order to balance interests they must be weighed against some common scale. What criterion/standard was to be applied? Was it the same for private interest factors as for public interest factors? Were

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[158] *Gilbert* (n 122) 511–512; *Koster* (n 122) 526.
[159] The case of *Reyno* is considered in detail below, see 2.5.4.
[160] *Reyno III* (n 123*)* 241.
[161] *Reyno III* (n 123) 241 n 6.
[162] See e.g., *Nolan v Boeing Co* 762 F Supp 680, 684 (ED La 1989); *Air Crash Near Peixoto de Azeveda* (n 151) 287–288.
[163] See e.g., *Lueck v Sundstrand Corp* 236 F 3d 1137, 1147 (9th Cir 2001); *Air Crash over the Mid-Atlantic* (n 189) 845–846.
[164] See e.g., *Disaster at Riyadh Airport* (n 152).
[165] See ibid 1153.
[166] *Reyno III* (n 123) 251 citing *Gilbert* (n 122) 509.
[167] *In re Air Crash at Madrid, Spain, on August 20, 2008,* 893 F Supp 2d 1020, 1041–1042 (CD Cal 2011). See also *Macedo v Boeing Co* 693 F 2d 683, 690 (7th Cir 1982).
[168] *Clerides v Boeing Co* 534 F 3d 623, 630 (7th Cir 2008). See also *Air Crash over Taiwan Straits* (n 184) 1206.

the two sets of factors alternative grounds for dismissal or should they be measured cumulatively against a common standard? These and other questions bearing on the applicable standard and the practical application of the balancing test were not adequately addressed by the Supreme Court in *Gilbert* and *Koster* and this lead to confusion and division among the lower federal courts.

When it came to private interests, Jackson J had defined these as 'practical problems that make trial of a case easy, expeditious and inexpensive',[169] in so doing, the suggestive criterion was one of trial convenience for the parties. One would thus expect that the *forum conveniens* would be the one in which, from the perspective of the private interests, trial would be easiest, cheapest and most efficient. However, Jackson J did not leave the matter here, a mere balance of convenience was not sufficient, something more was necessary. Immediately after referring to trial convenience, he stated that '[t]he court will weigh relative advantages and obstacles to fair trial.'[170] Much hinges on what he meant by fair trial. It is submitted that Jackson J meant to identify the threshold or standard of inconvenience required before a dismissal will be granted. The point he was attempting to emphasize was that a mere balance of convenience would not suffice to warrant dismissal, the degree of inconvenience must cause unfairness to the defendant.

While it has the obvious advantage of giving flexibility to the doctrine, the notion of fairness, without more, is a vague and unhelpful criterion for choice. The guidance to be found in *Gilbert* and *Koster* as to the meaning of fairness is far from unequivocal. Jackson J certainly considered that dismissal on grounds of FNC should be *exceptional*[171] and as something to be granted only in *rare cases*.[172] Indeed, Jackson J stated that 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should *rarely* be disturbed.'[173] However, in *Koster*, he also referred to the extreme standard of vexation and oppression.[174] The presence of two distinct standards, i.e. "vexation/oppression" and "strongly in favour", left the tipping point for dismissal ill-defined and led to judicial and academic uncertainty[175] that continues to generate doctrinal inconsistency to this day.

When it came to the balancing of public interest factors, *Gilbert* and *Koster* are far from illuminating. This is likely a result that dismissal in both cases was overwhelmingly supported by the balance of private interest factors and, perhaps for this reason, the two cases attended less to the matter of the aforementioned public interest factors. The resulting difficulty was that it was unclear what weight was to be given to public interest factors and what place their consideration was to be given in the overall FNC analysis.[176] Were private and public interest factors to be balanced together or separately? In other words, was dismissal dependent on the cumulative balance of these factors, or, did the two sets of factors provide alternative grounds for dismissal? Again, ambiguity reigned as support for each interpretation could be found in the Supreme Court judgments. The stronger interpretation, and the one ultimately affirmed by the Supreme Court in 1981 in *Reyno*, was that a court must, in exercising its discretion under the doctrine of FNC, give

[169] *Gilbert* (n 122) 508.
[170] ibid.
[171] ibid 504.
[172] ibid 509.
[173] ibid 508 (emphasis added).
[174] *Koster* (n 122) 524.
[175] See Braucher (n 5) 930–931.
[176] See Barrett (n 1) 408–409.

reasonable consideration to both private interest factors and public interest factors in the balancing of interests.[177] This accords with the view expressed in *Koster* of FNC as amounting to an '*ultimate inquiry* [of] where trial will best serve the convenience of the parties and the ends of justice'.[178]

2.5.2.4 Concluding Remarks on *Gilbert/Koster*

The majority decision of the US Supreme Court in *Gilbert* and *Koster* established the federal criteria for FNC.[179] The decisions confirmed that the federal courts have an inherent power to decline jurisdiction and identifying FNC as the doctrine which furnishes criteria for making a choice between forums. Although ultimately a question of discretion, such discretion was to be guided by consideration of factors which could be broadly identified under the headings of private interest and public interest factors. However, *Gilbert* and *Koster* were at times vague, leaving a number of issues in a state of uncertainty. There were two particularly troublesome issues. First, the precise standard(s) of inconvenience required to justify dismissal. Taking *Gilbert* and *Koster* together, it is not surprising that commentators and courts alike have read them as at times supporting an abuse of process version of FNC (a standard of vexatious and oppressive) and at other times as requiring a most appropriate forum version (a standard of strongly favors).[180] Second, the question of the deference due the plaintiff's choice of forum and to what extent, the FNC analysis ought to take account of the citizenship and residence of the plaintiff, most specifically the case of the foreign (i.e. non-U.S.) plaintiff.

When it comes to exploring the legacy of *Gilbert* and *Koster* and describing how the doctrine has come to be applied by the US courts, two issues are of primary relevance within the context of this work. First, the resolution of the ambiguity surrounding the precise standard of inconvenience required to justify dismissal. Secondly, an issue which relates to the first, is the question of whether, and to what extent, the FNC analysis ought to take account of the nationality of the plaintiff, most specifically the case of the foreign (i.e. non-US) plaintiff. Should the foreign plaintiff be subject to a different standard? This is, of course, especially relevant in the case of aviation litigation since such cases are frequently transnational in nature. Therefore, it is no surprise that the next most significant Supreme Court case in the history of FNC in the US should be an aviation disaster case, i.e. *Piper Aircraft Co v Reyno*.

2.5.3 Codification: Section 1404(a)

Gilbert and *Koster* both concerned the application of FNC by federal courts to competing US federal forums, in other words, they were inter-state cases, rather than international. This national scope of the doctrine was effectively removed from the ambit of the federal doctrine of FNC by

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[177] *Reyno III* (n 123) 257.
[178] *Koster* (n 122) 527 (emphasis added).
[179] Abbott (n 9) 136.
[180] See Robertson (n 58) 402–403; A Reed 'To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages' (2000) 29 *Ga J Int'l Comp L* 31, 47–48 JD Yellen 'Forum Non Conveniens: Standards for Dismissal of Actions From United States Federal Courts to Foreign Tribunals' (1982) 5 *Fordham Int'l LJ* 533, 542.

legislative action taken by Congress in 1948 which resulted in the enactment of Section 1404(a) of Title 28 of the US Code. Section 1404(a) provides a rule for the transfer of civil actions between federal district courts, it provides: 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.'[181] Dismissals in cases falling within the scope of § 1404(a) are thus decided on this statutory basis and not under the inherent power of the court to dismiss under FNC.

It has been claimed that § 1404(a) codified *Gilbert*.[182] Indeed, this finds some support in the Reviser's Note to § 1404(a) which stated that it had been drafted in accordance with FNC. However, the text of § 1404(a) was proposed and adopted in 1945, prior to *Gilbert* and, further still, the Congressional intent had been to make a revision of the doctrine and not merely a declaration of it.[183] The object of the revision was to make transfer more common by lowering the burden and this has been borne out by its more liberal application by the courts (comparative to FNC).[184] The courts may have applied the *Gilbert* approach to transfers under § 1404(a) but they required a much lesser showing of inconvenience than that necessary for dismissal under FNC.[185]

As a result of § 1404(a), the incidence of FNC motions in federal courts was greatly reduced. The statutory version pre-empted the majority of actions and effectively curtailed the availability of the federal common law doctrine to cases involving a foreign (i.e. non-US) forum,[186] or cases where the alternative forum was a state court (as opposed to another federal court).[187]

The introduction of § 1404(a) partially accounts for the low incidence of Supreme Court cases involving FNC after *Gilbert* and *Koster* which in turn helps to explain why there was a 30-year gap between them and the next substantial Supreme Court case, i.e. *Reyno*. This long hiatus is also accounted for by the fact that FNC dismissals were rare on account of the fact that many courts interpreted *Gilbert/Koster* as demanding a very high standard for dismissal. Indeed, it was only after a number of federal courts began to liberalize their approach to FNC in the 1970s that room was made for a case like *Reyno* and the Supreme Court was granted an opportunity to address some of the uncertainties left over from *Gilbert/Koster*.

2.5.4 *Reyno*: Refinement of the Federal Doctrine?

The litigation in *Reyno* concerned an action brought on behalf of the relatives of foreign decedents who perished in a 1976 aircraft accident in Scotland. Wrongful death suits in the Superior Court of California against the defendant manufacturers, Piper Aircraft and Hartzell Propeller (Pennsylvania and Ohio corporations respectively). The case was removed from state court to federal court. Removal is a common tactic in aviation litigation cases, often motivated by the

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[181] 28 USC §1404(a).

[182] See Abbott (n 9) 138 n 152; AM Bickel 'The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty' (1949) 35 *Cornell LQ* 12, 12–13 n 9.

[183] *Norwood v Kirkpatrick* 349 US 29, 30–32 (1955); B Currie 'Change of Venue and the Conflict of Laws' (1955) 22 *U Chi L Rev* 405, 416–418.

[184] See PJ Carney 'International Forum Non Conveniens - "Section 1404.5" - A Proposal in the Interest of Sovereignty, Comity, and Individual Justice' (1995) 45 *Am U L Rev* 415, 428-431.

[185] See Robertson (n 58) 404–405; Brand and Jablonski (n 1) 49.

[186] *American Dredging Co v Miller* 510 US 443, 449 n 2 (1994).

[187] See DL Shapiro 'Jurisdiction and Discretion' (1985) 60 *NYU L Rev* 543, 557.

perception that federal courts are more likely to grant a FNC dismissal than state courts. In *Reyno*, the case was removed to the District Court for the Southern District of California and from there it was transferred, under § 1404(a), to the District Court for the Middle District of Pennsylvania. At this point, the defendants sought dismissal on the grounds of FNC.

2.5.4.1 Deference Due the Plaintiff's Choice of Forum

The district court judge (Herman J) had applied the *Gilbert* criteria, beginning with the question of whether an alternative available forum existed. He determined that the Scottish courts satisfied this requirement, noting that the defendants had agreed to submit to the jurisdiction of those courts and to waive any statute of limitations.[188] The next step identified by the court was the plaintiff's choice of forum. The court began with the statement of Jackson J in *Gilbert* that, 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed.'[189] The plaintiff had expected the court to defer to its choice of forum but the court was quick to point out that plaintiffs were not US citizens, but foreigners, and this changed the complexion of things. Herman J stated:

> Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizen seeks to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States.[190]

Whilst he acknowledged that there is ordinarily a strong presumption in favour of a plaintiff's choice of forum, he decided that this presumption applied with less force when the plaintiff was foreign.[191] A foreign plaintiffs' choice of forum was 'entitled to little weight'.[192] On this basis, Herman J concluded that a necessary step in the FNC analysis was to determine the degree of deference owed the plaintiff's choice of forum, the result depending on whether he was foreign or not. From where did he get this notion? Its provenance is unclear. It was certainly not the brainchild of Herman J although he zealously adopted it. He provided no doctrinal rationale for his decision, instead he relied on weak or irrelevant authorities, taking his cue from other courts which had espoused similar trains of thought.[193] Examination of these authorities reveals a further poverty of judicial reasoning on the matter and only the flimsiest of rationales. What is to be found in these authorities is a stark example of false inductive reasoning. These courts concluded from the fact there were very few cases involving FNC dismissal of a US plaintiff, when compared to the dismissal of foreign plaintiffs, that a differential approach was inherent to the doctrine.

This erroneous conclusion was aided by the ambiguity in *Gilbert* and *Koster* with respect to

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[188] *Reyno v Piper Aircraft Co* 479 F Supp 727, 731 (MD Pa 1979) (*Reyno I*).
[189] ibid quoting *Gilbert* (n 122) 508.
[190] *Reyno I* (n 188) 731.
[191] *Reyno III* (n 123) 255.
[192] *Reyno I* (n 188) 732.
[193] *Farmanfarmaian v Gulf Oil Corp* 437 F Supp 910 (SDNY 1977) aff'd 588 F 2d 880 (2d Cir 1978); *Michell v General Motors Corp* 439 F Supp 24 (ND Ohio 1977); *Fitzgerald v Texaco Inc* 521 F 2d 448 (2d Cir 1975) cert denied 423 US 1052 (1976); *Olympic Corp v Société Générale* 462 F 2d 376 (2d Cir 1972); *McCarthy v Canadian National Railways* 322 F Supp 1197 (D Mass 1971); *Olympic Corp v Société Générale* 333 F Supp 121 (SDNY 1971). Examination of these authorities (and others) of these cases yield a lack of doctrinal reasoning and weak authoritative value. For full consideration of this, see D Cluxton 'Getting FNC Back on the Right Track: A Critical Re-Evaluation of the Federal Doctrine of Forum Non Conveniens' (2018) 41 *U Hawai'i L Rev* 72.

the applicable standard for dismissal. There is nothing in *Gilbert* to suggest that doctrinal adaptation was necessary in the case of a plaintiff bringing suit in a foreign forum. Indeed, Jackson J paid little attention to the foreign status of the plaintiff (i.e. that Gilbert was a Virginian suing in New York). However, *Koster* can be taken—erroneously—as supporting greater deference for a plaintiff that sues in his home forum. The key to understanding the emergence of the presumption that a higher degree of deference is owed a plaintiff suing in his home forum relies on reading *Koster* as establishing a different standard for dismissal in such cases. In other words, that *Koster* is to be distinguished from *Gilbert*. In simple terms, the view taken by some was that *Koster* intended a heavier burden (i.e. oppression and vexation) be placed on the defendant to secure dismissal where the plaintiff has sued in his home forum, as opposed to the lower burden of *Gilbert* (i.e. strongly favours) which was to apply only where the plaintiff is foreign to the forum. The existence of two distinct standards provided proof to some that a different level of deference was due the foreign plaintiff. Under this theory, the strength of the presumption in favor of a plaintiff's choice of forum (i.e. deference) was to be expressed by the standard required for dismissal.

This argument hinges on what Jackson J understood by referring to the "home forum" in *Koster*. For those who supported a differential standard, "home forum" was understood as referring to citizenship. However, the stronger line of argument is that Jackson J understood it as referring to residence and that he was only making a practical observation that where a plaintiff who sues in a forum located at his place of residence then that forum is likely to be more convenient than it would be to a foreign plaintiff. *Ipso facto*, a defendant will have to show a greater degree of inconvenience to warrant a dismissal. That a person has sued in their home forum is not conclusive proof of a defined and immutable degree of convenience from which one can infer a fixed standard to apply. Jackson J was merely making a practical observation of how the balance of convenience would normally operate in the context of a case where the plaintiff had sued in his home forum; he was not establishing a principle upon which a different standard ought to be applied.

It is submitted that the true basis for Herman J's determination, and for those of the authorities cited by him directly and indirectly, are considerations of policy, not legal principle. Up until the 1970s, FNC dismissal did not worry US plaintiffs. In the years following *Gilbert* and *Koster*, the general tendency of courts was to grant FNC dismissals only in extreme circumstances amounting to an abuse of process.[194] On account of § 1404(a), FNC motions were effectively limited to international cases which were far less numerous then than they are nowadays. The net result of all of this was that there were few FNC motions and even fewer dismissals. This changed in the 1970s when international cases became much more common (aided in part by the jet aircraft transport revolution) and federal judges complained of being overworked due to docket congestion.[195] Against this backdrop, judicial tendencies moved toward a more liberal attitude toward the dismissal of claims. Whilst this suited the US defendant it was not in the interests of the US plaintiff. On the one hand, the courts wanted to liberalize FNC, while on the other hand, they were reluctant to send US plaintiffs abroad. The solution was to limit the "liberalization" of

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[194] Robertson (n 58) 403, 404.
[195] ibid 407.

FNC by ring-fencing the US plaintiff through bestowing a greater level of deference on their choice of forum. Justification for this was based on the fact that in the cases involving FNC, i.e. international cases, dismissals were predominantly granted where the plaintiff was foreign. From this small selection of cases, the courts inferred the false conclusion that lesser deference was granted the foreign plaintiff and thus greater deference ought to be shown toward the foreign plaintiff. It is true that US plaintiffs are less likely to be dismissed from a US court on grounds of FNC, but this is not proof of a differential approach. All it proves is that, on average, a US plaintiff suing in a US forum is more likely to have sued in the *forum conveniens*. Nevertheless, this was the false logic upon which the decision of Herman J and the authorities cited by him were implicitly based. There were, of course, authorities (see below) which did not accord with this line of thought and refused to apply differing levels of deference.

Reyno was decided by the district court in 1979. In 1978, the Second Circuit had disapproved of the proposition that a foreign claimant's choice of a US forum is entitled to less weight than a US citizen in *Farmanfarmaian v Gulf Oil Corp*[196] and cited the opinion of the Ninth Circuit in *Mizokami Bros of Arizona Inc v Baychem Corp*[197] for support. What is striking about Herman J's opinion in *Reyno* is the fact that he made no mention of these authorities. In the interim between the district court's and the Supreme Court's judgments in *Reyno*, the Second Circuit had added further fuel to the fire. In *Alcoa Steamship Co v M/V Nordic Regent*, when addressing the correct standard to be applied to a US plaintiff in an FNC analysis, the Second Circuit endorsed its approach in *Farmanfarmaian*, stating that, 'American citizenship is not an impenetrable shield against dismissal on the ground of *forum non conveniens*'.[198] The court even observed that the 'trend of both the common law generally and admiralty law in particular has been away from according a talismanic significance to the citizenship or residence of the parties.'[199] The DC Circuit reached much the same view in *Pain,* concluding that citizenship was 'largely irrelevant to the factors which *Gilbert-Koster* required courts to consider when making [FNC] determinations' and opining that it regarded citizenship as serving as 'an inadequate proxy for the American residence'[200] of the plaintiff. The court specifically noted that residence was just one of the considerations to be taken into account in the FNC analysis of convenience, stating that US residence was not to be regarded as in any way dispositive.[201] There was, therefore, a great deal of judicial divergence between the federal courts on the degree of deference owed a foreign plaintiff comparative to a US plaintiff. So, when the Third Circuit reversed the decision of the district court in *Reyno,* citing *Alcoa Steamship* approvingly in the process,[202] the stage was finally set for the Supreme Court to have its say.

2.5.4.2 *Reyno* in the Supreme Court

The Supreme Court concluded that the district court had been fully justified in distinguishing

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[196] 588 F 2d 880, 882 (2d Cir 1978).
[197] 556 F 2d 975 (9th Cir 1977).
[198] 654 F 2d 147, 152 (2d Cir 1980) citing *Farmanfarmaian* (n 196).
[199] *Alcoa Steamship* (n 198) 154.
[200] *Pain* (n 156) 797.
[201] ibid 798.
[202] *Reyno v Piper Aircraft Co* 630 F 2d 149, 159 (3d Cir 1980) (*Reyno II*).

between US and foreign plaintiffs.[203] It explained that while there is ordinarily a strong presumption in favour of a plaintiff's choice of forum, this applies with less force when the plaintiff is foreign.[204] The Court was thus authorising a differential stance be taken in the FNC analysis depending on whether the plaintiff was foreign, or not. The difference in treatment was to be expressed by the degree of deference owed the plaintiff's choice of forum; a foreigner was entitled to less deference, the citizen or resident 'deserved somewhat more deference'.[205] Dismissal of a citizen or resident was possible, the Court stating that '[a]s always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.'[206] The Court continued by stating:

> When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.[207]

For the Court, 'citizenship and residence are proxies for convenience'.[208] One could infer from the foreign status of the plaintiff that his choice of a US forum was presumptively less convenient and therefore entitled to less deference. Precisely how much less deference a foreign plaintiff's choice of a US forum is entitled to was not quantified by the Court, but, in the final paragraph of the majority's judgment, it did furtively refer to a foreign plaintiff's choice of forum as applying with 'less than maximum force'.[209]

Rather than provide a cogent rationale for its position, the Court supported its position by reference to *dicta* from *Koster*[210] which it reinforced by alluding to its acknowledgement in *Swift & Co Packers v Compania Colombiana del Caribe SA,* that very different considerations arise where a US plaintiff is involved.[211] As discussed above, *Koster* does not provide the authority supposed by the Court, nor indeed does *Swift*. The Court also found support for its proposition in the typical practice of lower federal courts who accorded less weight to a foreign plaintiff's choice of forum.[212] As authority should flow down from the Supreme Court to the lower courts, rather than the other way, this reliance on lower court practice without an evaluation of the reasoning contained therein is lazy and tantamount to letting the tail to wag the dog. What value is the practice of lower federal courts on the matter when it is based on a weak or non-existent rationale? In truth, the Supreme Court thus did little more than echo Herman J by relying on the same authorities.

The Court was also very selective in its choice of authorities. Despite referencing *Pain* and *Mizokami,* it is quite amazing that the Court did not address itself to the rejection of a differential approach in those two cases. More bizarrely, the Court cited *Pain,*[213] as well as a scholarly article

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[203] *Reyno III (n 123)* 255.
[204] ibid.
[205] ibid 255 n 13.
[206] ibid 255 n 23.
[207] ibid 255–256.
[208] ibid 256 n 24.
[209] ibid 261.
[210] ibid 255 n 13 quoting *Koster* (n 122) 524.
[211] *Reyno III (n 123)* 255 n 13 citing *Swift* 339 US 684, 697 (1950).
[212] ibid 255.
[213] *Pain* (n 156) 797.

by Wolinsky,[214] as support for the reasonableness of the thesis that the degree of deference due a plaintiff's choice of forum can be inferred from his citizenship/residence.[215] Yet this was not at all what the DC Circuit in *Pain*, or Wolinsky in his article, were asserting. In fact, quite the opposite, they specifically advised against taking citizenship and residence as proxies for convenience.[216]

When it came to clearing up the doubts surrounding the applicable standard for FNC dismissal, the Supreme Court affirmed that dismissal 'will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.'[217] Later, the Court declared that it was sufficient for dismissal that trial in the plaintiff's chosen forum be burdensome, it need not be unfair.[218] This was a pivotal statement in *Reyno.* It rejected any interpretation of the doctrine as requiring a standard approaching an abuse of process. Bearing in mind that the post-*Gilbert* courts had, by-and-large, adhered to a very strict version of the doctrine, which if not an outright abuse of process version was certainly one that demanded such a degree of inconvenience as to amount to unfairness, the Court was now endorsing an alternative view that it was sufficient it be "burdensome". In the context of its assessment of the public interest factors, the Court demonstrated that the burden of the choice of forum had to be balanced against the convenience of the forum for the plaintiff. Dismissal was warranted where there existed a heavy burden on the defendant or court which was unjustified by the plaintiff's convenience, i.e. unnecessarily burdensome. This is closer in spirit to the standard actually intended by *Gilbert*/*Koster*, i.e. strongly favours, but it departs from it insofar as it substitutes the notion of a degree of inconvenience constituting unfairness to one of being merely unnecessarily burdensome. In so doing, *Reyno* liberalized the *Gilbert*/*Koster* doctrine.

In the end, although the Court clarified that a lesser degree of deference was indeed owed to the foreign plaintiff than that owed to a US claimant, it did not provide any logical basis for that blanket proposition. Neither did it quantify what degree(s) of deference was due, nor provide any helpful criteria by which it might be determined. Doubts remained about whether deference was a product of residence or whether it could also be inferred from mere citizenship. Crucially, the matter of how this deference ought to be accommodated into the FNC analysis was not expressly addressed by the Court. This was made all the more confusing by its supposed endorsement of its "unnecessarily burdensome" standard. In so doing, the Court was indicating that a single standard for dismissal applied in all cases. If that were the case, then it would seem that applying a different standard for dismissal in the case of a foreigner was not an option. Indeed, figuring out how to incorporate different degrees of deference while at the same time following a single standard for dismissal proved very difficult for the lower courts and has led to significant division among the federal circuits.

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[214] MO Wolinsky 'Forum Non Conveniens and American Plaintiffs in the Federal Courts' (1980) 47 *U Chi L Rev* 373

[215] *Reyno III* (n 123) 256 n 24.

[216] See *Pain* (n 156) 797 quoting Wolinsky (n 213) 382–383.

[217] *Reyno III* (n 123) 249.

[218] ibid 259.

2.5.4.3 Subsequent Supreme Court Judgments

In the years since *Reyno*, the Supreme Court has addressed itself to substantive issues of FNC in a handful of cases, most notably in *American Dredging Co v Miller* and *Sinochem Int'l Co Ltd v Malaysia Int'l Shipping Corp*.[219] However, these cases have added little more than a few snippets of information. In *American Dredging*, Justice Scalia (speaking with the majority) underlined that the doctrine's modern development has been in response to the phenomenon of forum shopping and describing it as being, 'at bottom, ... nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.'[220] He also acknowledged that '[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application ... make uniformity and predictability of outcome almost impossible.'[221] A concession likely to excite those civilian lawyers who oppose the doctrine. It may be tentatively suggested that Scalia J considered the merits of controlling forum shopping justified the lack of uniformity inherent in the US version of the doctrine, especially in light of the fact that it is a rule of procedure rather than of substance.[222]

In *American Dredging* Justice Scalia made a number of comments on FNC, by way of summary he stated:

> Under the federal doctrine of *forum non conveniens*, 'when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case,' even if jurisdiction and proper venue are established.[223]

Justice Scalia's choice of language in summing up the doctrine is very selective and potentially misleading, it could easily be read as endorsing an affirmation of the vexatious and oppressive standard for dismissal. Additionally, it returns to the language of either/or with respect to the grounds for dismissal. Simply put, he suggests that dismissal is granted where the balance of inconvenience to the defendant is out of all proportion to the inconvenience of the plaintiff, this being an assessment of private interest factors. Then, as an alternative proposition, he suggests that dismissal is appropriate where the court's own inconvenience renders it inappropriate, this being an analysis of public interest factors.

In *Sinochem*,[224] Justice Ginsburg (delivering the unanimous opinion of the Court) quoted approvingly this statement by Scalia J. She also stated, in more general terms, that a court may dispose of an action by an FNC dismissal 'when considerations of convenience, fairness and judicial economy so warrant.'[225] If anything, *American Dredging* and *Sinochem* represent retrograde steps in the evolution of FNC, contributing to the confusion rather introducing some much-needed clarity

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[219] *Sinochem* 549 US 422 (2007); *American Dredging* (n 186).
[220] *American Dredging* (n 186) 453.
[221] ibid 455.
[222] ibid 453.
[223] Ibid 447-448.
[224] *Sinochem* (n 219) 429.
[225] ibid 432.

On the specific issue of the degree of deference, Ginsburg J touched on this *Sinochem*, stating that a defendant ordinarily bears a 'heavy burden in opposing the plaintiff's chosen forum',[226] and that when a plaintiff sues in a forum which is not his home forum, 'the presumption in the plaintiff's favour "applies with less force," for the assumption that the chosen forum is appropriate is in such cases "less reasonable."'[227] It is submitted that Ginsburg J does no more here than merely echo the sentiments of *Reyno*. This is regrettable considering the divergence existing with the federal circuits on the question of the degree of deference due and its place within the FNC analysis.

2.5.5 The *Reyno* Conundrum

The title to the previous sub-section posed the question of whether the Supreme Court's judgment in *Reyno* amounted to a refinement or a revision of the federal doctrine of FNC as laid down in *Gilbert* and *Koster*. The answer to this question depends on how one reads *Gilbert*/*Koster*. These classical statements of the federal doctrine left a number of matters sufficiently uncertain that the federal courts had subsequently reached divergent interpretations on some key issues, especially with regards to the applicable standard for dismissal and whether differing degrees of deference applied. The following is submitted as the correct reading of *Gilbert* and *Koster*.

Dismissals on grounds of FNC were to be granted in exceptional cases, therefore, the plaintiff's choice of forum was to be rarely disturbed. Upon consideration of the private interest factors and public interest factors, dismissal was warranted where the cumulative balance of convenience of those factors was strongly in favor of dismissal. Crucially, the standard for dismissal in all cases was that the balance of convenience *strongly favors* dismissal. That Jackson J referred to vexation and oppression in *Koster* was not affirmation that, *a priori*, a different standard for dismissal applied in the case of a plaintiff who sues in his home forum. It was merely a common-sense observation that a plaintiff who sues in his home forum is more likely to make a greater showing of convenience and that a defendant who, in order to tip the balance to the level of *strongly favors*, will likely need to make a very strong showing of inconvenience, i.e. something akin to vexation and oppression. *A posteriori*, the doctrine of FNC, by being based on considerations of convenience, is arranged in such a way that it will, more often than not, defer to the choice of a plaintiff who sues in his home forum. Such deference is passive, it is not actively achieved through some form of judicial determination, such as by assigning a differential standard for dismissal.

On this reading, *Reyno* is not a refinement of the doctrine from *Gilbert* and *Koster*, it is a revision. The Court endorsed Herman J's approach as having been fully justified and concluded that the strong presumption in favour of the plaintiff's choice of forum applies with less force when the plaintiff is foreign. In so doing, it confirmed the proposition that the degree of deference due a plaintiff's choice of forum varied depending on his/her categorization as a US citizen/resident or as a foreigner. Yet, on the other hand, it appeared to reject the notion that *Gilbert/Koster* established alternative standards for dismissal and instead affirmed the proposition of a single standard. These two propositions are very difficult, if not impossible, to reconcile.

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[226] ibid 430 quoting *Reyno III* (n 123) 255–256.
[227] *Sinochem* (n 219) 430 quoting *Reyno III* (n 123) 255–256.

If at the outset one makes the determination that a particular plaintiff's choice of forum is entitled to lesser deference than that due another plaintiff, and if that determination is intended to play an active role in the FNC analysis, then you are inevitably applying different standards for dismissal. In practical terms, the standard corresponds to the burden that is upon the defendant to show the requisite level of inconvenience. If you lower that burden for one category of case (i.e. foreign plaintiffs) then you have adjusted the standard required for dismissal. You can call the standard by the same name in both cases but that only masks the fact that two different standards actually apply. What is really happening is that in one case the plaintiff is being handicapped. What is the basis for this handicap? It is based on the presumption (deemed reasonable by the Court) that where a foreign plaintiff sues in a US court his choice is less convenient. However, as shown above, this is not a reasonable presumption at all, especially where it is based on mere citizenship. It should unthinkable that a doctrine whose *raison d'être* is the determination of convenience, should rely on such blunt suppositions about convenience at a preliminary stage of its analysis. If, as the Court insisted, convenience is the central focus of FNC, then the court should allow the analysis to do its job and trust that it will inherently favour the domestic plaintiff.

With *Reyno*, the Supreme Court clearly intended to liberalize the doctrine and stated that it was not necessary for dismissal that the balance of convenience amount to unfairness, it was sufficient that it was unnecessarily burdensome. This is irreconcilable with the standard of dismissal laid down in *Gilbert* and *Koster* which required such inconvenience as to amount to unfairness, such that dismissal would be rare and exceptional. It is submitted that the standard in *Reyno* is more liberal and thus more likely to result in dismissal. That is a more substantial alteration than a mere refinement.

Reyno thus posed two inter-related revisions. Firstly, the deference due a plaintiff's choice of forum. Second, the applicable standard for dismissal. The dilemma this posed for the lower federal courts was one of accommodating two propositions that were essentially inconsistent. If a single standard for dismissal applies, how do you accommodate a differential stance with respect to deference? As we shall see federal courts have struggled to do just that and, as a result, have ended up producing differing versions of the doctrine of FNC.

2.5.6 Post-*Reyno*: Lower Federal Courts

The US federal court system consists of the Supreme Court, 13 courts of appeals and 94 district courts (organized into 12 circuits). Whilst the Supreme Court version of FNC is obviously binding on the lower federal courts, the doctrinal uncertainties inherent to it, combined with its inherently discretionary nature, has translated into a substantial degree of divergence between the courts of appeals which has filtered down to the lower district courts. Clearly, it is beyond the scope of this work to conduct a thorough examination of the various incarnations of the doctrine in the US federal circuits, but it is essential to demonstrate some of the divergence that exists.

The standard for dismissal continues to vary between the circuits in the wake of *Reyno*. This is not surprising given the facts that the standard was defined with the vague terms "unnecessarily burdensome" and the relationship between it and the standard proposed by *Gilbert/Koster* left

undefined. Consequently, some circuits apply a standard which is closer to the liberal one intended by *Reyno*. For example, in the Fifth Circuit, dismissal will be granted where the balance of convenience is in the defendant's favour.[228] However, other districts have kept more steadfastly to the *Gilbert*/*Koster* standard. For example, the Seventh Circuit looks for 'strong reasons'.[229]

Differences in the applicable standard are not the only source of divergence. Whilst the Supreme Court in *Reyno* was clear that both private and public interest factors had to be considered in the FNC analysis (a position adopted by most circuits) the Fifth Circuit continues to maintain the position that public interest factors do not need to be considered unless the private interest factors weigh in favour of dismissal.[230]

However, by far the biggest problem facing the circuit courts when interpreting the Supreme Court authorities is the question of how to accommodate the notion of deference to the US citizen/resident's choice of forum. By briefly looking at the case law from the Eleventh Circuit, the First Circuit and the Second Circuit, it will be possible to show how the controlling authorities of three circuit courts of appeals have interpreted the same Supreme Court authorities in different ways. The difference may appear subtle but it is nonetheless substantial since the net result is that a plaintiff's chances of successfully resisting an FNC dismissal is massively dependent on which circuit the district court is located and the version of FNC it follows.

Deference to the US plaintiff's choice of a US forum is accommodated in the Eleventh Circuit's doctrine of FNC by applying an alternative standard for dismissal. In *SME Racks Inc v Sistemas Mecanicos Para Electronica SA*,[231] it addressed the question of the degree of deference, stating that the 'presumption in favour of the plaintiff's initial forum choice in balancing the private interests is at its strongest when the plaintiffs are citizens, residents or corporations of this country.'[232] The applicable standard for dismissal of a case involving such a plaintiff requires 'evidence of unusually extreme circumstances' and that the court 'be thoroughly convinced that material injustice is manifest'.[233] Where the plaintiff is not a US citizen or resident then the standard required by the Eleventh Circuit is that the balance of private and public interest factors 'weigh in favor of dismissal'.[234] The Eleventh Circuit thus accords great significance to the US citizenship of the plaintiff, according them exceptionally high deference and thereby placing the foreign plaintiff in a disadvantageous position.

This can be discriminatory.[235] For example, if a non-resident US citizen residing in France is accorded such an exceptionally high degree of deference when he sues in a district within the Eleventh Circuit, whereas his French neighbour is afforded so much less deference, then it is difficult to see how the extent of the difference in treatment is justified on the grounds of convenience. What objective justification is there for this? Although it is conceded that mere US citizenship of a plaintiff does imbue a US forum with some convenience for that plaintiff, even if non-resident, the difference in treatment is utterly disproportionate and therefore discriminatory.

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[228] *Gonzalez v Chrysler Corp* 301 F 3d 377, 379–380 (5th Cir 2002).
[229] *Abad v Bayer Corp* 563 F 3d 663, 665 (7th Cir 2009).
[230] *Baumgart v Fairchild Aircraft Corp* 981 F 2d 824, 837 (5th Cir 1993).
[231] 382 F 3d 1097 (11th Cir 2004).
[232] ibid 1101.
[233] ibid citing *La Seguridad v Transytur Line* 707 F 2d 1304, 1308 n 7 (11th Cir 1983).
[234] *Tazoe v Airbus SAS* 631 F 3d 1321, 1330 (11th Cir 2011).
[235] See e.g., *Bell v Kerzner International Ltd* 503 Fed Appx 669 (11th Cir 2012).

It is clearly designed to protect US citizens from dismissal without a reasonable assessment of actual (in)convenience involved.

The Second Circuit, a frequent forum for international aviation litigation given the inclusion of New York within its jurisdiction, has adopted its own solution to accommodating *Reyno's* call for deference while seemingly applying a singular standard for dismissal. It achieved this by articulating a new step to the FNC analysis in *Iragorri v United Technologies Corp*.[236] Taking a collection of propositions regarding FNC from *Gilbert*, *Koster* and *Reyno* and throwing them into the cocktail shaker, the *Iragorri* court surmised the broad principle that the deference due the plaintiff's choice of forum varies with the circumstances. The degree of deference owed a plaintiff's choice of forum 'moves on a sliding scale depending on several relevant considerations.'[237] This, the court insisted, was the spirit of the Supreme Court's instructions.

Taking that viewpoint, the court could define its own vision of the Supreme Court's jurisprudence for determining deference. Essentially, the deference due a plaintiff is a reflection of their motivations for their choice of forum, the degree to which the lawsuit is genuinely connected to the US and to the forum, and the degree to which convenience supports that choice.[238] In other words, the goal is to divine the plaintiff's likely motivations for his choice of forum as inferred from several factors indicative of convenience.[239] Simply put, the more the court suspects that the plaintiff is forum shopping, the less deference will be accorded his choice of forum. Once evaluated, the degree of deference accorded to the plaintiff's choice of forum will determine the showing of inconvenience required by the defendant to secure dismissal.[240] The *Iragorri* test thus consists of a three-step FNC analysis. First, determination of the degree of deference owed the plaintiff's choice of forum; second, consideration of whether an adequate alternative forum exists; third, a balancing of private and public interest factors with a view to making a decision on dismissal. [241]

It is abundantly clear that the defendant's burden will be made either easier or harder depending on the deference afforded the plaintiff's choice of forum in the first step. The Eastern District of New York spoke of the first step in the *Iragorri* test as setting the bar which the defendant must hurdle.[242] Taking a selection of district court cases which have applied the test, the terminology employed varies, with determinations such as, 'little deference',[243] 'very little deference',[244] 'significant deference',[245] 'substantially reduced deference',[246] 'lesser degree of deference',[247] 'diminished [deference]'[248] and 'limited deference'.[249] What meaning are these determinations supposed to convey? More importantly, how do they influence the judge's decision

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[236] 274 F 3d 65 (2d Cir 2001).
[237] ibid 71.
[238] ibid 71–72.
[239] ibid 72.
[240] ibid 74.
[241] ibid 73.
[242] *Air Crash Near Peixoto de Azeveda* (n 151) 282.
[243] *Giro Inc v Malaysian Airline System Berhad* 2011 WL 2183171 *6 (SDNY 2011).
[244] *In re Ski Train Fire in Kaprun Austria on November 11, 2000,* 499 F Supp 2d 437, 446 (SDNY 2007) aff'd sub nom Geier v Omniglow 2009 WL 4893668 (2d Cir 2009).
[245] *Bakeer v Nippon Cargo Airlines Co Ltd* No 09-CV-3374, 2011 WL 3625103, *12 (EDNY 2011).
[246] *Esheva v Siberian Airlines* 499 F Supp 2d 493, 498 (SDNY 2007).
[247] *Khan v Delta Airlines Inc* No 10-CV-2080, 2010 WL 3210717 *6 (EDNY 12 Aug 2010).
[248] *Seales v Panamanian Aviation Co Ltd* 2009 WL 395821, *11 (EDNY 18 Feb 2009).
[249] *Navarette de Pedrero v Schweizer Aviation Corp* 635 F Supp 2d 251, 260 (WDNY 2009).

whether to grant FNC dismissal? The district court judgments provide no elucidation on this crucial component of the decision-making process. The reality seems to be that the courts will simply rely on some vague impression or gut feeling to guide their decision, something not appreciable by the parties themselves.

This approach is open to various lines of criticism, the full consideration of which is not possible with the scope of this work.[250] It suffices to note that the degree of deference due the plaintiff's choice of forum is essentially a determination regarding the perceived legitimacy of that choice. The reality is that the first step is not about convenience at all, its true object is to read the mind of the plaintiff so as to evaluate the legitimacy of his motivations for choosing a US forum and thereby assign a corresponding degree of deference or non-deference. In so doing, the *Iragorri* approach deflects the central focus of FNC away from what is largely an objective consideration of convenience toward a subjective evaluation of legitimacy. Indeed, it gives priority to legitimacy since the determination made under the first step of *Iragorri* skews the remainder of the analysis. This is an utterly unacceptable basis upon which to conduct an FNC analysis, it forfeits objectivity for supposition and suspicion. This is made all the more egregious by the inconsistency in treatment of the defendant's likely motivations in seeking dismissal, i.e. reverse forum-shopping, these are not treated with anywhere near the same severity as the plaintiff's. The strong impression is that the doctrine is custom-made to prejudice the interests of foreign plaintiffs whose status as such is thus inherently more likely to arose the suspicions of the judiciary. At the same time, it strongly favours US defendants sued by foreign plaintiffs.

The First Circuit adopts yet another approach to deference within its doctrine of FNC. It follows a two-step framework for FNC. The first stage of the investigation is to establish if there exists an adequate alternative forum. The second stage requires a balancing of private and public interest factors. However, what makes it truly different is that it refuses to arbitrarily assign deference based on the foreign status of the plaintiff, e.g. by applying different standards for dismissal.[251] In *Iragorri v International Elevator Inc*,[252] in which a US citizen was suing in a US forum (albeit not her home district) the First Circuit did not show a higher degree of deference by applying a higher standard for dismissal. Indeed, it made no attempt to categorise the plaintiff, or her choice of forum, based on citizenship or residence. This is not to say that the First Circuit's doctrine of FNC does not incorporate deference to the plaintiff suing in their home forum, as is required by Supreme Court precedent. The key distinction is that rather than explicitly do so by affixing a different standard, it does so passively by just allowing the doctrine to do its job; what the author refers to as "passive incorporation of deference". [253] Although still the subject of some uncertainty,[254] it is submitted that it is closest in spirit to *Koster/Gilbert* and can be interpreted consistently with *Reyno*.

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[250] See Cluxton (n 192).

[251] See *Iragorri v International Elevator Inc* 203 F 3d 8, 12 (1st Cir 2000); *Mercier v Sheraton International* 935 F 2d 419, 423–424 (1st Cir 1991).

[252] *International Elevator* (n 251).

[253] For a full elaboration, the reader is directed to Cluxton (n 192).

[254] See *Adelson v Hananel* 510 F 3d 43 (1st Cir 2007); *Interface Partners Int'l Ltd v Hananel* 575 F 3d 97, 102 (1st Cir 2007); *In re Montreal Maine & Atlantic Railway Ltd* 574 BR 381, 386 (D Maine 2017).

2.5.7 State Courts

Having considered the federal doctrine of FNC, it remains only to attend to the doctrine as it arises at state level in the US. Within the realm of international aviation litigation, the federal doctrine is the more relevant as many actions arising therein fall within the original jurisdiction of the federal courts, for reasons of being a federal question (i.e. the action arises under the constitution, treaty or federal statute).[255] Claims under the WCS or MC99 (or indeed any treaty to which the US is a party) come within this category, the federal courts having exclusive jurisdiction (vis-à-vis US state courts). Where a claim is properly brought under state law and is not pre-empted by federal law, then the federal courts may nonetheless have original jurisdiction where the amount in dispute is more than $75,000 and there exists complete diversity amongst the parties, i.e. the parties are citizens of different states (or non-US citizens).[256] Under this second category, i.e. diversity jurisdiction, the federal courts may have jurisdiction over state law claims in international aviation litigation which are not pre-empted by the WCS, MC99 or some other US treaty or federal statute. This commonly occurs in the context of products liability and will be addressed in Chapter 6.

At state law level, the doctrine of FNC is recognized in most of the fifty states of the US. It applies as a matter of common law in many but has also been codified by statute in several, e.g. Louisiana,[257] Florida,[258] California,[259] and New York.[260] Although federal law does not govern the doctrine at state level,[261] state courts, for the most part, follow the federal standard for FNC.[262] A two-stage test is thus followed, i.e. a dismissal for FNC requires, first, the existence of an adequate alternative forum and second, that the balance of convenience of the private and public interest factors strongly favours the defendant. As to what "strongly favours" means, this varies from state to state. For instance, under the law of Oregon, "strongly favours" means 'that the relevant private and public interest considerations weigh so heavily in favor of litigating in that alternative forum that it would be contrary to the ends of justice to allow the action to proceed in the plaintiff's chosen forum.'[263] Other courts interpret it as requiring a more onerous burden on the defendant. For example, in the state of Delaware, the defendant must show 'overwhelming hardship'[264] before a dismissal will be granted. The Supreme Court of Nebraska also applies a heavy standard, holding that 'a forum is seriously inconvenient only if one party would be effectively deprived of a meaningful day in court.'[265]

When it comes to the deference due a plaintiff's choice of his home forum, the majority of state courts give some recognition to this.[266] The California courts, although they did not initially follow

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[255] US Constitution, Article III.
[256] 28 USC § 1332.
[257] Louisiana Civil Code of Procedure art 123 (1999).
[258] Florida Rules of Civil Procedure Rule 1.061.
[259] Section 410.30(a) California Code of Civil Procedure.
[260] NY CPLR 327 (McKinney).
[261] *American Dredging* (n 186) 453.
[262] J Duval-Major 'One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff' (1992) 77 *Cornell L Rev* 650, 659; Brand and Jablonski (n 1) 71–72.
[263] *Espinoza v Evergreen Helicopters Inc* 359 Or 63, 102 (2015).
[264] *Ison v DuPont de Nemours & Co Inc* 729 A 2d 832, 842 (Del 1999).
[265] *Christian v Smith* 276 Neb 867, 876 (2008).
[266] See e.g., *Ellis v AAR Parts Trading Inc* 357 Ill App 3d 723, 742 (2005); *Langenhorst v Norfolk Southern Railway Co* 219 Ill 2d 430, 442–443 (2006).

Reyno, adopted a position close to it in *Stangvik v Shiley Inc*,[267] such that, 'foreign plaintiffs receive no presumption of convenience in their choice of a California forum.'[268] The courts of Minnesota and Florida apply the deference principle, affording greater deference to US citizens.[269] However, in the states of Washington and Oregon, their supreme courts have entirely rejected an approach that grants any deference to the plaintiff on the basis of his residence. In *Myers v Boeing Co*, the Supreme Court of Washington stated that deference raises concerns about xenophobia and described it as lacking any supportive analysis or reasoning.[270] Recently, the Supreme Court of Oregon, in *Espinoza v Evergreen Helicopters Inc*, expressed its agreement with the Washington court's view, stating that 'that there is no principled reason to vary the degree of deference afforded to the plaintiff's choice of forum based on where the plaintiff, or real party in interest, resides.'[271] The Second Circuit *Iragorri* approach to deference, i.e. a dedicated first step of the FNC analysis which determines the degree of deference owed, has not yet been influential in the state courts with only a handful of decisions even referring to it.[272] Thus, while the lesser degree of deference owed a foreign plaintiff is a factor for many state doctrines, it is generally only taken into consideration as a factor in the balancing of convenience and not as a separate step in the analysis.

The courts of Cook County, Illinois, have displayed a willingness to depart from the federal standard of FNC in a number of product liability cases, many with an aviation connection.[273] In a number of cases involving a foreign plaintiff and where there was an adequate available forum abroad, the courts have nonetheless denied FNC dismissal. The predominant reasoning for doing so was that in those cases the evidence and witnesses were spread across a number of jurisdictions. In such circumstances, the court concluded that no one forum could be regarded as being any more convenient than another.[274] Indeed, the Cook County courts have demonstrated a progressive tendency by reconsidering FNC in light of modern technological advances. In *Vivas v Boeing Co*, the court stated that the 'the location of documents, records and photographs has become a less significant factor in *forum non conveniens* analysis in the modern age of email, internet, telefax, copying machines and world-wide delivery services, since they can now be easily copied and sent.'[275] This approach has led the courts there to decline FNC dismissals in a number of cases involving Boeing,[276] however, in cases successfully removed to federal court, FNC dismissal is generally granted.[277] This neatly illustrates the divergence in approach to FNC between state courts and federal courts that is typical in the US, so much so that plaintiff lawyers

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[267] 54 Cal 3d 744 (1991).

[268] K King 'Open "Borders" - Closed Courts: The Impact of Stangvik v. Shiley, Inc.' (1994) 28 *Univ San Fran L Rev* 1113, 1138.

[269] *Kennecott Holdings Corp v Liberty Mutual Insurance Co* 578 NW 2d 358, 361 (Minn 1998); *Cortez v Palace Resorts Inc* 123 So 3d 1085, 1094 (Fla 2013).

[270] 115 Wash 2d 123, 136–137 (1990).

[271] *Espinoza* (n 263) 105.

[272] See e.g., *University of Maryland Medical System Corp v Kerrigan* No 24-C-2333, 2017 WL 5711857 (Md App 28 Nov 2017); *Rolls-Royce Inc v Garcia* 77 So 3d 855 (Fla 2012).

[273] *Vivas v Boeing Co* 392 Ill App 3d 644 (2009); *Arik v Boeing Co* No 1-10-0750, 2012 WL 6944131 (Ill App 1 Dist 10 Jan 2012).

[274] *Vivas* (n 273) 659.

[275] ibid.

[276] See e.g., *Vivas* (n 273); *Arik* (n 273); *Sabatino v Boeing Corp*, No 09-CV-1551, 2009 WL 1635670 (ND Ill 05 June 2009).

[277] See e.g., *Marshall v Boeing Co* 940 F Supp 2d 819 (ND Ill 2013); *Patricia v Boeing Co*, No 09-CV-03728, 2010 WL 3861077 (ND Ill 28 Sep 2010).

bemoan the routine outcome of FNC motions in the respective courts, that is, “win in state court, lose in federal court”.

2.5.8 Concluding Remarks

From modest beginnings in admiralty and in some state law jurisprudence, an inchoate doctrine gradually emerged in the US which exhibited some key features of what is recognisable today as FNC. The doctrine was not, as one might have expected, a direct importation from Scotland or England. Although they must share some common origin, the respective paths to their emergence as definable doctrines were parallel but distinct. It is not surprising, therefore, that the US version differs in some significant ways from its British counterpart. What is surprising, at least to an observer from outside the US, is the scale of divergence that exists within the US. Whilst we can refer to the federal doctrine of FNC as broadly representing the US doctrine of FNC, the reality is that the United States is a jurisdiction of many *doctrines* of FNC. In practice, depending on which version applies the outcome may be radically different. Some, particularly at state level, place a heavy burden on the defendant to secure dismissal, whereas others, are far more liberal. One’s chances of dismissal are far greater in a Florida district court than they are in a state court in Cook County, Illinois.

Chapter 3: Civilian Attitudes to *Forum Non Conveniens*

3.1 Introduction

Common law and civil law, never the twain shall meet. At the risk of offending adherents of both systems, it might—as a tentative generalization—be acceptable to say that a perceived difference between the two is that the civil law places greater emphasis on legal certainty and predictability whereas the common law is more inclined toward flexibility where necessary to tailor justice to a particular case. As Hartley opines:

> The difference is one of priorities: civil lawyers are more concerned with the structure of the law, common lawyers with its operation. … [Civil lawyers] often seem to regard fidelity to principle as more important than a just and satisfactory result in the case at hand. One could say that the civilian approach is theory-driven, while the common-law approach is practice-driven.[1]

Although certainly a common law lawyer's assessment, it nevertheless captures the quintessential division between the two systems. Clearly, both systems are equally committed to doing justice, no one would challenge that. However, their respective approaches to securing this ultimate goal differ. The common law emphases flexibility whereas the civil law places greater value on certainty. Although broadly consistent, this difference in ethos does lead the two systems to deviate in some important respects. One such area is on the question of the declining jurisdiction, especially where it is a matter of discretion and even more so where there is the potential for concurrent jurisdiction between the two systems. Where these criteria are met then conflict tends to arise.

The *in personam* jurisdiction of common law courts is very broad, even where the dispute involves a foreign element. It usually only requires that the defendant has been properly served with process either within or outside the territory of the forum. Civil law systems, however, are built on codes so the rules of jurisdiction tend to be more defined and specialised. Whereas FNC is a necessary mechanism for balancing the exercise of the common law's broad jurisdiction in cases involving a foreign element, a civilian law court, once vested with jurisdiction, is presumed appropriate. Therefore, the issue of declining jurisdiction is generally redundant, whereas in a common law system it serves a useful function by acting as a check on its broad jurisdiction. The jurisdictional systems of civil law States are thus often characterized as "closed", in contrast to the "open" systems of common law States.[2] Under civil law codes, the competent court to hear a dispute is specified, the general rule being (in accordance with the Roman law maxim of "*actor sequitur forum rei*") that the plaintiff must sue at the place of defendant's domicile. The result of which is that a single court will effectively have exclusive jurisdiction. Indeed, civilian law systems closely follow the Roman law maxim of *judex tenetur impertiri judicium suum*, i.e. a judge with jurisdiction must exercise it.[3]

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[1] TC Hartley 'The European Union and the Systematic Dismantling of the Common Law of Conflicts of Law' (2005) 54 *Int'l & Comp LQ* 813, 814.

[2] JJ Fawcett 'General Report' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995) 21; HCAW Schulze 'Forum Non Conveniens in Comparative Private International Law' (2001) 118 *South African Law Journal* 812, 823.

[3] See H Gaudemet-Tallon 'France' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995) 175.

Viewed in this light, one can appreciate why a German civil law commentator states that, '[l]egal certainty requires clear and foreseeable jurisdictional rules. Adopting the doctrine of *forum non conveniens* into the German system, which rests on statutorily standardized jurisdictional interests, would be paramount to breaking that system.'[4] As will be shown in the case of the Brussels I Regime, the civil law is not completely averse to judicial discretion in matters of jurisdiction. There are many additional reasons why civil law systems have no such doctrine as FN.[5] For instance, some State Constitutions indirectly prohibit it by guaranteeing their citizens a legally competent judge, the discretion to decline jurisdiction would be inconsistent with that guarantee.[6]

It is fair to say that, generally speaking, FNC is perceived with hostility within the civil law system.[7] The case of *West Caribbean Airways*,[8] with which this work commenced, brought into stark relief, not only the divisiveness of FNC in respect of the choice of the forum between claimant and defendant, but also the antipathy over the matter that exists between the common law courts and the civil law courts. International aviation litigation within MC99 provided the context there but there have been precedents in other areas in which the same essential dispute has arisen. This chapter will examine two of these. First, the fascinating example of the responses adopted by some South American courts to FNC dismissals by US courts. Secondly, on the other side of the Atlantic, the battle over FNC within the European Union (EU) in the context of the Brussels I Regime.

These confrontations between the two main legal systems over the question of FNC merits our attention as it will help to present the general civilian attitude toward the matter of a court's discretionary power to decline jurisdiction and reveal the underlying doctrinal and policy justifications for that attitude. In addition, it will provide an opportunity to consider the civilian solutions for dealing with the matter of concurrent jurisdiction, both preventative and remedial. As the question of the choice of appropriate forum in international aviation litigation, whether it be within or outside MC99, will frequently implicate both common law and civil law States, any proposed reform in the area must contemplate and accommodate their respective positions and the underlying reasons therefor. Prior to this, it is important to introduce the doctrine of *lis alibi pendens*.

3.2 *Lis Alibi Pendens*

The issue of jurisdiction is a relatively straightforward issue for a civil law system because of the low likelihood of concurrent jurisdiction arising. However, it may nevertheless arise on a domestic level where the code identifies more than one competent forum. Concurrent jurisdiction involving a civil law forum is much more likely to be a feature of litigation with an international element when the jurisdictional systems of two or more countries concurrently assert some ground for jurisdiction

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[4] H Schack 'Germany' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (OUP 1995) 194.

[5] See Fawcett (n 2) 21–27.

[6] A Reus 'Judicial Discretion - A Comparative View of the Doctrine of Forum Non Conveniens' (1994) 16 *Loyola Los Angeles Int'l Comp LJ* 455, 504–505.

[7] See W Kennett 'Forum Non Conveniens in Europe' (1995) 54 *Cambridge LJ* 552, 554–561.

[8] *In re West Caribbean Airways SA* 616 F Supp 2d 1299 (SD Fla 2007).

over the same dispute. Such a situation is known as *lis alibi pendens*, literally "dispute elsewhere pending". Aside from the inefficiency and costliness of duplicate proceedings, the prospect of competing judgments strongly discourages allowing both courts to proceed to judgment, so some rule is necessary to determine priority.

Of course, *lis alibi pendens* is not unique to the civil law. The common law has long recognized the power of its courts to stay or restrain proceedings in the event of parallel proceedings.[9] Although previously subject to differing principles, it has since become subsumed within FNC.[10] Where facing a situation of *lis alibi pendens*, the English courts will apply the doctrine of FNC (where still available) to determine whether to stay its own proceedings or restrain those in the foreign forum.[11] The civil law adopts a different approach, it applies a very simple rule, the court first seised (in time) of the case has priority and any subsequently seised court must decline its jurisdiction over the proceedings.[12]

The civil law rule is straightforward and mechanical. Unlike FNC, it does not entail the exercise of any discretion by the trial judge. However, it is not without its own problems. It is not always clear when two proceedings are to be considered as sufficiently similar to give rise to *lis alibi pendens*; for example, does the addition of an extra party to the litigation make an otherwise identical action distinguishable? Resolving such matters, as well as those of related proceedings, does in some cases require the civil law to grant discretion to the trial judge.[13] A frequently voiced criticism of the civil law rule is that it encourages a race to court upon the merest suspicion of possible legal action in order to secure a jurisdictional advantage.[14] As Hartley describes it, '[the rule] encourages well-advised, but unscrupulous, parties to win the race to the court house by commencing proceedings at the first hint of a dispute, often choosing a court precisely because it is inappropriate, though inappropriate in a way that advantages them.'[15]

Whilst the common law and civilian law approaches are both driven by some of the same core policy objectives of preventing wasteful duplication of litigation and avoiding the risk of conflicting judgments, their respective rules for securing those objectives differ and reveal an essential division. The common law rule engenders flexibility and places greater value on the need for justice/fairness in the individual case, i.e. *a posteriori*, whereas the civil law's mechanical rule serves the goal of justice/fairness by *a priori* ensuring certainty and predictability. This core philosophical belief divides the two systems, such that when a *lis pendens* situation arises between a civilian jurisdiction and a common law jurisdiction, one can expect the sparks to fly. This can be amply demonstrated by exploring the controversies surrounding FNC that emerged in the case of the Latin American response to FNC dismissals by US courts and in a European context by the case of the Brussels I Regime.

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[9] *The Christiansborg* (1885) 10 PD 141 (CA); *McHenry v Lewis* (1882) 22 Ch D 397 (CA).

[10] D McClean and V Ruiz Abou-Nigm *Morris on The Conflict of Laws* (8th edn, Sweet & Maxwell 2012) [5-052].

[11] *De Dampierre v De Dampierre* [1988] AC 92, 108 (HL).

[12] See e.g., Article 100, French Code of Civil Procedure.

[13] Gaudemet-Tallon (n 3) 178, 181.

[14] Fawcett (n 145) 34-35.

[15] Hartley (n 1) 816.

3.3 Latin American Response to FNC

A fascinating response by civil law States to the exercise of FNC by the US courts emerged in Latin America in the late 1990s in the form of FNC blocking statutes (as well as various other forms of judicial retaliation).[16] The basic gist of these blocking statutes is that they provide a legal basis whereby the courts of the State concerned are closed to hearing actions that have already been initiated in a foreign jurisdiction; a kind of pre-emptive *lis alibi pendens* rule. The objective of these blocking statutes is, as the name suggests, to block the application of FNC by making the statute forum unavailable; It being a prerequisite for FNC that an available alternative forum exists.

The background context to the introduction of this so-called retaliatory legislation is illustrated by cases such as *Delgado v Shell Oil Co*.[17] In *Delgado*, nearly 26,000 plaintiffs from developing nations in Latin America brought personal injury claims arising from their exposure to a dangerous chemical that had been manufactured, designed, sold or used by the US defendants. The plaintiffs had sustained their injuries whilst working for the defendants on banana plantations in foreign countries (mostly Panama, Costa Rica and Nicaragua). The claims were brought before the courts of Texas where the defendant sought dismissal on the grounds of FNC. The Texan court concluded that alternative forums for resolution of the disputes existed and granted the dismissal. A practical result was that it resulted in massively fragmenting the litigation across multiple jurisdictions. As is so often the case, the dismissal was outcome determinative and the parties ended up settling for sums far less than would likely have been awarded had the case continued in the US.[18] Generally having civil law systems and therefore already having a distaste for FNC, it was natural that legislators in some Latin American States affected by these decisions took a dim view of this and employed FNC blocking statutes as a form of legislative retaliation aimed at frustrating the attempts of US corporations to avoid having their liability determined by their own courts.

Of particular interest is a model law proposed in 1998 by the Latin American Parliament (PARLATINO), an international organization made up of representatives from most Latin American and Caribbean States. Article 1 of this provides that, '[t]he petition that is validly filed, according to both legal systems, in the defendant's domiciliary court, extinguishes national jurisdiction'.[19] In the late 1990s, Guatemala, Ecuador, Dominica, Nicaragua, Costa Rica and Panama either adopted or attempted to adopt legislation of this type. For example, the Civil Code of Procedure for Ecuador provides, '[i]f a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorian courts shall be definitely extinguished.'[20] In the case of Ecuador and Guatemala, their statutory provisions were subsequently held to be

[16] See D Figueroa 'Conflicts of Jurisdiction between the United States and Latin America in the Context of Forum Non Conveniens Dismissals' (2005) 37 *U Miami Inter-Am L Rev* 119, 154–156; WW Heiser 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 *U Kan L Rev* 609, 634–657.

[17] 890 F Supp 1324 (SD Tex 1995).

[18] W Anderson 'Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation' (2001) 10 *J Transnat'l L & Pol'y* 183, 184.

[19] As reproduced in HS Dahl 'Forum Non Conveniens, Latin America and Blocking Statutes' (2003) 35 *U Miami Inter-Am L Rev* 21, 47.

[20] As reproduced, ibid 48.

unconstitutional as conflicting with the guarantee of a right of access to the courts. In other cases, the statutes were limited to specific causes of action, particularly product liability.[21]

Brand and Jablonski discuss a number of US cases in which the existence of blocking statutes has arisen for consideration in the context of a motion for FNC dismissal.[22] In some of the cases discussed, the courts, dubious as to the actual effect of these statutes, granted dismissal on the condition that if the foreign court did indeed hold itself without jurisdiction then the plaintiff could refile in the US.[23] However, in others, the foreign plaintiffs managed to persuade the US courts that the foreign forum was not available and therefore resisted dismissal.[24] It would seem that the blocking statutes have only met with modest success before the US courts.

Modest though their success might have been, the mere existence of FNC blocking statutes aimed at frustrating attempts by US courts to dismiss cases against US defendants in favour of Latin American courts, is evidence of the deep dissatisfaction that exists within some of these civil law States toward the use of doctrine, generally within the sphere of international litigation relating to personal injury claims. To States whose general rule of jurisdiction is that the defendant ought to be sued at his place of domicile, it is particularly egregious for them to find themselves lumbered with deciding cases which were already brought before what they regard as the appropriate forum. Adding insult to injury, the motivation in such cases is usually the corporate defendant's desire to avoid paying damages in accordance with the law of his home forum, i.e. reverse forum shopping, an endeavour the defendant's home court appears to be endorsing, or at least facilitating. In such circumstances, the debate surrounding FNC goes beyond objections based on legal principle and enters into the sphere of morality.

3.4 The Brussels I Regime

In 1957, with the Treaty of Rome,[25] six States created the European Economic Community (EEC). In time, the EEC grew in membership and would evolve to become the European Union (EU). These six founding Member States all have civil law systems and whilst this meant there was a large degree of uniformity between them, there were nonetheless points of divergence which could potentially result in the frustration of the enforcement of judgments within the EEC. As this was deemed to be adverse to the creation of the internal market, a commitment to establish judicial cooperation in civil matters with an intra-Community component was given under Article 220 of the Treaty of Rome for the Member States to enter into negotiations with a view 'to securing for the benefit of their nationals ... the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards.'[26] To provide legal certainty and predictability within the Community, the Member States agreed a

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[21] See Anderson (n 18).

[22] RA Brand and SR Jablonski *Forum Non Conveniens: History, Global Practice and Future Under the Hague Convention on Choice of Court Agreements* (OUP 2007) 135–139.

[23] See e.g., *Polanco v HB Fuller Co* 941 F Supp 1512, 1525 (D Minn 1996); *Aguinda v Texaco Inc* 142 F Supp 2d 534, 546–547 (SDNY 2001) aff'd 303 F 3d 470 (2d Cir 2002).

[24] See e.g., *Canales Martinez v Dow Chemical Co* 219 F Supp 2d 719, 728 (ED La 2002); *In re Bridgestone/Firestone* 190 F Supp 2d 1125, 1130 (SD Ind 2002).

[25] Treaty Establishing the European Economic Community (signed 25 March 1957 entered into force 01 January 1958) (Treaty of Rome).

[26] ibid Article 220.

convention in 1968, the Brussels Convention.[27]

Given that the Brussels Convention was agreed in 1968, at a point in time when the UK and Ireland (i.e. common law States) were not yet members of EEC, it should not come as a surprise that it has a decidedly civilian flavour which has been retained in its later manifestations. The Brussels Convention is largely irrelevant nowadays as it has been superseded, for the most part, by the Brussels I Regulation of 2001,[28] which was itself repealed by a recast version of the Regulation in 2012 (which came into force on 10 January 2015).[29] For simplicity's sake, these instruments will be referred to collectively as the Brussels I Regime. With the accession of the UK and Ireland to the EEC in 1973, the legal landscape of the Community broadened to include its first common law Member States. This set the stage for potential conflict between the respective approaches of the common law and civil law States with respect to the then existing *acquis communautaire* and its future development. The focus here will be on the Brussels I Regime, which is of particular relevance to this work because it is, much like WCS and MC99, an international instrument aimed at the harmonization of rules of jurisdiction to which both common law and civil states subscribe. Furthermore, it is a regime within which the doctrine of FNC has proved controversial and its exploration is therefore germane.

3.4.1 Jurisdiction under the Brussels I Regime

Jurisdiction, in a simple sense, refers to the question of whether a court has the competence to hear and determine an issue upon which its decision is sought. The Brussels I Regime[30] provides a set of rules for answering this question where the issue falls within its scope of application. Of special relevance to this work is the fact that the Brussels I Regime does not affect conventions to which Member States had already entered to the extent that any of those conventions regulate the question of jurisdiction or the recognition or enforcement of judgments.[31] Thus, where a convention contains grounds for determining jurisdiction in a given area, as is the case with WCS and MC99 in respect of qualifying international carriage by air, the Brussels I Regime does not pre-empt the bases for jurisdiction provided thereunder.

The general rule for jurisdiction adopted by the Brussels I Regime is that, subject to limited grounds of exclusive jurisdiction, 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'[32] Of course, exceptions are provided under which a defendant may be sued in the courts of another Member State, i.e. special jurisdiction. For example, the courts of the place of performance of the obligation in matters relating to contract,[33] or, in the case of matters relating to tort, in the courts of the place where the

[27] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C 27/1 (Brussels I Convention).
[28] Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.
[29] Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.
[30] The term *Brussels I Regime* will hereinafter refer to the various instruments of collectively to the extent that their provisions are substantively the same.
[31] See e.g., Recast Brussels I Regulation (n 29) Article 71(1).
[32] ibid Article 4(2).
[33] See ibid Article 7(1).

harmful event occurred.[34] Therefore, the scheme of the Brussels I Regime provides for the possibility of concurrent jurisdiction of the courts of more than one Member State. In the interests of the harmonious administration of justice, and to minimize the possibility of concurrent proceedings, as well as avoid irreconcilable judgments, rules for dealing with situations of concurrent jurisdiction had to be defined.

Again, given its civilian origins, it is not surprising that the rule adopted for dealing with concurrent jurisdiction is that of recognizing the priority of the court first seised. Article 29(1) provides:

> Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.[35]

Where a situation of concurrent proceedings in the courts of different Member States arises, involving the same cause of action and being between the same parties, then the initial step to be taken is for any later seised court to stay its proceedings until such a time as the court first seised has ruled on its own jurisdiction.[36] Where the court first seised establishes its jurisdiction then all other courts seised of the matter are obliged to decline jurisdiction in favour of the first court.[37] This is not a matter of discretion, it is a mandatory rule.

On first impression, therefore, it would seem that where the Brussels I Regime applies there is no room for the application of a discretionary doctrine (such as FNC) to decline jurisdiction granted under the Brussels I Regime. However, an important qualification must be noted with respect to the case of *related actions* where, surprisingly, the Regime provides a discretionary power to stay proceedings. This is explored in the next sub-section. Following that, attention will firstly turn to taking a closer look at defining the scope of the Brussels I Regime and assessing the consistency of FNC with that regime. This approach will provide an opportunity to consider the landmark case of European Court of Justice (as it then was) in *Owusu v Jackson*[38] and will throw a light upon the divisiveness surrounding the doctrine of FNC between the common law and civil law States of the EU.

3.4.2 Related Actions: Discretion under the Brussels I Regime

Although the perception is that the exercise of judicial discretion with respect to jurisdiction is anathema to civil law courts, the reality is that, whilst it is certainly more tightly proscribed, it is nonetheless a feature of some civil law jurisdictional regimes. Such a discretion is also to be found in the Brussels I Regime which provides for the exercise of judicial discretion to stay proceedings or to decline jurisdiction in defined circumstances, i.e. in the case of related actions. This discretion was a feature of the Brussels Convention as originally adopted. This was at a point in time when it was an exclusively civil law affair and thus this discretion cannot be explained away

[34] ibid Article 7(2).
[35] ibid Article 29(1).
[36] ibid Article 29(2).
[37] ibid Article 29(3).
[38] *Case C-281/02 Owusu v Jackson* [2005] ECR I-01383.

as a concession to the common law Contracting States.

Unlike in the case of proceedings involving the *same cause of action and the same parties*, wherein staying or declination of jurisdiction by any court other than the court first seised is mandatory, in a case of *related actions*[39] it is discretionary.[40] For related actions, Article 30(1) of the Recast Brussels I Regulation (with similar provisions in the other Brussels I Regime instruments) states that a court, other than the one first seised, 'may stay its proceedings'[41] and Article 30(2) provides that it *may*, on application by one of the parties, decline jurisdiction.[42] The wording is clearly permissive rather than mandatory. The first thing of note is that jurisdiction of the court first seised remains mandatory, it is granted no discretion to stay proceedings nor to decline jurisdiction. However, a court subsequently seised on related actions *may* stay proceedings or decline jurisdiction. Secondly, Article 30 is concerned with cases which fall outside of Article 29; in other words, Article 30 concerns *related* actions, not the *same* actions.[43]

The doctrinal basis upon which such a court may exercise this discretion is unclear, except to the extent that Article 30(3) makes it clear that the object is to avoid the risk of irreconcilable judgments. There has been some debate as to whether this discretion allows a court to use of the doctrine of FNC or to at least consider matters of *forum conveniens*. Support for[44] and against[45] this proposition is to be found in the case law. The stronger line of argument is against its identification with FNC. The Brussels I Regime discretionary rule for related actions is inherently distinct from FNC insofar as only a court other than the court first seised may exercise this discretion. Therefore, even where the first court is not the *forum conveniens* it is not at liberty to stay its proceedings or decline jurisdiction. This is a key indicator that the appropriateness of the forum (in the general sense of FNC) is not at issue, a very different proposition to FNC. Whilst it might not amount to a presumption in law, the scheme works to prefer the jurisdiction of the court first seised in the case of related cases. Where consolidation of proceedings is an option, such consolidation will occur within the court first seised. The Brussels I Regime's discretion also differs from FNC insofar as there must be a risk of irreconcilable judgments. Although a consideration within FNC, it is not a requirement for the grant of a stay. This underlines that, rather than *forum conveniens*, the primary purpose of the Brussels I Regime's discretion is to avoid irreconcilable or conflicting judgments.

Therefore, it is submitted that the correct view, especially in light of the ECJ's decision in *Owusu* (discussed below), is that while the discretion involved under the Brussels I Regime in

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[39] Recast Brussels I Regulation (n 29) Article 30(3).

[40] Advocate General Opinion, *Case C-129/92 Owens Bank Ltd v Bracco* [1994] ECR I-00117 [75].

[41] Recast Brussels I Regulation (n 29) Article 30(1).

[42] ibid Article 30(2).

[43] JJ Fawcett and JM Carruthers *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 314.

[44] Indeed, in *Grupo Torras SA v Al-Sabah* [1995] 1 Lloyd's Rep 374 (QB) Mance J (now Lord Mance) remarked that the discretion brings 'considerations of *forum conveniens* enter into the question'. ibid 418. See also, e.g., *Jacobs & Turner Ltd v Celsius Sarl* [2007] SLT 722, 736 (Sess OH) (Scot). See also *Mecklermedia Corp v DC Congress GmbH* [1998] Ch 40, 56 (Ch); *Owens Bank* (n 40) [79].

[45] The strongest rejection of an identification with FNC was expressed by Sheen J in *The "Linda". The Linda* [1988] 1 Lloyd's Rep 175 (QB). Based on the object of the Brussels Convention and its desire to establish a simple rule granting the first-seised court jurisdiction, he declared that the question of which court is the more convenient or more appropriate does not arise in the context of *lis pendens* and related actions, spelling out that '[t]he doctrine of *forum non conveniens* can have no relevance'. ibid 179. See also, e.g. *Miles Platt Ltd v Townroe Ltd* [2003] 2 CLC 589, 597 (CA); *Virgin Aviation Services Ltd v CAD Aviation Services* [1991] IL Pr 79, 88–89 (QB).

relation to related actions shares some considerations in common with FNC, it is not otherwise identifiable with the common law doctrine. Instead, the Brussels I Regime envisages a narrow doctrine whose exercise is limited, in the context of a given case, to considerations relating to the expediency of declining jurisdiction or staying proceedings in order to avoid the risk of irreconcilable judgments. This was emphasized by the Supreme Court in *The Alexandros T*, Lord Clarke (giving the leading opinion) stating that 'the circumstances of each case are of particular importance but the aim ... is to avoid parallel proceedings and conflicting decisions.'[46]

The mere fact that the Brussels I Regime contains a discretionary rule pertaining to a court's power to stay or dismiss proceedings in the case of related actions demonstrates that the civil law is not inherently incompatible with the granting of discretion to its courts in matters of jurisdiction. However, this example of a civilian discretion also demonstrates the tendency to constrain it within boundaries much narrower than those which exist within the common law. In the appropriate circumstances, civil law States are prepared to concede some level of discretion, the Brussels I Regime being one such example.

3.4.3 FNC and the Brussels I Regime

It almost goes without saying that where a dispute does not fall within the scope of the Brussels I Regime, for instance, where it is not a civil or commercial matter, or where it comes within one of the exceptions, then its rules, including those on jurisdiction, do not apply. In these types of cases, the jurisdiction of the court will be determined in accordance with its own law. Accordingly, where part of the Member State's national law, FNC would *prima facie* be available. Likewise, if a dispute is entirely domestic in nature then the Regime does not apply and FNC may be applicable, albeit only as a mechanism for determining venue within that State's own territory. Where the defendant is not domiciled within a Member State but is sued therein, the Brussels I Regime directs the court to apply its own national law to determine the question of jurisdiction. If a Chinese national, domiciled in China, is sued in England then the Regime instructs the English courts to apply its own law, whereupon FNC may be employed to stay proceedings. However, where the alternative forum is located in a Member State to the Brussels I Regime then there remains a question as to whether FNC can be applied; current authority in England supports it application[47] but it is recognized that reference to the CJEU is desirable.[48]

Ordinarily, where a defendant is domiciled within the Community then the Brussels I Regime regulates the international jurisdiction of the Contracting States' courts. The general rule is that a defendant shall be sued before the courts of his place of domicile. It is settled law at this point in time that where jurisdiction is established under the Regime and there are connecting factors between two or more Contacting State courts then FNC has no role to play.[49] The doctrine would be clearly inconsistent with the legal framework of the Regime. However, where the defendant is domiciled in the Community and the only international element involved in the dispute is with a third State. For instance, if an English domiciled defendant is sued in England by an Argentinian

[46] [2013] UKSC 70, [92].
[47] *Sarrio SA v Kuwait Investment Authority* [1997] 1 Lloyd's Rep 113 (CA).
[48] See *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337 (CA).
[49] Fawcett and Carruthers (n 43) 325.

claimant in respect of a dispute entirely centred in Argentina. Should this concern the Brussels I Regime? Would it have intended to regulate the international jurisdiction of the English courts in such a case? These questions proved to be exceptionally controversial.

The common law position, generally speaking, was that where there is no Community dimension involved then FNC remained an option because its use was not inconsistent with the Brussels I Regime.[50] This perspective is predicated on the relative effect of treaties and on a narrow conception of the Regime's object as being to establish a legal framework to provide for the free movement of Member State court judgments within the internal market. If there is no connection to the internal market then the Community has no vested interest and ought not to attempt to regulate the international jurisdiction of the Member State. The countervailing point of view among civilian lawyers was that the general rule of the Brussels I Regime allocated jurisdiction to the court of the defendant's domicile, such jurisdiction being mandatory, even where the alternative forum was in a third State.[51] Surprisingly, the English High Court initially aligned itself with the latter perspective.[52] However, the Court of Appeal, in the *Re Harrods (Buenos Aires) Ltd*,[53] reversed course and adopted the view that the Brussels Convention is only concerned with regulating jurisdiction between Member States and not with a jurisdictional dispute between a Member State and a third State. In such a situation, the Court of Appeal concluded that applying FNC would not be inconsistent with the Brussels Convention and that English courts were therefore entitled to continue to apply it.

The Court of Appeal's in *Harrods* was appealed to the House of Lords, who referred the matter to the ECJ. But, the dispute was resolved before the ECJ had the chance to rule on the issues raised. *Harrods* was subsequently followed by the Court of Appeal in a number of cases.[54] In 2000, in *Lubbe v Cape plc*,[55] the House of Lords received submissions from both parties on the availability of FNC within the context of the Brussels I Regime. Although the Court was not required to decide the issue, on account of the fact that a stay was refused in that case, Lord Bingham CJ did opine that the answer to the question was not clear and that a ruling from the ECJ would have been necessary.[56] It was not until the 2005, with the case of *Owusu v Jackson,*[57] that the ECJ would finally get its chance to weigh-in on the matter.

In *Owusu*, despite finding that Jamaica was the natural forum for the dispute, the English High Court had elected not to follow *Harrods* and refused to grant a stay on grounds of FNC. The Court of Appeal sought a preliminary ruling from the ECJ on the consistency of the discretionary power of a Contracting State court to stay proceedings, under its national law, where jurisdiction is founded under the Brussels Convention on the basis of the defendant's domicile in the Community (i.e. Article 2) but where the jurisdiction of no other Contracting State is at issue, or, where the

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[50] L Collins 'Forum Non Conveniens and the Brussels Convention' (1990) 106 *LQR* 535, 538–539.

[51] See the Schlosser Report on the Brussels Convention, 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice ('Schlosser Report')' [1979] OJ C 59/71 [76-81].

[52] *S & W Berisford v New Hampshire Insurance* [1990] 2 QB 631, 645 (QB)

[53] [1992] Ch 72 (CA).

[54] *The Po* [1991] 2 Lloyd's Rep 206 (CA); *Hamed el Chiaty & Co v Thomas Cook Group Ltd (the 'Nile Rhapsody')* [1994] 1 Lloyd's Rep 382 (CA).

[55] [2000] 1 WLR 1545 (HL).

[56] ibid 1562.

[57] *Owusu* (n 38).

proceedings have no connecting factors to any other Contracting State.[58] The ECJ flatly rejected both propositions.[59]

Curiously, the ECJ's judgment began by addressing a question which was not actually referred to it. It asked whether Article 2 of the Brussels Convention applied at all. Clearly, the defendant was domiciled in the UK so the real issue here was whether the scope of Article 2 only applied where there was also an intra-Community element. If such an element was required, then the Convention would not apply at all. If a narrow view is taken of the purpose of the Brussels Convention then it is logical to conclude that it was only interested in regulating the international jurisdiction of Contracting States. And, only to the extent necessary to ensure the simplification of procedures relating to the recognition and enforcement of judgments between Contracting States and to promote the operation of the internal market. As Peel reminds us, the Brussels Convention 'is a "judgments" convention in which rules on jurisdiction are included purely to facilitate the recognition and enforcement of judgments.'[60] If an English court grants a stay and the dispute is determined by the courts of a third State then there is no issue since the judgment granted is not that of a Contracting State. In such a case, there is no real prejudice to the internal market.

The ECJ did not agree, it held that it was never intended to be limited to intra-Community disputes. It held that the international element required did not have to be between Contracting States to the Brussels Convention. Instead, it could be a connection to any other State.[61] The court found additional support for its holding in perceiving the purpose of the Brussels Convention in broader terms. The Convention was not simply about ensuring the free movement of judgments within the Community and promoting the internal market, it also sought to strengthen the protection accorded to persons established within the Community. This protection was achieved through eliminating disparities between national legislations by harmonizing rules of private international law.[62] The free movement of judgments within the Community and the certainty granted with respect to where they might sue or be sued, not only benefitted those persons established within the Community, it also indirectly promoted the internal market. Having adopted this perspective, the writing was already on the wall for FNC.

The ECJ made short shrift of the argument that FNC was not inconsistent with the Brussels I Regime, coming to the opposite conclusion based on the following considerations. As we shall see in the following chapter, these are arguments that arise in the context of FNC and the WCS and MC99. First, it noted that jurisdiction is mandatory under Article 2 of the Brussels Convention and may only be derogated from in situations expressly provided for by the Convention. Nothing in the Convention made provision for FNC. Secondly, an objective of the Brussels Convention is legal certainty and this could not be fully guaranteed if the court seised could apply the doctrine of FNC.[63] As a doctrine which leaves a wide measure of discretion to the court to determine if another forum might be the more appropriate one for the resolution of the dispute, it is liable to

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[58] *Owusu v Jackson* [2003] 1 CLC 246, 264 (CA).
[59] *Owusu* (n 38) [46].
[60] E Peel 'Forum Non Conveniens and European Ideals' [2005] *LMCLQ* 363, 567.
[61] *Owusu* (n 38) [26].
[62] ibid [34].
[63] ibid [38]. A point emphasized by Advocate General Léger in his opinion, see ibid AG Opinion at [168].

undermine the predictability of the rules and therefore undermine the principle of legal certainty.[64] Thirdly, the legal protection that the Brussels Convention seeks to ensure to persons established within the Community would be undermined by the doctrine of FNC. Fourthly, allowing for the operation of FNC in the context of the Brussels Convention would likely affect its uniform application as the doctrine is only a feature of a minority of Contracting States.[65] This was contrary to the instrument's purpose of providing for the harmonization of jurisdictional rules and would hinder, not promote, the functioning of the internal market. All of which justified the court's decision to preclude the application of FNC.

Leaving to one side the theoretical objections, the ECJ's decision brought to the fore some practical consequences and difficulties inherent to the Brussels I Regime. Problems which had hitherto been resolvable with FNC. The UK court had posed a second question in the *Owusu* case which was tailored to challenge the ECJ to contemplate the consequences of its decision in the event that it held FNC to be inconsistent with Article 2 jurisdiction. The second question boiled down to whether the ban on FNC within the Brussels I Regime applied in all cases. The ECJ would not be drawn into responding to what it viewed as a hypothetical question.[66] While it might not have been at issue on the facts of *Owusu*, it is regrettable that the ECJ did not deign to throw some light on it since its decision to bar FNC, if taken to its logical extreme, could raise substantial problems for the operation of the Brussels I Regime.

First of all, where a stay is not available, this may result in considerable hardship for a defendant in the position of *Owusu*. Of the several defendants in *Owusu*, only one was domiciled in the UK whilst the others were all Jamaican. As the dispute involved was undoubtedly more closely connected with Jamaica, it would place massive inconvenience on the parties to litigate in the UK. Not only would proceedings be much more expensive, the logistical problems involved in litigating so far from the geographical centre of the dispute would be substantial. Not to mention the difficulties involved in applying Jamaican law, the recovery of costs, the enforcement of an English judgment in Jamaica and so on. Another negative consequence of barring FNC (one not noted by the ECJ) was the likelihood that it might result in fragmentation of litigation. The Jamaican domiciled defendants had a strong case for FNC dismissal notwithstanding the fact that the English defendant was now obliged to proceed in the UK. This raises the spectre of conflicting and inconsistent judgments and is surely not consistent with the sound administration of justice. The ECJ acknowledged these potential hardships but was unperturbed. It appeared to regard these as natural consequences of a jurisdictional regime based on the mandatory domicile rule. In other words, this was the price to be paid for the certainty and predictability offered by the Brussels I Regime.[67] On this precise point can be discerned the fundamental difference in ethos that exists between the common law and civil law systems; where flexibility is prized by the common law courts as providing a means of securing a just and fair result in the individual case, the more utilitarian perspective of civilian lawyers is to emphasize the greater good of legal certainty.

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[64] *Owusu* (n 38) [41].
[65] ibid [43].
[66] See ibid [47-52].
[67] ibid [45].

Secondly, a conundrum has long been recognized to exist with respect to Brussels I Regime's provisions relating to cases of *lis pendens* and related actions, exclusive jurisdiction, and jurisdiction agreements. The gist of the dilemma involved here is that the Brussels I Regime, in each of these cases, provides for the priority of a particular Member State court, but it does not make any provision for non-Member State courts. This is best illustrated by way of an example. Let us imagine that proceedings are commenced in England against an English domiciled defendant but there is an exclusive jurisdiction agreement between the parties which has nominated the courts of a third State. Traditionally, the English courts would apply a bespoke version of FNC which applies in the case of breach of an exclusive jurisdiction clause.[68] However, in this hypothetical scenario the jurisdiction of the English court is established under the general rule of the Brussels I Regime, i.e. the domicile of the defendant within the Community. The problem for the Brussels I Regime is that it nowhere confers the power to stay proceedings where they are brought in breach of an exclusive jurisdiction clause nominating a court in non-Member State; it only speaks of the courts of a Member States.[69] Had the agreement nominated a court in another Member State then the Regime would have given priority to that court; problem solved. But, in the case of a non-Contracting State the Regime is silent. If *Owusu* means that FNC is barred, then the English court would be unable to rectify this situation. Yet, would this not involve disregarding the exclusive choice of forum clause agreed between the parties? Would this not actually subvert the legal certainty and predictability the parties intended to create? These questions are made all the more salient by the fact the Brussels I Regime has always championed respecting the autonomy of the parties to a contract[70] and the sound administration of justice.[71] Surely it would be desirable for a court to apply its own national law to resolve such problems? Would FNC, or some similar doctrine, not provide a sensible solution to a most unsatisfactory and unworkable state of affairs whilst also safeguarding party autonomy and the sound administration of justice? The English court's second question to the ECJ in *Owusu* targeted this kind of situation, asking whether the use of FNC might be acceptable in such circumstances.

Some commentators have referred to the ruling of the ECJ (pre-*Owusu*) in *Coreck Maritime GmbH v Handelsveen BV* in which the court ambiguously said that in relation to exclusive jurisdiction clauses that designate the courts of third countries, '[a] court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits.'[72] This might be read as authorising a Member State to apply its own private international law, including FNC.[73] At least one English case has done just that,[74] albeit subject to criticism.[75]

The refusal of the ECJ to address the English court's second question in *Owusu* has given some solace to those who hold out hope that that FNC might make a comeback of sorts within

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[68] See *Donohue v Armco Inc* [2001] UKHL 64.
[69] See e.g., Recast Brussels I Regulation (n 29) Article 25.
[70] See e.g., ibid Recital 19.
[71] See e.g., Brussels I Regulation (n 28) Recital 12.
[72] *Case C-387/98 Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-09337 [19].
[73] See A Briggs *The Conflict of Laws* (Kindle edn, OUP 2008) 103.
[74] See *Konkola Copper Mines plc v Coromin* [2005] EWHC 898.
[75] Fawcett and Carruthers (n 43) 329; J Harris 'Stays of Proceedings and the Brussels Convention' (2005) 54 *ICLQ* 933, 944–945.

the Brussels I Regime. One commentator refers to them as 'a chink of light ... [for] a residual right to stay proceedings in favour of the courts of Non-Contracting States'.[76] However, a more pragmatic—perhaps cynical—observation is that the tide has well and truly turned against FNC and given the general civilian distaste for the doctrine it would be a great surprise to see the European courts throw it a life-line. There seems little doubt that the CJEU would take the same dim view as it did in *Owusu* and bar the use of FNC and cognate doctrines.[77] The CJEU seems beyond conceding any utility to a doctrine so intimately associated with the English common law, especially where an alternative exists. This alternative is based on the notion of "reflexive effects". In essence, this notion proposes to treat these situations involving non-Member States the same as if they involved a Member State. Therefore, in the example of an exclusive jurisdiction clause, the Member State court would yield to the nominated court (even though it is not manifestly empowered to do so by the Regime). This approach would certainly be more attractive to the CJEU since it would provide a solution from within the Brussels I Regime whilst also been more closely aligned to its civilian law sensibilities.

With the Recast Brussels I Regulation, a partial solution has been established in the case of *lis pendens* and related actions.[78] However, where a Member State court has jurisdiction under the Brussels I Regime and the dispute involves the courts of a third State, the lamentable situation persists in the case of proceedings brought in breach of jurisdiction agreements and where exclusive jurisdiction is granted under the Regime.

Owusu's impact has been to substantially narrow the already shrinking scope for the application of the doctrine of FNC by UK courts. Whilst *Owusu* was decided in relation to the Brussels Convention, there is no suggestion that the subsequent introduction of the Brussels I Regulation and now the Recast Brussels I Regulation have changed anything. Both instruments make it clear that continuity with the Brussels Convention was both desired and intended to be maintained.[79] Indeed, the likelihood that a different conclusion might be reached in the case of the Regulations is made even more unlikely by the fact that both instruments' recitals contain language consistent with the *Owusu* position.

While the faintest glimmer of hope persists that FNC might have some relevance in some residual areas of the Regime, that seems unlikely, the trend within the EU is towards its eventual demise. This is especially so in light of Brexit. Once the UK has left the EU, then Ireland and Cyprus will be the only remaining common law jurisdictions applying the doctrine. Much will depend on the type of Brexit secured, where the UK follows through on its Article 50 withdrawal from the EU then it will cease to be bound by the Recast Brussels I Regulation. However, it might remain party to the Brussels I Regime, either by reversion to the Brussels Convention or, perhaps by becoming party to the Lugano Convention 2007 (which would require the UK to join the European Free Trade Area) or, by forming a bespoke bilateral agreement with the EU. The final option could conceivably open the door to the UK courts being re-empowered to employ FNC in areas where it is currently denied to them. Only time will tell.

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[76] Harris (n 75) 943.
[77] As argued by Fawcett and Carruthers (n 43) 328.
[78] See Recast Brussels I Regulation (n 29) Article 33.
[79] ibid Recital 34; Brussels I Regulation (n 28) Recital 19.

3.5 Conclusions

FNC seems most adept at stirring up the passions of common law and civil law lawyers alike. This is amply demonstrated by the experience of the Brussels I Regime, as well as the phenomenon of FNC-blocking statutes of some South American States. Indeed, the standoff between the French and US courts over *West Caribbean Airways*—the case at the heart of this work—exemplifies the dissension that exists between civil and common law systems with regard to FNC. It often goes beyond the purely doctrinal issues at hand and can engender suspicion and distrust. For instance, writing on *Owusu*, Hartley suggested that '[i]t seems that the continental judges on the European Court want to dismantle the common law as an objective in its own right.'[80] From a common law perspective, it is hard not to sympathize with this perception since experience certainly seems to suggest that FNC is the *persona non grata* of the European legal landscape. Yet this lowly position is surely undeserved. On the one hand, one can appreciate civilian concerns about a doctrine which clashes with the civil law emphasis on legal certainty and predictability, as one commentator put it, 'the doctrine of *forum non conveniens* produces too much legal uncertainty'.[81] Yet, on the other hand, the vitriol and contempt with which it sometimes regarded by civilian lawyers is out of proportion to the offence actually posed. Why, for instance, did one French jurist choose to pejoratively entitle an article on the topic, "*Le 'forum non conveniens' une menace por la convention de Bruxelles?*"[82]

One cannot escape the sense that some irrational fear exists behind the civilian law's distrust of FNC, something more intimately bound up in the existential anxiety provoked by the separation of common law and civil law. Whatever the origins of this animus, the divisiveness that surrounds FNC is an inescapable reality. Irrational or not, it must be taken into account in the context of any international agreement in the field of private international law that wishes to unify or harmonize rules of jurisdiction between the common law and civil law systems. Foreshadowing the concluding chapter to this work, it is inevitable that any suggestions for reform made in this work must contemplate how to accommodate, or allow for, civilian attitudes toward FNC. This chapter has attempted to lay some of the groundwork for such by elucidating these attitudes and identifying some of the various principled objections made against FNC.

This divisiveness that exists between the civil law and the common law systems over FNC will remerge in the next chapter in respect to WCS and MC99 and thus provide further opportunities for examination. This is especially so in the case of MC99, where FNC featured very prominently in the debate over the most controversial issue at the Montreal Conference in 1999.

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[80] Hartley (n 1) 828.

[81] G Cuniberti '*Forum Non Conveniens* and the Brussels Convention' (2005) 54 *Int'l & Comp L Q* 973, 977.

[82] H Gaudemet-Tallon 'Le "Forum Non Conveniens", Une Menace Pour La Convention de Bruxelles?' (1991) 80 *Revue critique de droit international privé* 491.

Conclusion to Part Two

Having traced the doctrine of FNC from its origins in Scotland to its current manifestations throughout the common law world, we are in a position to draw out the features which have a particular relevance for choice of forum in international aviation litigation. Firstly, there is no doctrine of FNC. There are only *doctrines* of FNC. At an international level, whilst consensus has built around the *Spiliada* doctrine of FNC, there remain States which apply divergent versions of the doctrine; most notably the US and Australia. In simple terms, this means there is a lack of doctrinal uniformity. At a domestic level, the lack of a unified doctrine within the US constitutes a very worrying issue for international aviation litigation; the US being the undisputed centre of gravity for such litigation at the present time. The dis-unified state of the doctrine in the US undermines the international credibility of the US as a jurisdiction for litigation of claims and has only exacerbated the jurisdictional lawfare engaged in by claimants and defendants. A topic which will be explored in greater detail in Chapters 6 and 7.

Secondly, in this part the existential division that exists between the common law and the civil law has been identified and explored. The two systems adopt positions which diverge precisely on the matter of the discretion to decline jurisdiction. Civilian antipathy for FNC has been demonstrated and its alternative approach to jurisdiction described. As we shall see, the jurisdictional regime established by the Warsaw Convention (and in consequence by MC99) has a greater affinity to the civilian approach, it provides a limited number of potential forums which have been pre-selected precisely so as to ensure a strong connection to the defendant carrier. The question we now have to explore is precisely how compatible the doctrine of FNC is with the jurisdictional regime of the Warsaw Convention and MC99. It is to this that Part Three of this work is devoted. What can be singled-out at this point is the following question: if, as the title of the Warsaw Convention and MC99 suggest, the goal of those instruments is the unification of law, can a doctrine which inherently generates uncertainty have a place therein?

Thirdly, although in its origins FNC was fixed firmly in convenience, there has been a shift in emphasis toward appropriateness of forum. The doctrine has evolved. It is undoubtedly employed nowadays primarily as a tool for policing forum shopping and only secondarily as preventing the unfair inconvenience of defendants. This shift, as well as other factors (e.g. comity), has seen a marked liberalization of the doctrine, with the consequence that dismissal is now far more likely whereas in the past it was exceptional. We must ask: Is it legitimate to speak of forum shopping in the context of a convention which grants the claimant passenger a limited choice of available forums? The shift toward liberal doctrines of FNC has favoured defendant carriers who wish to dispute the claimant's choice of forum. Is this consistent with the balance of interests struck under the Warsaw Convention and now under MC99? Or, do we need to reassess that balance in light of the modern realities of FNC? Although it will only come into relief in Part Four, it is worthwhile noting at this point that the balance of interests is premised on a two-party conception of international aviation litigation. As we shall see, the truth is that third parties play a huge role and the weight of their influence is on the side of the defendant carrier, not the claimant passenger. It is a fundamental thesis of this work that the balance of interests struck in MC99 does not reflect the reality of international aviation litigation today.

PART THREE
WARSAW AND MONTREAL

Chapter 4: Warsaw

4.1 Introduction

The availability of FNC within the jurisdictional scheme of WCS and MC99 is a critical question of this work. One which is ultimately a matter of treaty interpretation. While the Warsaw Convention and MC99 are conventions relating to private international law, they are nonetheless treaties and are therefore instruments governed by public international law. Therefore, it is to that body of law that we must look for the principles to be applied to their interpretation. Customary international law provides a body of interpretative rules to be applied to treaties, rules which have been codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[1] It is with the text of the particular provision in question that the interpretation of a treaty must begin, but this is done within its context and that of the treaty as a whole in light of its object and purpose. Treaty interpretation involves consideration of these and other authentic means of interpretation and, as is necessary in the case of FNC and the Warsaw Convention, supplementary means of interpretation.

As codified by Article 32 of the Vienna Convention, customary international law permits access to supplementary means of interpretation, these include the *travaux préparatoires* of the treaty as well as its background circumstances and history.[2] With this in mind, this section begins with the historical origins and context for the drafting of the Warsaw Convention and involves consideration of the existing legal regimes governing the liability of the carrier under common law, civil law, and existing international law regimes. Attention shall then turn to the drafting history of the Warsaw Convention in order to elucidate its purposes—a vital ingredient in the interpretative approach to treaties—and the specifics of its jurisdictional scheme. This chapter will then conclude with a critical evaluation of the case law treating the question of the availability of FNC within the Warsaw Convention and a final section in which a summation and conclusion on this critical issue will be presented.

4.2 Purpose of the Warsaw Convention

It is axiomatic that international air transport, by its nature, exposes carriers and their customers to the diversity of laws of multiple jurisdictions. From early on, aviation itself was awake to the issues of non-uniformity and it was accepted that uniformity of certain rules relating to international carriage by air was a necessity, especially regarding the liability of the carrier.[3]

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[1] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[2] ibid Article 32.

[3] S Latchford 'The Growth of Private International Air Law' (1944) 13 *Geo Wash L Rev* 276, 276; see also, JJ Ide 'The History and Accomplishments of the International Technical Committee of Aerial Legal

Around this time, the liability of the carrier under *le droit commun* was actually quite favourable to passengers. Where difficulties emerged was, firstly, surrounding the applicability of existing legal regimes of carriage to the newly discovered carriage by air, and, secondly, the exploitation of exemption clauses by air carriers to restrict or exclude their liability. The English courts traditionally placed few restrictions on carriers using special contracts to exempt themselves from liability,[4] even in the case of passengers.[5] In similar vein, the French civil law generally permitted exemption clauses in the case of contractual liability but not to the extent of exempting *dol* or *faute lourde* (i.e. wilful misconduct or gross negligence).[6]

These difficulties led many States to introduce specific legislation directed at carriage by air and regulating the liability of the carrier and the use of exemption clauses. These regimes differed substantially from one another with a resulting lack of international uniformity. For example, the French legislature introduced the Air Navigation Law of 1924[7] which essentially established a fault-based model of liability with no monetary limitation of liability; according to contemporary commentators, similar laws to the French Act were introduced in Chile (1925)[8] and in Yugoslavia (1928),[9] and Italy (1923).[10] However, other civilian legal systems did not follow the fault-based model but adhered to a risk-based model with a monetary limitation of liability, e.g. Germany (1922)[11] and Switzerland (1920).[12] The resulting mish-mash of diverse national regimes being applied to an essentially international activity created an unacceptable level of non-uniformity. A unifying treaty was the solution adopted by the international community to address this non-uniformity.

The First International Conference on Private Aeronautical Law took place in October 1925, in Paris, France. The Conference considered a draft convention (prepared by France) and remitted it for further study to the newly created Comité International Technique d'Experts Juridiques Aériens (CITEJA). CITEJA was comprised of members from several States, nearly all of which had civil law legal systems. However, the UK was also member. A revised draft was submitted to the Second International Conference on Private Aeronautical Law, held in Warsaw in 1929, from which would ultimately emerge the Warsaw Convention. As it shall prove highly significant at a later point, it must now be noted that the US did not officially participate in the First or Second International Conference on Private Aeronautical Law but it did send observers.[13] It was not until 1935 that the US would fully participate in CITEJA.[14]

Experts (CITEJA)' (1932) 3 *J Air L* 27, 27; AN Sack 'Unification of Private Law Rules on Air Transportation and the Warsaw Convention' (1933) 4 *Air L Rev* 345, 346.

[4] See O Kahn-Freund *The Law of Carriage by Inland Transport* (4th edn, Stevens & Son 1965) 200–201.

[5] M Lobban 'Personal Injuries' in W Cornish and others (eds), *The Oxford History of the Laws of England* vol 12 (OUP 2010) 969.

[6] See S Whittaker 'The Law of Obligations' in J Bell, S Boyron and S Whittaker (eds), *Principles of French Law* (OUP 2008) 333, 356.

[7] *Loi du 31 mai 1924 relative à la navigation aérienne*.

[8] Sack (n 3) 360 n 65.

[9] ibid.

[10] D Goedhuis *National Air Legislations and the Warsaw Convention* (Springer 1937) 78.

[11] The text of the German law of 1922 is reproduced (in French) in (1923) 7 Revue Juridique Internationale de la Locomotion Aérienne 59.

[12] 'Arrêté Du Conseil Fédéral Concernant La Réglementation de La Circulation Aérienne En Suisse Du 27 Janvier 1920' (1922) 6 *Revue Juridique Internationale de la Locomotion Aérienne* 141.

[13] S Latchford 'The Warsaw Convention and the CITEJA' (1935) 6 *J Air L* 79, 87.

[14] Ide (n 3) 40–44.

4.2.1 The Resulting Regime

The principal choice that faced the delegates was between the adoption of risk-based liability or fault-based liability.[15] In simple terms, should the air carrier carry the entire risk of air transportation irrespective of fault, i.e. strict liability, or should its liability only arise in those circumstances where it could be shown that the air carrier failed to meet a specified standard of care? Those in support of risk-based liability argued that the air carrier should shoulder the burden for the entire risk of transportation by air. This point of view was supported on the basis that carriage by air was inherently risky and because it was deemed unreasonable to expect the claimant to prove negligence in the case of an air disaster. Fault-based liability was favoured by some because it emphasized the passenger's assumption of risk, recognized the perils of the air, and was sympathetic to the view that it was unfair to expect carriers engaged in a new-born and experimental industry to bear strict liability. Instead, air carriers should be liable only where demonstrably at fault.[16]

The Warsaw Convention adopted the fault doctrine with some modifications. A concession was made to the risk liability doctrine by shifting the burden of proof to the carrier, therefore making the carrier presumptively liable[17] but allowing limited grounds for exoneration.[18] What the choice of the theory of fault for the underlying doctrine for the carrier's liability under the Warsaw Convention tells us is that it was largely dictated by the nascent state of aeronautics at that time. It was recognized that this would be beneficial to the carrier and detrimental to the claimant. Whilst it was accepted that it was in the shared interests of carriers and the public not to impose strict liability on the carrier, the need to make to concessions to claimant in order to adjust the balance was admitted.

Having opted for a fault-based regime that thus favoured carriers, the drafters might have chosen to leave liability unlimited as a concession to the claimant. Instead, the Warsaw Convention reached a compromise solution. It established a monetary limit of liability[19] while making allowance for its non-application in certain circumstances, i.e. potential unlimited liability.[20]

There are many possible reasons for electing for a limitation of liability.[21] The consensus of academic opinion has long supported the conclusion that the main rationale for the limitation of liability in the Warsaw Convention was to protect a nascent industry from the risk of catastrophic

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[15] See *Conférence Internationale de Droit Privé Aérien (Paris 27 Octobre - 6 Novembre 1925)* (Imprimerie Nationale 1926) 55. See also RA Greer 'The Civil Liability of an Aviator as Carrier of Goods and Passengers' (1930) 1 *J Air L* 241, 260.

[16] H Wikoff 'Uniform Rules for Air Passenger Liability' (1930) 1 *J Air L* 512, 515–516.

[17] Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention) Articles 17, 18 & 19.

[18] However, the carrier may exonerate itself by proving that it and its agents took all necessary measures to avoid the damage (Article 20(1)) or that the damage was caused by or contributed to by the negligence of the injured party (Article 21).

[19] ibid Article 22. The carrier is prohibited from excluding or limiting its liability below the limits set by the Convention (Article 23) and, in this sense, it loses its freedom of contract but it may agree to a higher limit by special agreement with the passenger/shipper (Article 22).

[20] There are two occasions in which the carrier may face unlimited liability. The first is where it fails to fulfil the mandatory documentary requirements of the Convention (Articles 4(4) and 9). The second, where the damage is caused by the wilful misconduct of the carrier or its agents (Article 25).

[21] Drion, for example, identified at least eight. H Drion *Limitation of Liabilities in International Air Law* (Springer 1954) 12–13.

losses that it was not yet able to bear.[22] It is submitted that this is only part of the story and that stated alone it may give rise to the imprecise assumption that the Warsaw Convention's limitation of liability served the sole purpose of protecting the carrier at the expense of the claimant. There is a better and fuller understanding to be found.

Goedhuis identified two reasons for the limitation of liability, the need to prevent carriers from exempting themselves from liability through the contract of carriage, and, the necessity for carriers to know the extent of their risk for the purposes of insurance.[23] Goedhuis' explanation is the preferable starting point as it finds agreement in the minutes of the 1925 Conference.[24] However, if we settled just for Goedhuis' two reasons then we would be unable to adequately explain why the limits of liability were set at the level at which they were. Would higher limits not have served the same purposes?

The setting of specific monetary limits of liability serves the Convention's objective of assuring certainty and predictability for the interested parties because it provides the parties with a measure of the risk against which the air carrier and passenger/consignor may insure themselves. However, setting the limits at the particular levels that it did is not justified by the same objective, a higher limitation would have been just as certain and predictable. It is submitted that relatively low limits were were set for an economic policy reason, counterbalanced, to a lesser degree, by a moral consideration.

The economic policy justification for low limits of liability was grounded in the public interest in the promotion of air transport.[25] The stakeholders in air transport had an interest in seeing the costs kept down and this could be achieved by allocating a lower proportion of the risk to the carrier. The imposition of unlimited liability (or a high limit) would increase the insurance premiums of the carriers which would trickle down to the passenger and shipper in the form of higher fares and rates. It was in the general public interest to have a low limit of liability, it benefitted not just the carrier but also the public at large. The public interest in seeing this new means of transportation develop and mature demanded it be given the room to grow without the threat of massive liability claims which could wipe-out carriers and which would deter the capital investment the industry so desperately needed. The opposing moral consideration was the minimum level of protection to be afforded to victims of air accidents (specifically those without insurance).

The result of these competing interests with respect to the Convention's liability regime was that the scales were tipped against the victim of an air accident in favour of the carrier and the general public interest in the development of air transport. Too much has been made of the limitation of liability with the result that its assumed purpose, i.e. protecting the carrier, has come to eclipse the real principal purpose of the Convention, i.e. uniformity.

Whilst uniformity of certain rules is the primary purpose of the Convention, a fact clearly evidenced in the rationale for the limitation of liability, consideration of the limitation of liability also leads us to appreciate another purpose of the Convention. By setting relatively low limits of liability it is clear that the delegates were also seeking to aid the development of air transport. This was

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[22] This view is commonly held. See, e.g., M Milde *International Air Law and ICAO* vol 4 (Eleven International 2008) 284; FN Videla Escalada *Aeronautical Law* (Sijthoff & Noordhoff 1979) 565.

[23] Goedhuis (n 10) 256.

[24] *Conférence Internationale de Droit Privé Aérien* (n 15) 56.

[25] See the comments made in Pittard's report, ibid 57.

not, as is so often assumed, done solely for the benefit of the carrier but primarily in the interests of the general public. When one talks of the balance of interests in the context of the Warsaw Convention, it is not a simple opposition of carrier and passenger, it is actually a balance between the carrier and the general public on the one side and the claimant seeking compensation on the other side.

Whilst it is convenient to speak of the Warsaw Convention as a pro-carrier instrument, it is more accurate to define it as an instrument whose paramount interest was that of the general public in the development of air transport. The regime was not intended to protect the carrier *per se* but only to the extent that it served the public interest. This conclusion necessitates reframing the understanding of the purposes of the Convention, especially as these are employed in its interpretation. We must recognize the inaccuracies inherent in the reductionist understanding of the Warsaw Convention as a pro-carrier instrument.

4.2.2 Interpretation by the Courts

Within common law jurisdictions, the courts have largely held to the view of the Warsaw Convention as having a dual purpose. However, some courts have chosen to give pre-eminence to one or other of those purposes. In particular, there has been a tendency to view the Convention's purpose in the context of its monetary limitation. In the early US case of *Kelley v Societe Anonyme Belge d'Explotation de la Navigation Aerienne (Sabena)*, a New York court spoke of the purposes of Article 22, i.e. the limitation of liability, as follows: 'In order to protect this emerging industry, and to secure uniformity of recovery to passengers, the signatories framed Article 22'.[26] In so doing, the Court identified a dual purpose, i.e. the protection of the industry and uniformity.

A source which has been heavily relied on by the courts when speaking to the purpose of the Warsaw Convention is the 1967 law journal article by Lowenfeld and Mendelsohn.[27] In this article, the authors also identified a dual purpose for the Warsaw Convention:

> First, since aviation was obviously going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity. … The second goal-clearly recognized to be the more important one was to limit the potential liability of the carrier in case of accidents.[28]

Several decisions in which Lowenfeld and Mendelsohn's article was cited have adopted this version of a dual purpose interpretation.[29] Furthermore, some courts concurred that the limitation of liability was the 'dominant' purpose.[30] As suggested earlier, this has skewed their interpretative analysis. For instance, in the Supreme Court case of *Trans World Airlines Inc (TWA) v Franklin Mint Corp*, the Court stated, '[t]he Convention's first and most obvious purpose was to set some limit on a carrier's liability for lost cargo. … The Convention's second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling

[26] 242 F Supp 129, 138 (EDNY 1965).
[27] AF Lowenfeld and AI Mendelsohn 'The United States and the Warsaw Convention' (1967) 80 *Harv L Rev* 497.
[28] ibid 498–499.
[29] See, e.g., *Block v Compagnie Nationale Air France* 386 F 2d 323, 327 (5th Cir 1967); *Saks v Air France* 724 F 2d 1383, 1385 (9th Cir 1984).
[30] *Domangue v Eastern Air Lines Inc* 722 F 2d 256, 261 (5th Cir 1984).

industry.'[31] Here, the Court identified both purposes with the limitation of liability.

The US Supreme Court took some corrective action in *Zicherman v Korean Air Lines Co Ltd*, opining that, '[u]ndoubtedly it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel'.[32] However, in *Floyd v Eastern Airlines Inc,*[33] the Supreme Court stated that 'the primary purpose of the contracting parties to the Convention' was 'limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry.'[34] At other times the goal of achieving uniformity has been considered the *dominant* purpose. In *Reed v Wiser*, the Second Circuit defined, 'providing a uniform system of liability and litigation rules for international air disasters' as 'the Convention's most fundamental objective'.[35]

In the most recent Supreme Court authority on the matter, *Tseng v El Al Israel Airlines Ltd*, the Court stated that, '[t]he cardinal purpose of the Warsaw Convention … is to "achiev[e] uniformity of rules governing claims arising from international air transportation."'[36] *Tseng* identified a 'complementary purpose' of the Convention as being, 'to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability'.[37] This complementary purpose served the goal of aiding the growth of the industry by accommodating the interests of the various parties.[38]

The authorities in England and Wales are less numerous than the US. Nevertheless, there are *dicta* from the House of Lords and the Court of Appeal holding to the view that uniformity is the object of the Warsaw Convention. In *Grein v Imperial Airways Ltd*, Greene LJ stated that, '[t]he object of the Convention is stated to be "the unification of certain rules relating to international carriage by air"',[39] and he subsequently referred to it as one of the 'main objects'.[40] The House of Lords reached the same view in *Fothergill v Monarch Airlines Ltd*, Lord Scarman thinking it plain that, 'uniformity is the purpose to be served by most international conventions, and we know that unification of the rules relating to international air carriage is the object of the Warsaw Convention.'[41] The English authorities thus do not single out the limitation of liability as a distinct objective of the Convention, on the few occasions where the Convention's purpose is dealt with, it is rather matter-of-factly stated to be uniformity.[42]

The *Tseng* position regarding the purpose of the Warsaw Convention is best aligned with the drafting history and general scheme of the Convention itself and is reconcilable with the British authorities. As suggested by both the title to the Convention and its preamble, the cardinal purpose of the Warsaw Convention was to achieve uniformity of certain rules relating to international carriage by air, specifically relating to travel documentation and the liability of the carrier.

Next to this cardinal purpose stands that of accommodating or balancing the interests of

[31] 466 US 243, 256 (1984).
[32] 516 US 217, 230 (1996).
[33] 499 US 530, 552 (1991).
[34] ibid 546.
[35] 555 F 2d 1079, 1092 (2d Cir 1977).
[36] 525 US 155, 169 (1999) citing *Floyd* (n 32) 552; *Zicherman* (n 32) 230.
[37] *Tseng* (n 36) 170.
[38] ibid
[39] [1937] 1 KB 50, 75 (CA).
[40] ibid 76.
[41] [1981] AC 251, 294 (HL).
[42] *Morris v KLM Royal Dutch Airlines* [2001] EWCA Civ 790, [67]

passenger and carrier, what was characterized in *Tseng* as ‘a complementary purpose of the Convention’.[43] *Tseng* spoke of this as seeking ‘to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability’.[44] This is partially correct but it fails to clearly identify the interests of the general public as distinct from those of claimants. In that respect it stands in need of alteration. That said, *Tseng* provides the best foundation for a definition of the purpose of the Warsaw Convention.

4.2.3 The Purpose of the Warsaw Convention

What then is the purpose of the Warsaw Convention? The principal purpose of the Warsaw Convention is uniformity. The historical background presented above showed that the patchwork of divergent national laws necessitated the conclusion of a treaty in order to avoid the conflicts of law that would otherwise be inherent in the uncoordinated regulation by individual countries of an international activity. However, uniformity was not pursued for its own ends but in order to provide a requisite level of certainty and predictability to the interested parties in carriage by air, namely the carrier, the passenger and the consignor. In other words, there was a limited scope to the goal of uniformity. It was not the stated goal of the Convention to unify “all rules” relating to carriage by air, but only “certain rules”. It is clear that these “certain rules” concerned travel documentation and liability of the air carrier; the latter being of primary importance.[45] The preceding consideration of the drafting history of the Warsaw Convention has demonstrated that by addressing only “certain rules”, the delegates intended to limit the scope solely to matters strictly necessary for a convention on private air law. Indeed, they repeatedly noted their desire to leave well alone questions of procedure and general matters of private international law.[46]

The low limits of liability set in the Convention indicate the service of another purpose, i.e. the fostering of the development of international air transport. However, one must specify the interests pursued, lest one might conclude that the purpose of the Convention was only to protect the carrier. The drafters understood the regime as being in the general public interest. At that time, the public interest was aligned more closely with the interests of the carrier and thus the resulting regime had a *de facto* pro-carrier slant but it was not directly intended as such. The drafters were aware of this and made concessions to potential claimants in an effort to reach an equitable balance. However, the fact is that the public interests of air transport took precedence over those of the victim.

In conclusion, the author proposes the purpose of the Warsaw Convention is twofold, consisting of a cardinal purpose and a supplementary purpose:

1. Avoidance of conflict of laws through unification of certain rules relating to carriage documentation and air carrier liability.
2. Furtherance of the public interest in the development of air transport whilst striking an equitable balance of interests between carriers, users and claimants.

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[43] *Tseng* (n 36) 170.
[44] ibid.
[45] Milde (n 22) 283.
[46] See RC Horner and D Legrez (trs) *Second International Conference on Private Aeronautical Law, October 4-12, 1929 Warsaw: Minutes* (Fred B Rothman 1975) 173–174.

4.3 Jurisdiction under the Warsaw Convention

Jurisdiction under the Warsaw Convention and MC99 is laid down in Article 28 and Article 33 respectively. The text of both Conventions is substantially the same with the exception of the fifth jurisdiction which was added with MC99. As the fifth jurisdiction was not initially provided for under the Warsaw Convention and because it bears special significance for the doctrine of FNC, it shall be explored in detail in Chapter 5. The focus of this section shall be on the first four jurisdictions. This section shall refer to the Warsaw Convention on the understanding, unless otherwise noted, that what follows applies equally to MC99.

4.3.1 The Four Jurisdictions

The 1925 Preliminary Draft Convention (*Avant Projet*) presented by France at the First International Conference on Private Air Law in Paris in 1925, had based jurisdiction on the place of departure or the place of arrival with the possibility—in the case of an accident—of jurisdiction at the stopping place of the aircraft *en route*.[47] After deliberations, the draft produced at the 1925 Conference provided for jurisdiction at the place of departure, the place of arrival, the place of the accident, or the place of the *domicile* of the defendant.[48] Subsequent alterations were made by CITEJA, such that the draft submitted for consideration by the Diplomatic Conference in Warsaw provided for four jurisdictions: (1) the court of the principal place of business of the carrier (*le siège principal de l'exploitation*); (2) the place where the carrier has an establishment through which the contract was made; (3) the place of destination; and (4) in the case of non-arrival of the aircraft, the place of the accident.[49]

The place of the accident had featured as basis for jurisdiction since the *Avant Projet* in 1925. Its removal had been proposed at the Second CIETJA Session in April, 1927,[50] but it remained in the CITEJA Final Draft considered at Warsaw. The UK had submitted a proposal to the Conference calling for its removal, arguing that it bore no relationship to the contract of carriage, that it would not have been contemplated by the parties as the place for litigation of claims, and that it could not be presumed that the carrier would have a business presence there.[51] The UK also perceived a risk of "blackmail", whereby a claimant would elect for the place of accident in order to vex or harass the carrier into settling rather than face the difficulties and expense of answering a claim in a distant forum.[52]

During the Conference, the Rapporteur explained that CITEJA had elected for the place of the accident because it would provide a convenient forum from the perspective of establishing the circumstances of the accident (such as access to evidence).[53] The UK Delegate referred to the points raised in its submission and elaborated by pointing out the fortuitous nature of the location

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[47] See *Conférence Internationale de Droit Privé Aérien (Paris 27 Octobre - 6 Novembre 1925)* (n 15) 13.
[48] ibid 80.
[49] Article 26 of Preliminary Draft, Horner and Legrez (n 46) 266.
[50] 'Compte-Rendu de La Deuxieme Session Du Comité International Techniques d'Experts Juridiques Aériens (CITEJA) (Avril 1927)' 65.
[51] Horner and Legrez (n 46) 298.
[52] ibid.
[53] ibid 113.

of the accident, indicating that it could result in a case being heard before courts which were 'not well organized'.[54] The Polish and Greek delegates opposed the deletion. For them the place of accident was a natural choice of forum and they supposed that since the possible drawbacks of some forums would also be detrimental to the claimant that this would discourage them from pursuing litigation there in order to vex the carrier.[55] Speaking in support of the UK proposal, the French Delegate opined that the place of the accident would be justifiable in the case of a third party but not where a contractual relationship existed between the parties. The Swiss Delegate was also in support of removing the place of the accident, pointing out that where one is dealing with an organized State then reliance could be placed on the local authorities to establish the circumstances of the accident, whereas if the State is disorganized then its forum would be objectionable in any case.[56] The British proposal was adopted and the place of the accident was removed from the Convention. What is noteworthy in this interchange is the recognition by the other delegates that considerations of convenience and predictability were controlling. As to the possibility of forum shopping, this was not expressly rejected, nor accepted. The Polish and Greek delegates instead regarding it as not really being at issue. The main reason that the place of the accident was removed was because its *raison d'être* had been diminished by the observations of the Swiss delegate. This is striking given that the convenience posed by the location of evidence is so frequently cited in FNC motions in aviation litigation.[57] Yet, in 1929, the delegates had not felt that such convenience was strong enough to guarantee jurisdiction at the place of the accident.

Therefore, the result was that Article 28(1) of the Warsaw Convention provides four jurisdictions:[58] (1) the place where the carrier is ordinarily resident; (2) the place where the carrier has its principal place of business; (3) the place through which the contract has been made; (4) the place of destination. In each case, the location must be within the territory of one of the Contracting Parties and where more than one forum is possible the choice rests with the claimant. The generally accepted view is that the jurisdiction of these forums under the Convention is mandatory and exclusive; the parties may not agree to waive jurisdiction and the claimant must ground jurisdiction on Article 28.[59] Roskill LJ described Article 28, in *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp,* as creating a 'self-contained code within the limits of which a plaintiff must found his jurisdiction.'[60]

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[54] ibid 114.
[55] ibid 114–115.
[56] ibid 115–116.
[57] See e.g., *In re Air Crash over the Southern Indian Ocean, on March 8, 2014, (MH370),* No 16-CV-1184, 2018 LEXIS 198598 *90-93 (DC Cir 21 Nov 2018); *Lueck v Sundstrand Corp* 236 F 3d 1137, 1146 (9th Cir 2001).
[58] Warsaw Convention (n 17) Article 28(1).
[59] CEB McKenry 'Judicial Jurisdiction under the Warsaw Convention' (1963) 29 *J Air L & Com* 205, 229. PPC Haanappel *The Law and Policy of Air Space and Outer Space* (Kluwer Law 2003) 82; LB Goldhirsch *The Warsaw Convention Annotated - A Legal Handbook* (2nd edn, Kluwer Law 2000) 177.
[60] [1981] QB 368, 385 (CA).

4.3.1.1 The Place where Carrier is Ordinarily Resident and Principal Place of Business

For reasons which will become apparent, it is advisable to consider the first two grounds of jurisdiction under the Warsaw Convention simultaneously. In the French text of the Warsaw Convention (the only authentic language version) *le domicile du transporteur* is the first place whose courts have jurisdiction. The British translation of which is the place where the "carrier is ordinarily resident", whereas the US translation refers to "the domicile of the carrier". The second place whose courts are vested with jurisdiction under the Convention is the carrier's principal place of business (*le siège principal de son exploitation*)—translated identically in both the British and US versions. In most circumstances, a carrier is domiciled/ordinarily resident in the same location as its principal place of business, so the question arises to why the Warsaw Convention provided two bases of jurisdiction which appear to point to the same location?

The concept of domicile differs between common law and civilian law systems but what is common to the two is that it is more usual for it to be used to refer to natural persons. In the case of a corporation, it is generally understood as referring to its place of incorporation. For both systems, the proposition that a person or corporation can have only one domicile at a given point in time is widely accepted.[61] While it is conceivable that a carrier may be incorporated within one State and have its principal place of business in another, this would certainly be exceptional, even today. The reason why the Warsaw Convention provided two bases of jurisdiction which overlap in the vast majority of cases is to be found in the *travaux préparatoires*. The comments submitted by Czechoslovakia on the CITEJA Final Draft had noted that *le siège principal de l'exploitation* and the place of the establishment through which the contract was made (i.e. the third jurisdiction) both presumed the existence of the carrier as a company/corporation. This would not cover those instances where a natural person provided carriage for hire.[62] Only the term *domicile* of the carrier would cover this eventuality.

It is clear that the drafters intended to ensure, as a prerequisite to a forum having jurisdiction under the Warsaw Convention, that there would exist a strong connecting factor between the carrier and the jurisdiction in question. This requirement was clearly satisfied by the first two jurisdictions, being places to which the carrier generally has its closest links. These would have provoked little controversy since they conform with the fundamental principle of jurisdiction, i.e. *actor sequitur forum rei*.

4.3.1.2 Establishment Through Which the Contract Has Been Made

A difference exists with respect to the wording of the third jurisdiction under the Warsaw Convention as translated in the UK and the US versions. Article 28(1) of the authentic French language version of the Warsaw Convention specifies that a claim may be brought before the courts of the place where the carrier has *un établissement* through which the contract has been made. *Un établissement* has been translated as "an establishment" (UK translation) and as "a

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[61] See e.g., *Pflug v Egyptair Corp* 961 F 2d 26 (2d Cir 1992); *Aikpitanhi v Iberia Airlines of Spain* 553 F Supp 2d 872, 877–878 (ED Mich 2008).

[62] Horner and Legrez (n 46) 169, 285.

place of business" (US translation). The authentic English version of MC99 employs the US translation in Article 33(1).

In most cases, identification of the forum under this base of jurisdiction is uncontroversial but difficulties emerge when the ticket has been purchased through an agency. Miller recounts the French case of *Herfroy v Cie Artop.*[63] Here the passenger had purchased a ticket for a flight between Lisbon and Madeira through the carrier's agent in Paris. The aircraft crashed, killing all on board. The claimant brought an action against the carrier in Paris, arguing that the sales agency office amounted to *un établissement* of the carrier. The court, however, explained that in order to be *un établissement* the premises would have to be directly owned by the carrier but that in the case at hand it was not. The French courts have thus adopted a strict interpretation of *établissement* which would not extend to the independent agent selling tickets on behalf of the carrier. The French interpretation is supported by reference to French authentic text of Article 28(1) which states that the carrier *possède un établissement*, thus implying legal possession, a sense not carried by the verb "to have" in the English translations.

Facilitated by its translation as "place of business", US case law demonstrates that the US courts understanding of *établissement* is broader than that of the French. The US courts have held that an agency will suffice as a place of business for the purposes of the Convention where the agent issues tickets on behalf of the carrier,[64] even where the agent is another carrier[65] and especially where there is an interline agreement.[66] As the authentic English version of MC99 incorporates the term "place of business" it would seem that the French interpretation has been weakened, at least in respect of MC99, since it can no longer rely on the French being the only authentic language version.

The third jurisdiction highlights some divergence between the views of the US and France with respect to the underlying policy considerations determining when jurisdiction is appropriate over a carrier. The US interpretation would suggest that minimal links are required whereas the French position demands a more substantial juridical link between the carrier and forum. However, although there proved to be disagreement among the courts as to the precise threshold involved, it is abundantly clear that consensus existed between the drafters that a significant business presence was required. A strong commercial link will exist in either case since the third jurisdiction was chosen precisely because it was the place through which the carrier's undertaking to provide carriage to the passenger/shipper was given. Therefore, providing jurisdiction at the place of business through which the contract was formed would promote certainty and predictability because it presupposed a relationship to the contract of carriage and would thus likely have been contemplated by the parties.

[63] (1962) 16 RFDA 177 (CA Paris 2 March 1962) as cited in G Miller *Liability in International Air Transport* (Kluwer Law 1977) 304.

[64] See *Berner v United Airlines Inc* 157 NYS 2d 884 (1956); *McLoughlin v Comm Airways (Pty) Ltd (Comair)* 602 F Supp 29 (EDNY 1985); *Boyar v Korean Air Lines* 664 F Supp 1481 (DC Cir 1987).

[65] *Eck v United Arab Airlines Inc* 360 F 2d 804 (2d Cir 1966).

[66] Goldhirsch (n 59) 185 citing *Kapar v Kuwait Airways Corp* 845 F 2d 1100 (DC Cir 1988); *Pflug* (n 61).

4.3.1.3 Place of Destination

One of the advantages of providing jurisdiction at the place of destination is that it guarantees a place of jurisdiction under the Warsaw Convention for international carriage by air because such carriage must, as defined by the Convention, possess its place of destination in the territory of a Contracting State. For the Convention to apply the carrier need not have its domicile, principal place of business, or establishment through which the contract was made, located in the territory of a Contracting State but, once the Convention applies, then there is, by definition, jurisdiction at the place of destination. A threshold requirement of the Warsaw Convention and MC99 is that the relevant contract be for *international carriage* with the Convention providing an autonomous concept for such. Article 1(2) of the Warsaw Convention defines international carriage as any carriage where, according to the contract made by the parties, the place of departure and the place of destination, regardless of any breaks in carriage, are located in the territories of two Contracting States.[67] Therefore, where carriage is wholly domestic (regardless of transiting the airspace over the high seas or of a foreign State) it does not come under the Convention and thus jurisdiction under the Convention is not at issue.

Given that return or roundtrip tickets are the mainstay of the airline business it would be a glaring oversight if the Convention did not apply to such carriage and indeed it does apply because Article 1(2) provides that international carriage also arises where the place of departure and the place of destination are located within the territory of the same Contracting Party provided there is an agreed stopping place within the territory of another State.

The contract of carriage is controlling in identifying the place of destination. It is not the destination of the particular flight of an itinerary on which the injury arose that is the relevant place, it is the ultimate destination under the contract of carriage that is taken. Thus, where a contract of carriage is for a return trip, e.g. London-Paris-London, and the passenger is injured on the outbound flight, the place of destination for the purposes of jurisdiction is not Paris, it is London. In the English case of *Grein v Imperial Airways Ltd,*[68] Greene LJ stated the it did not matter that there were breaks in the journey because for the purposes of the Convention 'the contract is the unit, not the journey'[69] and defined the place of destination as '"the place at which the contractual carriage ends".'[70] The courts will look to the full itinerary and it is the final destination of the entirety of the carriage under the contract that is the determinative place and not the destination of any of the intermediate flights.[71] This remains the case even where one or more of the intermediate flights are wholly domestic,[72] or where an agreed stopping place is in a non-Contracting State.[73] Modifications to an itinerary (even to add or remove sectors) or the substitution of a carrier, generally speaking, occur within the framework of the existing contract of carriage and the place of destination for the purpose of the Warsaw Convention remains that of ultimate destination.[74] It

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[67] Warsaw Convention (n 17) Article 1(2).
[68] *Grein* (n 39).
[69] ibid 78.
[70] ibid 79.
[71] See, e.g., *Vergara v Aeroflot Soviet Airlines* 390 F Supp 1266 (D Neb 1975).
[72] *Haldimann v Delta Airlines Inc* 168 F 3d 1324 (DC Cir 1999).
[73] *Kelley* (n 26) 144–145.
[74] *Vergara* (n 71) 1269.

is the objective fact of the contractual itinerary that is controlling, not the passenger or shippers intention or purpose for travel.[75]

By grounding this forum in the place of ultimate destination (per the contract of carriage) and thereby excluding accidental, fortuitous or intermediate destinations, the drafters ensured that the carrier would have a significant business presence there. Indeed, much of the reason for excluding the place of accident as a ground for jurisdiction was precisely because it did not presuppose a strong business connection to the carrier. Whilst the certainty of a limited number of forums was beneficial to both carrier and claimant, the fourth jurisdiction was predominantly granted with the interest of the latter in mind. The place of destination for the passenger would, in the majority of cases, be their home forum and in the case of goods, the place of destination was of special importance to the consignee.

4.3.2 Purpose of the Jurisdictional Scheme

The essential object being pursued via the jurisdictional scheme was the same as the Convention's cardinal purpose, to avoid the conflict of laws though the unification of certain rules, in this case, the rules pertaining to jurisdiction. Rather than leaving the competence of a chosen tribunal to be evaluated in accordance with *le droit commun*, the drafters chose instead to establish harmonized rules of jurisdiction. The key features of the scheme are, the guarantee of a forum in a Contracting State, the centrality of the contract of carriage, the requirement that the forum have a substantial business connection to the carrier, and the limited number of possible forums. These key features reflected two core policy considerations. First, the need to ensure legal certainty and predictability. Secondly, the desire to accommodate the interests and convenience of the parties.

Whilst certainty and predictability were of paramount importance, the drafters were keenly aware of the interests of the parties and this can be seen in the selection of the four jurisdictions. The choices made by the drafters demonstrate that much consideration was given to the interests and convenience of the carrier. Each forum bears a link to the contract and requires a significant business connection to the carrier. It has been said that the four jurisdictions are carrier-oriented and focus on the convenience of the carrier and not the claimant.[76] It is submitted that this is inaccurate.

The jurisdictional scheme demonstrates that a balanced approach was taken which weighed-up the competing interests of both parties against the desire to secure the overriding goal of certainty and predictability. Both the interests of carriers and those of claimant passengers/shippers were taken into account. The rejection of the place of the accident and the definition of the four jurisdictions all demonstrate a clear desire to ensure a connection to the carrier; perhaps from this the conclusion has been reached that the scheme is carrier-oriented but this ignores a number of factors. One must firstly bear in mind that from the outset the general scheme itself inherently benefitted the claimant since it granted him the initiative in choosing his

[75] *Gulf Air Co GSC v Fattouh* (2008) 230 FLR 311, 326–327 (NSWCA Australia); *Swaminathan v Swiss Air Transport Co Ltd* 962 F 2d 387, 389 (5th Cir 1992).

[76] Mendelsohn, AI and R Lieux 'The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff' (2003) 68 *J Air L & Com* 75, 79.

forum (at least where a choice existed). Second, the third and fourth jurisdiction are concessions to the passenger/shipper since, in most cases, it would mean that the claimant would have the benefits of a home forum. This was not carrier-oriented since it meant the carrier would be faced with the likelihood of having to face litigation in a foreign forum.

It is safe to conclude that convenience and fairness to the parties to litigation was an influential factor in the determination of the Warsaw Convention's jurisdictional scheme. However, its significance should not be overstated. The third and fourth jurisdictions clearly contemplated exposing carriers to litigation in foreign forums which the drafters understood would entail some inconvenience to carriers. Secondly, while the drafters emphasized the need to reflect the expectations of the parties to the contract, the test employed to determine said expectations was objective in nature. It looked to the contract of carriage and not to the subjective intentions of the parties. This evidences a preference for legal certainty over the flexibility afforded by a subjective assessment. Thirdly, the number of potential forums was limited to a small number. A claimant might potentially have a choice of up to four fora or he may be limited to just one and have no choice at all. Realistically, a choice between two forums would be the most likely scenario in the vast majority of cases. More forums to choose from would have offered the claimant a greater chance of a convenient forum but here the drafters wisely opted instead for fewer. Nor was any rule for priority between the four jurisdictions defined, from which it can be inferred that relative convenience of the forums was not a consideration. More likely, the drafters would have regarded each as presumptively convenient and left prioritization to the claimant's choice. Lastly, in removing the place of the accident as a ground for jurisdiction the drafters opted for predictability over convenience, specifically in the knowledge that such a forum would have offered some convenience to the parties given the location of evidence.

Overall, the jurisdictional scheme of the Warsaw Convention displays a strong civilian sensibility to the nomination of forums. Primacy was given to legal certainty and predictability throughout, balanced against the secondary concern for the interests of the parties.

4.3.3 Article 28(2): Rules of Procedure

Article 28(2) of the Warsaw Convention provides (as does Article 33(4) of MC99) that: 'Questions of procedure shall be governed by the law of the Court seised of the case.'[77] That the forum which has been legitimately selected by the claimant (from those available per Article 28(1)) should apply its own rules of procedure to proceedings for a claim under the Convention would seem eminently uncontroversial. However, this seemingly innocuous provision has proved itself a source of controversy with respect to the availability of FNC under both the Warsaw Convention and MC99. The fundamental question asked has been whether the rules of procedure contemplated by Article 28(2) should be interpreted as including the doctrine of FNC or should the claimant's choice of forum under Article 28(1) be pre-emptive and inviolable?

There is no specific mention of FNC in the drafting history of the Warsaw Convention but there

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[77] Warsaw Convention (n 17) Article 28(2); Convention for the Unification of Certain Rules for International Carriage by Air (signed 28 May 1999, entered into force 04 November 2003) 2242 UNTS 309 (MC99) Article 33(4).

is a very brief mention of the discretion to decline jurisdiction. In its comments on the CITEJA Final Draft, the UK had made a proposal to include an additional paragraph in what would become Article 28, part of which stated:

> None of the stipulations of this Article shall be deemed to bind any court whatsoever to hear a complaint which it would consider, according to principles of law and procedure in force in the country to which the said court belongs, as contrary to the rules of justice, or as irrelevant to be submitted to it.[78]

That the UK had the discretionary power to decline jurisdiction in mind is clear from its commentary attached to this proposal. It explained, '[a] stipulation of this nature would avoid all interference in the discretionary power of courts, and would give them more latitude to repress vexatious litigation, as in the case where the "forum" of another country would be naturally indicated as being that where the debates should take place.'[79] Had this proposal been adopted then there would be little doubt that it would cover the doctrine of FNC. However, it was not included in the final text of the Convention. All the Minutes tell us is that the British Delegate 'did not insist'[80] on the proposal, his reasons for doing so were not revealed. Whilst its non-inclusion may be taken as support for the argument that the drafter's intended the claimant's choice of forum to be final, the reality is that the record is so sparse that it is ultimately inconclusive either way. In the author's opinion, the more plausible explanation for the British delegate's non-insistence is simply that with the removal of the place of the accident, the imperative for a discretionary power to decline jurisdiction was diminished to a degree insufficient to justify pressing the point. In the circumstances, where outnumbered by civilian lawyers, the British delegate's non-insistence was more than likely acquiescence to inviolability of the claimant's choice of forum.

Full consideration of the significance of the matter will only be possible once the case law concerning FNC under the Warsaw Convention has been explored and reflected upon in light of the observations and conclusions made in the first sections of this chapter. For now, there are only questions: Should the reference in Article 28(2) to rules of procedure being a matter for the seised forum be understood as constrained by the provisions of Article 28(1)? In other words, do the rules of procedure of the forum apply only insofar as they are consistent with the choice of forum granted the plaintiff under the Convention? Or, should the Warsaw Convention be read in general—as the delegates repeatedly noted—as providing only for the unification of rules essential for a treaty on private aeronautical law whilst leaving general matters of private international law and matters of procedure outside its scope?

4.4 The Availability of FNC within the Warsaw Convention

Surprisingly, it was only in 1984 that the question of the availability of FNC under the Warsaw Convention first arose for consideration by the courts. In *Irish National Insurance Co Ltd v Aer Lingus Teoranta*[81] the question had been asked whether a court was empowered to dismiss a case on FNC under the Warsaw Convention. On that occasion the court in question had not been

[78] Horner and Legrez (n 46) 298–299.
[79] ibid 299.
[80] ibid 169.
[81] 739 F 2d 90 (2d Cir 1984).

required to decide the matter.[82] However, the US courts would later make determinations on the question on three occasions, in a 1989 decision in the case of *Re Air Crash Disaster near New Orleans, Louisiana on July 9, 1982,*[83] then in a 1999 decision in the case of *Re Air Crash off Long Island, New York, on July 17, 1996,*[84] and then in 2003 with *Hosaka v United Airlines Inc*.[85] In England, the Court of Appeal would offer its perspective in 1996 with *Milor v British Airways plc*.[86] It is proposed to treat these cases by placing each of them into one of two categories which correspond to the nature of the approach to interpretation adopted, i.e. the literal approach or the comprehensive approach.

4.4.1 The Literal Approach

As noted in the introduction to this chapter, as an instrument of public international law, it is to that body of law we must turn to guide its interpretation. Articles 31 to 32 of the Vienna Convention are generally accepted as codifying the rules of treaty interpretation under customary international law.[87] The interpretation of treaties under the Vienna Convention consists of a general rule (Article 31) and supplementary means of interpretation (Article 32).

Article 31(1) provides that '[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.'[88] When a court is faced with interpreting a provision of a treaty it must, first of all, start with the text, this is because, as the International Law Commission (ILC) stated, 'the text must be presumed to be the authentic expression of the intentions of the parties'.[89] In so doing, the court must endeavour to give to the text its natural and ordinary meaning within its context and in light of its object/purpose.

Articles 31(2) and 31(3) fill out the broad approach defined by Article 31(1). The meaning of "context" is elucidated by Article 31(2) as not only including the text of the treaty (as a whole) but also includes its preamble and annexes. Article 31(3) specifies other authentic means of interpretation which must be considered together with the context, i.e. any subsequent agreement or practice in relation to the interpretation of the treaty, and, any relevant rules of international law applicable in the relations between the parties. Article 31(4) provides that a special meaning shall be given to a term if it is established that the parties so intended.[90]

Although not expressly referred to in the Vienna Convention, the principle of effectiveness is implicit as part of the duty under Article 31(1) to interpret a treaty in good faith.[91] The principle of

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[82] ibid 91.
[83] 821 F 2d 1147 (5th Cir 1987).
[84] 65 F Supp 2d 207 (SDNY 1999).
[85] 305 F 3d 989 (9th Cir 2002) cert denied 537 US 1227 (2003).
[86] [1996] QB 702 (CA).
[87] International Law Commission 'Reports of the Commission to the General Assembly' (1966) 2 *YBILC* 169, 218–219. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad) Judgment* [1994] ICJ Reports 6, [41].
[88] Vienna Convention (n 1) Article 31(1).
[89] International Law Commission (n 87) 220.
[90] See *Legal Status of Eastern Greenland, Judgment* (1933) PCIJ Reports Series A-B No 53.
[91] See International Law Commission (n 87) 219; see also, RY Jennings 'General Course on Principles of International Law' (1967) 121 *Recueil des Cours* 323, 549; H Lauterpacht 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 28 *Brit YB Int'l L* 48, 73.

effectiveness requires that a treaty be interpreted so as to give effect to its purpose.[92] Thus, where the text supports two possible interpretations, preference must be given to the one which will best give effect to the purpose of the treaty.[93]

It is with this general rule of customary international law that courts ought to approach any interpretation of a treaty's provisions. As will now be shown, when it came to the interpretation of Article 28 of the Warsaw Convention, the courts in *Air Crash Disaster near New Orleans* and *Air Crash off Long Island* began their analyses with the text of the Convention but never strayed too far from there, taking an overly literal approach which failed to adequately consider that text in its context and in light of the object and purpose of the Convention.

The plaintiffs in *Air Crash Disaster near New Orleans* were the family of Uruguayan passengers killed when Pan Am Flight 759 crashed shortly after take-off from New Orleans. The plaintiffs sought to resist the defendant's motion for FNC dismissal, arguing that the phrase in Article 28, "at the option of the plaintiff", meant they were granted 'the absolute and inalterable right to choose the national forum in which their claims will be litigated'.[94] The question, therefore, turned on the interpretation to be given to that provision of the Warsaw Convention.

The Court of Appeals for the Fifth Circuit made the following statement defining the intention behind the drafting of Article 28(1):

> Commentators are in general agreement that the delegates to the Convention were most concerned with limiting the locations in which an air carrier would have to defend an action, with ensuring that an injured party have an available forum in which to redress his injuries, and with allowing the suit to be heard in a forum that had some interest in the dispute.[95]

The court was hereby relying on the views of commentators to discern the intention behind Article 28(1). However, with respect to Article 28(2), the court was less concerned with the reasons for its inclusion, satisfied—without citing any authority—that it was included because the delegates understood that the provisions of the Warsaw Convention would be 'applied and adopted to a variety of legal systems'.[96] The court understood this to mean that Article 28(2) manifested the delegates' intention not to interfere with the internal workings of the States' legal systems on procedural matters. The interpretation of the text adopted by the court was that Article 28(1) grants the claimant a choice of forum, with Article 28(2) making that choice subject to the procedural rules of the chosen forum.[97] In the courts view, FNC is a procedural rule of the legal system of the US, ergo it is available under the Convention.[98] The court might have left it there, but instead it stated: '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*.'[99]

The significance attached by the court to US adherence is predicated on a number of

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[92] P Malanczuk *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 367.

[93] *Ambatielos Case (Jurisdiction) Judgment* [1952] ICJ Reports 28, 45; *Fisheries Jurisdiction (Spain v Canada) Jurisdiction of the Court, Judgment* [1998] ICJ Reports 432, 455.

[94] *Air Crash Disaster near New Orleans* (n 83) 1161.

[95] ibid citing Lowenfeld and Mendelsohn (n 27); McKenry (n 59); CE Robbins 'Jurisdiction Under Article 28 of the Warsaw Convention' (1963) 9 *McGill LJ* 352; — 'Article 28 of the Warsaw Convention: A Suggested Analysis' (1966) 50 *Minn L Rev* 697.

[96] *Air Crash Disaster near New Orleans* (n 83) 1161.

[97] ibid.

[98] ibid.

[99] ibid 1162 (emphasis added).

assumptions. Firstly, the court assumes that FNC was a valuable procedural tool in 1934. Secondly, that in adhering to the Convention the US had given consideration to, and had an understanding of, the status of FNC therein. Thirdly, even presupposing that the US understood that FNC would not be available, that explanations nonetheless justifying US adherence could not be found. As shown in Chapter 2, FNC was not the valuable procedural tool in 1934 that the court assumed it to be. In all likelihood the US had given no consideration to its availability when adhering to the Convention and, even if it had, there are many compelling reasons why it might have justified forfeiting it solely for Convention claims.

Even if the court's assumptions regarding US adherence were true, it would not materially alter the situation. Under international law, an accepted principle of treaty interpretation is that the intention of the parties at the time at which the treaty was concluded which is relevant, i.e. the principle of contemporaneity.[100] The US did not actively participate in the drafting of the Warsaw Convention so, first and foremost, the meaning to be ascribed to its provisions would not be influenced by the US understanding. The only relevance that US adherence might have is as an example of subsequent State practice. Whilst this does constitute an authentic means of interpretation under the Vienna Convention,[101] such practice is only relevant where it establishes the agreement of the parties with respect to the interpretation of the treaty. Whilst it need not be the practice of all State Parties, practice by one or some will suffice only where it is accepted by all. There is simply nothing to suggest that US adherence was understood by other State Parties as an acceptance of, or acquiescence to, the consistency of FNC with the jurisdictional scheme of the Warsaw Convention.

The second ground for the court's decision was that to accept the plaintiff's interpretation of Article 28 would undermine the purpose of the Warsaw Convention's provisions on jurisdiction by allowing cases to be heard in forums without an interest in the matter.[102] The court had—based solely on the views of commentators—identified three goals to the Warsaw Convention's jurisdictional regime: (i) to provide a limited number of forums; (ii) to ensure the claimant would have a forum for resolution of his/her claim (by which one understands the guarantee of a forum in a Contracting State); (iii) that the forum would have an interest in the dispute. The court's assessment fails to note the overarching goal of ensuring certainty and predictability and makes no mention of the emphasis on the interests of the carrier. Its third goal is dubious in the extreme for the following reasons. In the first place, there is no evidence supporting the court's view that the forums were so chosen. As detailed above, the specific forums were chosen, above all to ensure certainty and predictability, and secondarily with the interests of the parties in mind. They were not chosen for the purpose of ensuring that the forum itself had an interest in the dispute. Had the drafters had such a purpose in mind then they would surely have adopted the place of the accident as a possible forum. What the court's approach amounted to was a reading of Article 28 from a US common law perspective by importing considerations of the relative appropriateness of the available forums. Such an approach is utterly inconsistent with the text of the Convention

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[100] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) Judgment* [2002] ICJ Reports 303, [59].

[101] Vienna Convention (n 1) Article 31(3).

[102] *Air Crash Disaster near New Orleans* (n 83) 1162.

which imposes no hierarchy on the forums and explicitly grants the claimant a free choice. Should the claimant's choice result in the dispute being heard by a forum with a lesser interest, then this would merely be a natural consequence of the scheme. The court was wrong to conclude that the drafters (predominantly made up of civilian lawyers and without any US delegates) intended the forum should have an interest in the dispute.

Once the fact of US adherence is dismissed and the dubious account of the purposes of Article 28 exposed, the decision of the Fifth Circuit in *Air Crash Disaster near New Orleans* effectively boils down to little more than a bare literal interpretation of the text of Article 28. Although ultimately resting its decision of the same grounds, the Southern District of New York in *Air Crash off Long Island* did engage in a somewhat broader interpretative analysis. The litigation in that case had been initiated by the relatives of forty-five French passengers who had died in the 1996 crash of TWA Flight 800. The defendants' FNC motion was ultimately denied but not before the question was raised regarding the availability of FNC. The court summarized the claimants' contention as follows: 'that the language of Article 28(1), considered in the context of the Convention as a whole and of its drafting history, prohibits a court from declining to exercise its jurisdiction in a case properly brought under Article 28(1).'[103]

The claimants presented a number of arguments to support their contention, one of which was the precedent of *United States v National City Lines Inc,*[104] a case in which the US Supreme Court considered the special jurisdiction provisions of a federal act which prohibited a court from interfering with the claimant's choice of forum through the application of FNC.[105] The claimants sought to draw an analogy to the Warsaw Convention and argued that it too established special jurisdiction rules which could not be displaced by FNC. The court distinguished *National City Lines* because in that case the legislature had expressed a clear legislative intent to preclude interference with the claimant's choice of forum.[106] It held that the mere fact that the Warsaw Convention contains a special jurisdiction provision is not enough to conclude that dismissal on grounds of FNC is precluded.[107] Something more was required.

The missing element of the claimants' argument was the manifest intention that the claimant's choice of forum be inviolable under the Convention. They sought to supply this by reference to the drafting history. In particular, the plaintiffs relied on the non-insistence of the British Delegate to the UK's proposal for a judicial discretion to decline jurisdiction.[108] For them, this was proof that the delegates had intended the choice of forum under Article 28(1) to be final. The court, however, found the drafting history to be inconclusive. The court opined that UK's non-insistence on the proposal may simply have been because they did not wish to impose the procedural device on other signatories and on the understanding that the UK and other States, within whose procedural law an FNC-like doctrine was a feature, could continue to apply it on the strength of Article 28(2). Likewise, the civil law jurists may have adopted Article 28(2) precisely because they recognized

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[103] *Air Crash off Long Island* (n 84) 213.
[104] 334 US 573 (1948).
[105] ibid 588.
[106] ibid 213 citing *Transunion Corp v PepsiCo Inc* 811 F 2d 127, 130 (2d Cir 1987); *Howe v Goldcorp Investments Ltd* 946 F 2d 944, 949 (1st Cir 1991); *Capital Currency Exchange NV v National Westminster Bank PLC* 155 F 3d 603, 608 (2d Cir 1998) cert denied 526 US 1067 (1999).
[107] *Air Crash off Long Island* (n 84) 213.
[108] See 4.3.3 supra.

that were procedural rules in other systems with which they were unfamiliar and did not wish to interfere.[109] It did not, 'necessarily signify an intention by the drafters to prohibit signatory nations for which the [FNC] doctrine was part of their procedural law from employing the doctrine in a Convention case.'[110]

The court's reading of the drafting history led it to conclude that, '[n]othing in the discussion indicates a desire to restrict the defendant carriers to the forums listed in Article 28(1).'[111] By which it meant that there was no suggestion that once a forum was chosen that such choice was inviolable. In any case, the court's observations on the drafting history were purely *obiter* because it based its finding on the literal interpretation of Article 28. The literal language of Article 28(2) was clear, the court determined that '[FNC] is a procedural tool available to US courts and thus squarely falls within the literal language of Article 28(2).'[112] Like in *Air Crash Disaster near New Orleans*, the court argued that Article 28(1) had to be read in conjunction with Article 28(2) and that the plaintiff's choice of forum was subject to the forum's rules of procedure, which in the US included FNC.

The approach to treaty interpretation adopted by the two courts might have been justified on a restrictive reading of the Supreme Court's judgment in *Chan v Korean Air Lines Ltd*,[113] but it does not pass muster under the Vienna Convention. Article 31(1) of the Vienna Convention on the Law of Treaties provides that '[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.'[114] The context considered by the two courts in reaching their determinations did not go beyond Article 28. Even in *Air Crash off Long Island*, where the plaintiffs had asked the court to consider the jurisdictional scheme in the context of the Convention as a whole and in light of its object and purpose, the court had not done so and contained itself to the immediate context of Article 28. In so doing, the courts failed to consider its meaning in light of the Convention's dual-purposes.[115] Had the courts asked themselves how compatible FNC is with the Convention's cardinal purpose of uniformity and with a supplementary purpose which involves the balancing of interests between carriers, users and claimants, then its ability to adopt the stance that the meaning of Article 28 was clear and unambiguous would surely have been upset. Even the limited context of Article 28 should have given the courts pause for thought, but even there the courts still failed to identify the primary purpose of the jurisdictional scheme, i.e. certainty and predictability.

In *Air Crash Disaster near New Orleans* and *Air Crash off Long Island* the courts did little more than adopt a literal interpretation of the text of Article 28. Taken at this level the conclusion of the courts is logical, but their approach was too superficial. Under the general rule of interpretation provided by Article 31 of the Vienna Convention, the courts interpretative approach was inadequate for failing to properly consider the extrinsic evidence provided by the context of the Warsaw Convention as a whole and its object and purpose. Had the courts followed the correct

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[109] *Air Crash off Long Island* (n 84) 214–215.
[110] ibid 214.
[111] ibid.
[112] ibid.
[113] 490 US 122 (1989).
[114] Vienna Convention (n 1) Article 31(1).
[115] See 4.2.5 infra.

approach, then it is submitted that they would have to concede that the text was ambiguous and that recourse to supplementary means of interpretation was required.

4.4.2 The Comprehensive Approach

Given their overly narrow approach to interpretation, the two courts in the decisions considered above rested their decisions on a literal interpretation of Article 28. As such, they felt satisfied that because the ordinary meaning of the terms was clear, recourse to supplementary means of interpretation, such as the drafting history and background circumstances, was not required. In the context of the Vienna Convention, it could be said that the courts did not see any requirement to go beyond the general rule of interpretation of Article 31. On the face of it, this seems plausible. Under Article 32 of the Vienna Convention, a court may have recourse to supplementary means of interpretation in two defined circumstances; firstly, to confirm the meaning resulting from the application of the general rule, and second, to determine the meaning where the application of the general rule fails to produce an acceptable meaning. The ICJ stated, in an advisory opinion in *Admission of a State to the United Nations*, that, 'there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.'[116] These might have given to the courts in *Air Crash near New Orleans* and *Air Crash off Long Island* a sense of vindication for their inattentiveness to supplementary means of interpretation.

Clearly the courts thought the ordinary meaning of the Article 28 was clear and unambiguous. Even so, they would have been permitted to have recourse to supplementary means of interpretation for the purpose of "confirming" the meaning arrived at from the operation of Article 31. They elected not to do so and given that such recourse is couched in permissive, rather than mandatory terms, their decision to do so is defensible. However, in the second set of circumstances, where the application of the general rule leaves the meaning 'ambiguous or obscure',[117] or, where it 'leads to a result which is manifestly absurd or unreasonable'[118] supplementary means of interpretation may be used to determine the meaning. This second scenario is a strictly limited exception to the general rule of interpretation whereby the supplementary means plays a more significant role than that of mere confirmation, they may be used to determine the meaning.[119] As argued above, if properly applied the general rule of interpretation would result in the conclusion that the meaning of Article 28 is ambiguous, therefore, recourse to supplementary means of interpretation was both valid and necessary. Such means include the *travaux préparatoires* and Article 32 provides one other example, i.e. the circumstances of the treaty's conclusion. It is not clear what is meant by the latter means, but the ILC Special Rapporteur understood it to mean, 'both the contemporary circumstances and the historical context in which the treaty was concluded.'[120]

How then would a more complete application of the general rule of interpretation and recourse

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[116] [1948] ICJ Reports 57, 63.
[117] Vienna Convention (n 1) Article 32(a).
[118] ibid Article 32(b).
[119] See International Law Commission (n 87) 223 referring to *Competence of Assembly regarding admission to the United Nations, Advisory Opinion* [1950] ICJ Reports 4, 8; *Polish Postal Service in Danzig, Advisory Opinion* (1925) PCIJ Series B No 11, 39.
[120] International Law Commission (n 87) 59.

to supplementary means of interpretation resolve the critical question of the consistency of FNC with the Warsaw Convention? The English Court of Appeal wrestled with this same question in *Milor*.[121] Philips LJ gave the opinion with which Gibson and Legatt LJJ both agreed. The claimant sought to resist a stay on grounds of FNC, arguing that, Article 28 gave him 'the right to select within which of the competent jurisdictions their claim will be tried, and that accordingly there is no scope for the application of the doctrine of *forum non conveniens*.'[122]

Much of the argument turned on the meaning to be given to the word "bring" in the context of Article 28. Did it mean merely the right to initiate proceedings in the forum, or, did the meaning cover initiation and resolution of proceedings? Philips LJ considered the French text of Article 28, (the only authentic language version of the Warsaw Convention). In Article 28 the word used is *portée* and the court contrasted this with the use of the word *intentée* in Article 29; both translated into English with the verb "to bring". For Philips LJ this was significant. In his view, *intentée* carried the restrictive meaning of merely initiating proceedings whereas *portée* carried the meaning of commencing and pursuing. Philips LJ favoured the latter:

> [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. … If the option granted by Article 28 is to have value, it must be an option to the plaintiff to decide in which forum his claim is to be resolved.[123]

The operation of FNC would be inconsistent with this right. There is much to commend in this line of argument but it is also an element hyperbole to suggesting that a claimant is given nothing because his choice may be subject to a rule of procedure. It is unlikely that Philips LJ intended his statement to be taken too literally. In most cases, the claimant's choice will stand and only in limited circumstances, where the defendant can overcome the burden of proof, will the claimant's choice not be final. Nonetheless, there is undoubtedly something absurd about offering a claimant the choice between a limited number of forums in to which sue and then disregarding that choice in preference of that of the defendant. A claimant on the receiving end of such treatment is certainly going to wonder if the choice first granted him had any real value. The crux of the matter is whether the drafters intended to bestow a substantive right to absolutely determine the forum for resolution of his claim under the Convention.

For Philips LJ, the natural meaning was not so unambiguous that reference to extrinsic considerations need not be made. So, he looked beyond the natural meaning in its context and examined the object of the Convention, its drafting history and historical background. Philips LJ expressed his agreement with the trial judge's opinion that the object of the Convention, as far as jurisdiction was concerned, was to harmonize national views on jurisdiction, i.e. to establish uniformity. Support for this position was found in *Rothmans of Pall Mall*[124] where Roskill LJ had described Article 28 as creating a 'self-contained code within the limits of which a plaintiff must found his jurisdiction.'[125] Philips LJ understood this to mean that the object of the Convention's jurisdictional provisions was to establish a uniform regime which would be self-reliant and independent of the substantive law of the individual national legal systems. In his view, if the

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[121] *Milor* (n 86).
[122] ibid 706.
[123] ibid 706–707.
[124] *Rothmans* (n 60).
[125] ibid 385.

parties had intended FNC to apply within this 'self-contained code' then they would surely have made express provision for it. That they did not do so, not only reflected the desire for uniformity but also the fact that FNC was not an established doctrine in all common law countries in 1929 and would have been unknown to many civilian jurists. In light of its purpose and in the context of its historical background, Philips LJ reached the following conclusions:

> I think it would be surprising if the high contracting parties has preserved to that small minority of countries which applied the doctrine of *forum non conveniens* a power to affect the choice of the forum in which a dispute should be tried by a process unknown to the majority of the parties. It seems to me that the jurisdictional code that was agreed in the form of article 28 aimed at providing the plaintiff with a limited choice of competent jurisdictions each of which to a greater or lesser degree was likely to be appropriate for the bringing of a claim. It was implicit that the court of the chosen forum would remain seised of the matter, trying it in accordance with its own rules of procedure, and there was no scope for an individual court to impose a venue that conflicted with the plaintiff's choice.[126]

Philips LJ very briefly considered the US authorities supporting the availability of the doctrine, including *Air Crash Disaster near New Orleans*, but did not find their reasoning compelling. The conclusion thus reached by the Court of Appeal was that FNC is not available under the Warsaw Convention, a plaintiff's choice of forum under Article 28 is absolute. Philips LJ stated that he considered 'that article 28 of the Warsaw Convention leaves no scope for a challenge to the jurisdiction on the grounds of *forum non conveniens'*.[127]

Philips LJ's concept of a "self-contained code" on jurisdiction appears to be at variance with the text of Article 28(2) which provides that matters of procedure will be determined by the procedural law of the chosen forum. As far as procedural law is concerned, the code is not at all self-contained. Philips LJ was clearly aware of this. This apparent inconsistency is reconcilable once it is understood that his essential point was that the drafters had intended to bestow upon the claimant a substantive right to choose his forum and have the dispute resolved there. Yes, Article 28(2) provides for the application of the forum's rules of procedure, but in light of the Convention's cardinal purpose of achieving uniformity, it would be inconsistent to allow such a rule of procedure to undermine that substantive right. The validity of the decision in *Milor* rests entirely on the nature of the substantive right intended under Article 28(1). Was that right limited to the choice of forum or did it also include the right to have the dispute resolved in that forum? If the latter, then the reference to national rules of procedure in Article 28(2) must be interpreted as precluding FNC otherwise it would conflict the substantive provisions of the Convention. The same reasoning would be applied by a US court in *Hosaka*,[128] a case in which the court took particular note of Philips LJ's decision in *Milor*.

Decided in 2002, the *Hosaka* case concerned claims made by 46 Japanese tourists for injuries (as well as one fatality) suffered during severe turbulence encountered whilst travelling with United Airlines from Tokyo to Hawaii. At first instance the case was dismissed on the grounds on FNC in favour of the courts of Japan. The question to be resolved by the appellate court was whether or not FNC could be invoked by a court to decline jurisdiction where such jurisdiction is established under Article 28 of the Warsaw Convention.

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[126] *Milor* (n 86) 708–709.
[127] ibid 710.
[128] *Hosaka* (n 85).

Starting with the text of Article 28, J Fisher (whose opinion was unanimously adopted by the court) looked to the preceding decisions of the courts on the matter. These demonstrated that two plausible interpretations were considered possible. The first was that adopted by the English Court of Appeal in *Milor*,[129] which meant that FNC was unavailable under Article 28(2) because it would be inconsistent with the absolute right of choice of forum granted under Article 28(1). The textual interpretation adopted by *Air Crash Disaster near New Orleans*, had looked to the plain meaning of Article 28(2), concluding that the claimant's choice of forum is subject to the procedural rules of the forum, which in the US includes FNC. That two plausible interpretations could be reached was justification enough for Fisher J to conclude that the text of Article 28 was ambiguous.

Fisher J declined to adopt the *Milor* textual analysis of the authentic French version and the distinction between the terms *portée* and *intentée*; he doubted the meaning attributed to *portée* as requiring 'that the action must be litigated to conclusion in the forum selected by the plaintiff.'[130] The text alone was not sufficient to provide an answer, all it showed was that the text of Article 28 was ambiguous. This being so, the court followed Supreme Court precedent of *Chan*,[131] *Tseng*[132] and *Saks*,[133] to guide its interpretation of the Warsaw Convention by looking to other sources to elucidate the meaning of Article 28. This involved looking to the purposes of the Convention, its drafting history and the post-ratification understanding of the parties, whilst throughout, attempting 'to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.'[134]

Following precedent, the court identified the two purposes of the Warsaw Convention as being: (1) uniformity of the rules governing claims arising from international air transport;[135] (2) to achieve a balance between the interests of air carriers and those of passengers.[136] This sought after uniformity extended to matters of jurisdiction, the court opining that, '[b]y including an article addressing jurisdiction, the signatories manifested their intent to create not just uniform rules of liability, but also uniform rules of jurisdiction.'[137] Quoting approvingly from *Milor*, Fisher J identified the purpose of the jurisdictional rules contained in Article 28(1) as being aimed at creating a 'self-contained code on jurisdiction'[138] that sought to harmonize the rules of jurisdiction. FNC would undermine this harmony and uniformity because claimants could find their right to choose their forum denied before the courts of one Contracting State yet recognized in another. Additionally, the doctrine of FNC is itself 'vague and discretionary'[139] and therefore unlikely to produce uniform results.

In light of the dual purpose of the Convention, the court took the view that in limiting the number of forums available to a claimant and balancing that against the claimant's right to choose, the

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[129] See ibid 995 n 5.
[130] See ibid 996 n 7.
[131] *Chan* (n 113) 134.
[132] *Tseng* (n 36) 167–176.
[133] *Saks v Air France* 470 US 392, 399 (1985).
[134] *Hosaka* (n 85) 994 quoting *Saks* (n 133) 399.
[135] *Hosaka* (n 85) 996 citing *Tseng* (n 36) 169.
[136] *Hosaka* (n 85) 997 citing *Tseng* (n 36) 170.
[137] *Hosaka* (n 85) 996.
[138] ibid 997 quoting *Milor* (n 86) 707.
[139] *Hosaka* (n 85) 997 quoting from *National City Lines* (n 104) 581.

drafters were conferring a benefit on the passenger (echoing the view of Philips LJ in *Milor*). This benefit being part of the balance struck between passenger and carrier. The court reached the view that, '[p]ermitting defendants to utilize *forum non conveniens* to cancel out the plaintiff's choice would undermine this balance just as it would undermine uniformity',[140] concluding that, '[t]he doctrine of *forum non conveniens* is inconsistent with the Convention's dual purposes of uniformity and balance.'[141]

Moving then to the drafting history, the court considered the UK proposal to include wording relating to discretion to decline jurisdiction.[142] Like the court in *Air Crash off Long Island*, it considered the possible reasons for the non-inclusion of the UK proposal in the final draft of the Convention but determined that nothing conclusive could be established. However, the court stopped short of dismissing the UK proposal as irrelevant. Instead, it determined that the proposal suggested that the delegates at the Warsaw Conference were aware of FNC and that they did not see Article 28(2) as silently incorporating nor acquiescing to it.[143] When further considered against the historical context of the Convention's drafting, the implicit incorporation of FNC under Article 28(2) was even more difficult to accept for the court, because, with the exception of the UK, the drafters hailed from predominantly civilian legal systems where FNC was unknown. Fisher J thought it would be unreasonable and unlikely to assume that the majority of drafters would have acquiesced to the application of FNC under Article 28(2).[144] He thought that if they intended such a doctrine to apply then they would surely have made express provision for it. Faced with a choice between an interpretation which would permit or prohibit FNC in circumstances where the majority of the drafters hailed from jurisdictions where such a doctrine was all but unknown, Fisher J was not prepared to adopt a construction of Article 28(2) that 'would be controversial for most signatory countries.'[145]

The next port of call for the consideration of extrinsic means of interpretation was the post-ratification understanding of the parties and any decisions of other courts. The court was not persuaded by the Fifth Circuit's reasoning in *Air Crash Disaster near New Orleans* because the court had not had the benefit of the *Milor* decision, nor had it considered the purpose, drafting history and post-ratification understanding of the parties.[146] Having completed the consideration of extrinsic guides to interpretation, the court came to the same conclusion as *Milor*, i.e. FNC is not available under the Warsaw Convention. [147] The Supreme Court declined to review *Hosaka* on appeal.[148]

4.5 Conclusion on the Availability of FNC

Should the claimants choice of forum be conditioned on the application of local rules of procedure? Or, should those local rules of procedure be constrained by the jurisdictional scheme

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[140] *Hosaka* (n 85) 997.
[141] ibid.
[142] ibid 997–998.
[143] ibid 998.
[144] ibid 999.
[145] ibid 998 quoting *Floyd* (n 32) 552.
[146] *Hosaka* (n 85) 1003.
[147] ibid 1003–1004.
[148] *United Airlines Inc v Hosaka* 537 US 1227 (2003).

providing the claimant his choice of forum? To put this another way, must Article 28(2) be read as constrained by the jurisdictional scheme provided by Article 28(1)? These were the questions we left hanging above (see 4.3.3 supra) but which we are now, having considered the case law, in a position to provide some answers to.

Although, the general rule of interpretation under the Vienna Convention requires a court to start with the text, it is not permitted to limit itself solely to the terms of the provision in question. It must consider context and purpose. If one took Article 28(2) in isolation then it could be logically concluded that FNC is available where it forms part of the procedural law of the forum seised of an action under the Warsaw Convention. However, even the most immediate context of Article 28(2), i.e. that provided by Article 28(1), must raise a doubt as to the extent to which rules of procedure may be relied upon to disturb the claimant's choice of forum.

These doubts are only intensified by consideration of the object and purpose, not only of the jurisdictional provisions themselves, but also of the Convention as a whole. As defined earlier, the cardinal purpose of the Warsaw Convention is the avoidance of conflict of laws through unification of certain rules relating to carriage documentation and air carrier liability; let us refer to this as the uniformity goal. This is confirmed by the historical context which shows that the legal status of the air carrier within the existing regimes of *le droit commun* was uncertain and the introduction of statutory solutions by various States had produced substantial non-uniformity. The supplementary purpose of the Convention was the furtherance of the public interest in the development of air transport whilst striking an equitable balance of interests between carriers, users and claimants; let us refer to this as the balance of interests goal. Together these can be understood as providing the general purposes of the Warsaw Convention. The jurisdictional scheme of the Convention also serves specific purposes. Primarily, the harmonization of jurisdictional rules. Supplementary to which, the drafters, in defining the jurisdictional scheme, gave primacy to legal certainty and predictability but balanced this with regard to the interests of the parties to litigation. With the former, the drafters followed the Convention's cardinal purpose. With the latter, the jurisdictional scheme explicitly followed the supplementary purpose of the Convention by ensuring an equitable balance of interests.

The application of a discretionary doctrine which operates to displace the claimant's choice of forum in preference for the defendant's choice of forum, on the face of it, offends both the uniformity goal and the balance of interests goal, as well as the specific purposes of the jurisdictional scheme. However, it is important not to overestimate the reach of uniformity in the context of the Warsaw Convention. How exactly does FNC offend uniformity? In one obvious way, FNC means the treatment of jurisdiction in a Warsaw Convention case will be different depending on whether the court seised applies FNC or not. In this sense, the claimant's choice of forum is worth less and therefore does not carry a uniform value amongst the courts of Contracting States. But that can be said for any rule of substance or procedure which differs from one jurisdiction to the next. For example, the Warsaw Convention do not define damages, for the most part, it is left to *le droit commun* to determine the recoverable heads of damage. As a consequence, a plaintiff who sues under Swedish law will not be able to recover the same range of heads of damage available under US law. But we do not impugn this lack of uniformity as a breach of the Convention's goals and purpose. This is because one must show that the uniformity which is

being undermined by *le droit commun* is one which the Convention intended to establish. Uniformity in the context of the Warsaw Convention was pursued to ensure legal certainty and predictability. Undoubtedly, FNC disturbs legal certainty and predictability. But the extent of this disturbance is greatly mitigated in the case of the Warsaw Convention's jurisdictional regime with its limited number of possible forums. While the claimant is deprived of the certainty of knowing that their own choice of forum is final, they are assured that their case will be heard in one of the other forums available under the Warsaw Convention. This is because even where FNC dismissal is granted the alternative forum must be one of those identified by Article 28.

From the other point of view, the strongest argument against the inconsistency of FNC within the Warsaw Convention is the literal interpretation of Article 28(2). Another argument is that the goal of uniformity pursued by the Warsaw Convention is only partial. Clearly, the Warsaw Convention did not seek to secure absolute uniformity of rules, the drafters sought only to unify "certain rules". They maintained throughout that only matters essential to a treaty on private aeronautical law should be within its scope and that they did not wish to encroach on matters of general private international law or questions of procedure. Read in this light, Article 28(2) appears an affirmation of that intention. However, by including a bespoke jurisdictional scheme, the drafters undoubtedly intended to regulate this area of law within the context of international carriage by air. Thus, the question still remains as to what extent they intended to regulate it.

The drafters were conscious that the adoption of a fault-based theory of liability with a low limitation of liability was fundamentally pro-carrier. However, contrary to what is often assumed, this was not done in order to directly protect the interests of carriers but rather in furtherance of the public interest in the development of air transport. The purpose of the Convention was not to protect the carrier *per se*, but only to the extent necessary to promote the public interest in air transport. The drafters were keenly aware that the basic regime favoured carriers at the expense of claimants and made a number of concessions to the latter in order to provide for an equitable balancing of interests. The jurisdictional scheme of the Convention must be examined in light of this context. Having established the basic liability regime, the drafters were of a mind-set to make concessions to the claimant. The jurisdictional scheme is reflective of this mind-set and it is submitted that the drafters would have looked dimly on granting further benefits to the carrier at the expense of the claimant where not justified by the public interest.

The drafters of the Warsaw Convention hailed, almost entirely, from civilian law jurisdictions for whom the competence of a court was mandatory and thus, where the concept of a judicial discretion to decline jurisdiction did not exist. In addition, as demonstrated in Chapter 3, FNC is anathema to the civilian lawyer. Bearing this historical context in mind, it is eminently more likely that the drafters would have intended that the right to choose the forum in which to bring an action against a carrier would amount to a substantive right for the claimant to determine the forum in which his claim would be settled. The possible forums ensured a significant business connection to the carrier in whichever forum he was sued, whereas the convenience of the claimant was principally served by his having the initiative in choosing the forum. FNC would upset that balance of interests in favour of the defendant carrier. The desire to secure legal certainty and predictability for the parties outweighed considerations of convenience and no effort was made by the drafters to inject considerations of relative convenience into their jurisdictional scheme. The idea that the

choice of forum provided under Article 28(1) could be disturbed by a discretionary rule for declining jurisdiction, whose *sine qua non* is relative convenience, would not have been within the contemplation of the drafters.

The issue ultimately boils down to a simple question: Would the drafters have considered FNC, as invoked per Article 28(2), to be inconsistent with the right granted under Article 28(1)? It is submitted that the answer to this question is yes. The drafters intended to grant the claimant a substantive right to choose the forum in which their action would be resolved and that this right should be inviolable. The employment of a rule of procedure by which the chosen forum exercises its discretion to decline the jurisdiction granted it under the Convention is inconsistent with that right.

As codified by Article 26 of the Vienna Convention on the Law of Treaties, customary international law provides that a Contracting Party to a Convention is under a duty to perform its obligations thereunder in good faith and, as codified by Article 27 of the Vienna Convention, it may not invoke provisions of its internal law as justification for its failure to perform.[149] The rule of Article 26 is also referred to as that of *pacta sunt sevanda.* In the simplest of terms, this means that the parties to a treaty are obliged not to defeat the object and purpose of a treaty.[150] In the context of the Warsaw Convention, a Contracting State would, as a matter of good faith, be precluded from applying a doctrinal principle such as FNC in a manner inconsistent with its obligations under the Convention. Given that Article 28(1) must be interpreted as giving the plaintiff the absolute right to choose the forum for the resolution of his claim, Article 28(2) must be read as precluding the application of FNC.

Indeed, this has been the position reached by the stronger judicial authorities, i.e. *Milor* and *Hosaka*. *Hosaka* spelled the death knell for FNC under Warsaw Convention within the Ninth Circuit, and seriously undermined its continued availability for Warsaw claims in other US circuits. The great irony of the *Hosaka* decision was that it came just two years after the US delegates at the Montreal Conference in 1999 had been allaying the fears of other States (regarding the fifth jurisdiction) that the application of the doctrine of FNC by US courts would restrict forum shopping. The irony being that while the US delegates were holding up FNC as the saving grace for what was the most hotly debated issue at the Montreal Conference, one of its own courts was in process of whipping it away. Even before MC99 came into effect the *Hosaka* decision had effectively undermined one of the key components that had paved the way for its agreement. The question that was inevitably going to arise, therefore, was whether or not FNC would be available under MC99.

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[149] M Shaw *International Law* (5th edn, CUP 2003) 124–125; *Nottebohm Case (Liechtenstein v Guatemala), Judgment* [1955] ICJ Reports 4, 20–21.

[150] M Lachs 'The Development and General Trends of International Law in Our Time' (1980) 169 *Recueil des Cours* 9, 190–191.

Chapter 5: Montreal

5.1 Introduction

Having examined the history of the Warsaw Convention and the place of FNC therein—or not as the case turned out—the obvious next step is conduct a similar examination in respect of MC99. One distinguishing feature this time will be that MC99 did not emerge from a vacuum of private international air law but within the context of an existing regime, i.e. WCS. The relationship that exists between WCS and MC99 is a critical factor in understanding the latter's provisions and interpreting them correctly. This chapter begins with some basic background history to MC99 which will account for its emergence and provide some valuable indicators as to its object and purpose. A significant portion of this chapter is dedicated to detailing the fifth jurisdiction. Aside from completing the picture of the current jurisdiction scheme that exists under MC99, attention to the fifth jurisdiction is necessary and desirable for a number of reasons. First, it proved to be the most controversial issue at the Montreal Conference and it involved prolonged consideration of FNC. Secondly, the debate over the fifth jurisdiction gave the delegates of the various States a chance to express views and voice criticisms relevant to general matters of jurisdiction. This provides an invaluable source of policy which is both specific to the field of international carriage by air and relatively recent. Appreciating the policy positions of the delegates will prove exceptionally useful in weighing-up options for reform in the concluding part of this work. Thirdly, the fifth jurisdiction controversy at the Montreal Conference was predominantly played out between the US and France who, once again, found themselves on opposing sides. This mirrors the core conflict at issue in the case of *West Caribbean Airways* which provided the catalyst for this work. The final sections of this chapter will focus on answering the ultimate question of the availability of the FNC within MC99.

5.2 General History

Time had inevitably pulled at the loose threads of WCS and expressions of dissatisfaction with the regime became more frequent and vociferous, especially from within the US. As air transport blossomed, the underlying public justifications for protecting the industry ebbed away and the balance of interests agreed in 1929 became harder and harder to justify. This was exacerbated by the low limits of liability. Limits which were being gradually eaten away by inflation. Discontent led to various attempts to remedy the situation and which saw the Warsaw Convention evolve into WCS. However, the result was a system which was fragmented, dis-unified and the subject of conflicting jurisprudence.[1] With the emergence of private inter-carrier agreements and other regional initiatives, this dis-unification was on the verge of causing the disintegration of WCS. The time had come for international community to take collective and decisive action and it was decided that this should be done through ICAO with the aim of producing a new instrument aimed at ensuring world-wide uniformity.

[1] See PPC Haanappel *The Law and Policy of Air Space and Outer Space* (Kluwer Law 2003) 73.

The drafting history of MC99 followed a rather convoluted and unorthodox course.[2] On 15 November 1995 the ICAO Council decided to amend the General Work Programme of the Legal Committee to provide for the modernization of the WCS and to allow for a Secretariat Study Group (SSG) to be established to assist the Legal Bureau in developing a mechanism by which such modernization could be accelerated.[3] The SSG met in February of 1996, and submitted a report to the Council which recommended the development of a new instrument to consolidate and modernize WCS.[4] The Warsaw Convention was to be taken as the starting point and useful elements of the various subsequent instruments of WCS were to be incorporated. The hoped for end result would be a consolidation and modernization of WCS.

In early 1996, the ICAO Council considered the recommendations of the SSG and referred them to the Legal Committee who were to have the Legal Bureau (with the assistance of the SSG) develop a draft. The Council referred the draft to the Legal Committee who appointed a rapporteur to review and revise it. The Rapporteur's Report detailed the need for a new deal to replace the one struck in Warsaw in 1929.[5] It was generally accepted that the need to protect an infant industry was no longer a legitimate justification and that the applicable limits were indefensibly low for many jurisdictions. However, some key issues were still hotly contested within the Legal Committee and this dissuaded the Council from calling a Diplomatic Conference. Instead, it circulated the latest draft to States and international organizations for comment. Preferring to have outstanding matters resolved prior to convening a Conference, the ICAO Secretariat recommended, not only further sessions of the SSG, but also the establishment of an expert panel. This panel was created by the Council and named the Special Group on the Modernization of the Warsaw System (SGMW).

The SGMW convened between 14 and 18 April 1998. The hope was that by having the flexibility to consider 'the political, economic and legal aspects of the problems at hand',[6] the SGMW would be able to resolve the outstanding issues. The conclusions or recommendations of the SGMW would not be final but would be presented to the Council for a final decision. The SGMW *refined* the text on several points.[7] A report[8] and an approved text of the Convention[9] were sent to the ICAO Council which then took the decision to convene the Conference in Montreal in May 1999.

It was clear from early on in the Conference that States were not prepared to commit themselves to anything until the key matters of the liability regime and the fifth jurisdiction had been resolved.[10] In order to achieve that, it was acknowledged that a smaller dedicated group should be created to deal with the matters that could not be resolved by the Commission of the

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[2] See M Milde and PS Dempsey *International Air Carrier Liability: The Montreal Convention of 1999* (Centre for Research in Air and Space Law McGill University 2005) 40.

[3] See *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999, Doc 9775-DC/2 (Volume 3: Preparatory Material)* (ICAO 1999) (hereinafter MC99 Preparatory Material) 129.

[4] ibid 1.

[5] ibid 67.

[6] ibid 141.

[7] ibid 142–143.

[8] ibid 233.

[9] ibid 113.

[10] See AG Mercer 'The 1999 Montreal Convention: An Airline Perspective' (2002) 27 *Annals Air & Space L* 451, 457–458.

Whole. This group, the Friends of the Chairman Group (FCG), was to conduct a careful and thorough analysis of the issues with a view to finding common ground on key liability issues upon which a consensus could be built. The FCG produced a consensus package[11] which was subsequently adopted by the Conference and forms the heart of MC99.

Regarding the liability regime for passenger death and bodily injury, MC99 consists of a two-tier system: strict liability of the carrier up to SDR 113,100[12] and presumed fault liability for claims in excess of that amount. In respect of both tiers, the carrier can invoke the defence of contributory negligence.[13] For the second tier liability the carrier can exonerate itself by proving the absence of fault, rather than the previous *all necessary measures* defence. An additional ground for exoneration was introduced which released the carrier from liability under the second tier where it could prove that the damage was solely due to the negligence or other wrongful act or omission of a third party.[14]

Other important elements of MC99 worth mentioning include the express provision codifying jurisprudence to the effect that 'punitive, exemplary or non-compensatory damages shall not be recoverable.'[15] Recovery for mental injury was a hot topic at the Conference.[16] The FCG stopped short of declaring mental injury non-compensable, instead it quixotically recognized that jurisprudence in the area was still developing and that it did not intend to interfere with this development, thus leaving the door open to future recovery.[17]

The new regime is very beneficial for the passenger/claimant because the only initial barrier to full recovery is the obligation to prove damages resulting from an accident. Once having done this, barriers to full recovery, where in excess of the first tier limit, will only come into question where the carrier elects to and successfully raises one of the available defences. Given that the great majority of aviation disasters will involve some element of carrier negligence, the likelihood of the carrier even deciding to raise a defence, let alone prove it, are rare.[18]

MC99 is not without its critics.[19] However, in terms of ratification, MC99 has been an overwhelming success.[20] It was hoped that it would result in a reduction in the amount of litigation and the speedier resolution of claims. Again, the consensus amongst carrier and claimant lawyers is that MC99 has been successful in this regard. As noted in Chapter 1, an MC99 claim is regarded as a "slam-dunk" by claimant lawyers. In fact, they are more likely to complain at the loss of work

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[11] *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999, Doc 9775-DC/2 (Volume 2: Documents)* (ICAO 1999) (hereinafter MC99 Documents) 271–274.

[12] The limit was originally SDR 100,000 but this figure was reviewed raised with effect from 30 December 2009 pursuant to Article 24 MC99.

[13] Convention for the Unification of Certain Rules for International Carriage by Air (signed 28 May 1999, entered into force 04 November 2003) 2242 UNTS 309 (MC99) Article 20.

[14] ibid Article 21(2)(b).

[15] ibid Article 29.

[16] See, for instance, the views of the UK, US, Sweden and Norway, *International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air) Montreal, 10-28 May 1999, Doc 9775-DC/2 (Volume 1: Minutes)* (ICAO 1999) (hereinafter MC99 Minutes) 67–68.

[17] ibid 201.

[18] One example is provided in D McClean (ed) *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019) div VII ch 29 [505], i.e. *Wright v American Airlines Inc*, No 08-CV-660, 2010 WL 446077 (ND Tex 08 Feb 2010).

[19] See e.g., Milde and Dempsey (n 2) 39.

[20] Having entered into force on 4 November 2003, MC99 currently has 136 Contracting Parties. Source: <https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf>accessed 25 February 2019.

they have incurred from MC99 than they are to complain of its substantive provisions. Nevertheless, we have seen that its success is conditional on it offering the claimant their desired choice of forum. Therefore, it is to the evolution of MC99's jurisdictional provisions from those provided under WCS that much of this chapter is dedicated. First, however, a few words are necessary on the general purpose of MC99.

5.3 Purpose

Unlike the Warsaw Convention of 1929, MC99 did not spring into existence from within a vacuum of international private air law. By 1999, the Warsaw Convention was itself seventy years old and had developed into a system comprising of amending Protocols, a supplementary Convention and several inter-carrier agreements. Surrounding this was a huge body of jurisprudence and commentary. The juristic landscape of private international air law was infinitely richer and more developed in 1999 than it had been in 1929. The industry itself had evolved further than even the most prescient observer could have predicted and as the ICAO President, Assad Koitaite, explained in this opening address to the Montreal Conference, 'the present-day aviation industry bears little resemblance to its precursor.'[21] MC99 is a modernization and a consolidation of WCS. This requires us to appreciate two key factors in assessing the purpose of MC99: (i) the continuing relevance of the Warsaw Convention and WCS; (ii) the contrasting purpose of MC99 in light of WCS. In other words, to what extent does MC99's purpose derive from WCS and to what extent does it diverge?

5.3.1 Enduring Relevance of WCS

As between Contracting States, MC99 completely replaces the previous liability system of the Warsaw Convention. MC99 is a new convention, neither supplemental to nor an amendment of the Warsaw Convention.[22] However, this does not render WCS an irrelevancy. It continues to retain relevance. Firstly, because it continues to govern certain international air transportation involving Contracting States of that system who have not yet ratified the MC99. The second way is because it lives on through its jurisprudence.

Much of the wording for the provisions of MC99 was directly transferred from WCS. It is abundantly clear that the drafters of MC99 did not intend to throw out the baby with the bathwater but wished instead to hold onto the valuable jurisprudence which had built up through applying and interpreting WCS.[23] This is borne out by the Preamble to MC99 which begins by '[r]ecognizing the significant contribution' made by the Warsaw Convention and other related instruments and further on, recognizes the need to 'consolidate' them. The Minutes of the Montreal Conference further underline this sentiment.[24] The courts have since relied on the jurisprudence of WCS to

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[21] MC99 Minutes (n 16) 37.
[22] As recognized the US courts. See *Schopenhauer v Compagnie Nationale Air France* 255 F Supp 2d 81, 87 (EDNY 2003).
[23] See MC99 Preparatory Materials (n 3) 12.
[24] See MC99 Minutes (n 16) 218–220.

assist in interpreting MC99 where the provisions in question are substantively the same.[25]

5.3.2 Warsaw and Montreal: At Cross Purposes?

When it comes to defining the purpose of MC99, new considerations arise that were not at play in 1929 with the Warsaw Convention. Likewise, other considerations have fallen away as they lost import with the passage of time and the progress of air transport. The recognition by the preamble of the need to *modernize* and *consolidate* the Warsaw Convention is the first clear indication of one of MC99's purposes. For example, the US Court of Appeals for the Second Circuit described MC99 as having been passed to 'harmonize the hodgepodge of supplementary amendments and intercarrier agreements" of which the Warsaw Convention system consists.'[26] On the one hand, this certainly identifies something of the impetus behind the conclusion of the new treaty and describes the state of affairs as they existed at the time of negotiation. However, as a description of the object and purpose of the Convention itself, it does little more than refer consideration to the purposes of WCS and invite reflection on how these have been affected by MC99. This was the intimation of the Supreme Court of Canada in *Thibodeau v Air Canada*, where, citing the preamble's stated object as modernization and consolidation, opined that, '[t]o understand the purposes of the Montreal Convention, we therefore must go back to its predecessor, the Warsaw Convention'.[27]

Another consequence of the nature of MC99 as a modernising and consolidating instrument is that much of the work had already been achieved. In fact, the greater part of MC99 is taken verbatim from WCS. Consequentially, most of the debate contained in the *travaux préparatoires* of MC99 pertained to the relatively few matters that stood in need of modernization. The pitfall to be avoided herein is to identify the purpose of MC99 only with the changes rather than view the treaty in its full context. If one were to make this mistake, then one might conclude that the purposes of MC99 differed significantly from those of the Warsaw Convention. However, the courts have generally supported the view that there exists great commonality of purpose between the Warsaw Convention and MC99.[28] However, equating the purpose of MC99 with that of the Warsaw Convention requires qualification in order to accommodate the effects and changes of the process of modernization and consolidation. The point to be borne in mind is that MC99 was not drafted on the basis of tearing up the preceding instruments and starting from a clean slate.

For the reasons described above, the denomination of the objects and purposes of MC99 must begin with the objects and purposes of the Warsaw Convention and its subsequent instruments. In the previous chapter (see 4.2.5), the object and purpose of the Warsaw Convention was defined in twofold form. The first part of which was the cardinal purpose of avoiding conflict of laws through the unification of certain rules, this has been reaffirmed by MC99 which incorporates the unifying rules of the Warsaw System, simplifying and modernizing some of which. The mere

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[25] *Hunter v Deutsche Lufthansa AG* 863 F Supp 2d 190, 205 (EDNY 2012); *Stott v Thomas Cook Tour Operators* [2014] AC 1347, 1359 (SC); *Thibodeau v Air Canada* [2014] SCC 67, [31].

[26] *Ehrlich v American Airlines Inc* 360 F 3d 366, 371 n 4 (2d Cir 2004).

[27] *Thibodeau* (n 25) [31].

[28] See the view expressed by the UK Supreme Court in *Stott* (n 25) 1359. See also, *Matz v North Eastern Airlines* No 07-CV-13447, 2008 WL 2064800 *2 (ED Mich 13 May 2008).

act of modernization and consolidation is itself a poignant and powerful reaffirmation (by the drafters of MC99) of the cardinal purpose of WCS as the unification of certain rules of private air law. This first object remains the same with MC99 and has been broadly regarded so by the courts.[29]

The previous chapter also identified a supplementary objective to the Warsaw Convention, the desire to further the public interest in the development of air transport while striking an equitable balance of interests. While the development of air transport remains a fundamental objective under MC99 there has been a substantial shift in the balance of interests which requires revising our understanding of this supplementary purpose. What was new about the approach taken in Montreal was the weight given to protecting the interests of consumers, i.e. the interests of natural persons who contract for international carriage by air.

At least three inter-connected factors have helped shift the balance from that of the industry toward that of the consumer. First, the technological maturation of the air transport industry meant it was now much safer than it had been in its infancy and thus the financial risk to the industry of accident was less. Second, the economic maturation of the industry meant that the impetus for its development in service of the public's need for air transport was no longer anywhere near as pressing, in fact, it could be said to have been overtaken by the public interest in the third factor, i.e. the global trend toward greater levels of consumer protection. Thus the preamble of MC99 specifically recognizes the importance of ensuring protection for consumers. Both the courts[30] and commentators[31] have echoed the centrality of this objective.

At the same time, the preamble also noted the need for an equitable balance of interests. Just as it would be unjust to claim that the Warsaw Convention was a drafted with only the carriers' interests in mind, so too it would be unjust to claim that MC99 had only the consumers' interests in mind. The interests of the carrier, in particular those of the small to medium airlines (especially from developing nations) were strongly advocated at the Conference with several States raising concerns about the negative impact of being too pro-consumer.[32] Under both Conventions it was a question of achieving an equitable balance between the interest of all parties. As Mercer states of MC99: '"Equity" and "balance" were cardinal guiding considerations in the crafting of the new Convention.'[33] Without doubt there was a shift in the balance of interests, the Warsaw Convention had favoured the interests of the air transport industry (comprising both the carrier and the travelling public) with the claimant passenger drawing the short straw. When it came to MC99, a new deal was in order. There was to be better protection of the interests of consumers and equitable compensation secured for victims and their families. The carriers and the travelling public were expected to carry more of the burden of the fewer risks inherent in air transportation.

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[29] See e.g., *Allianz Global Corporate & Specialty v EMO Trans California Inc* No 09-CV-4893, 2010 WL 2594360 *4 (ND Cal 22 June 2010); *Thibodeau v Air Canada* (n 25) [47].

[30] See e.g., *Sompo Japan Insurance Inc v Nippon Cargo Airlines Co Ltd* 522 F 3d 776, 780–781 (7th Cir 2008); *Bassam v American Airlines* 287 F App'x 309, 312 (5th Cir 2008).

[31] See B Cheng 'A New Era in the Law of International Carriage by Air - From Warsaw (1929) to Montreal (1999)' (2004) 53 *Int'l & Comp LQ* 833, 844–845; GN Tompkins Jr *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (Wolters Kluwer 2010) 33–34.

[32] See the comments made by the following States in the general observations on the draft Convention, MC99 Minutes (n 16) 45–6 (Algeria); 47 (India, Canada); 48 (China, Madagascar); 49 (Indonesia); 50 (Mexico); 51 (Egypt).

[33] Mercer (n 10) 457.

5.3.3 Statement of the Purpose of MC99

In light of the above, the purposes of MC99 can be defined as follows. The cardinal purpose remains unchanged from the Warsaw Convention. However, the second supplementary purpose has undergone significant recalibration in light of the changing circumstances of the industry and socio-economic conditions. This is underlined by the forceful declarations made by the Contracting Parties in the preamble and as reflected in the substance of the provisions contained within the Convention itself.

Thus, while retaining its twofold structure, the object and purpose of MC99 can be defined as consisting of the following:

1. Avoidance of conflict of laws through unification of certain rules relating to travel documentation and air carrier liability.
2. Assurance of an equitable balance between the interests of consumers in international carriage by air, the need for equitable compensation based on the principle of restitution and the orderly development of international air transport.

5.4 The Long Path to the Fifth Jurisdiction

The plaintiffs in *Osborne v British Airways PLC Corp*[34] were two American missionaries working in Nairobi, Kenya. Wishing to travel to the United States for Christmas, they had purchased a return ticket in Kenya for carriage by air between Nairobi and Orlando (via London) with British Airways. On the final leg of the journey, i.e. the London-Nairobi leg, a deranged passenger broke into the cockpit and attempted to commandeer control of the aircraft. During the fracas, the aircraft plunged downwards around 10,000 feet, allegedly leading the plaintiffs to sustain physical and psychological injuries. The plaintiffs brought proceedings against British Airways in the District Court for the Southern District of Texas. In another case, *Hornsby v Lufthansa German Airlines*,[35] the plaintiff was an American citizen living and working in Kaiserslautern, Germany. She had purchased a return ticket in Germany for carriage by air between Frankfurt and Los Angeles. She allegedly suffered physical injury caused by severe turbulence encountered during the Frankfurt-Los Angeles leg of the journey and subsequently brought an action against Lufthansa before the District Court for the Central District of California.

In *Osborne*, the court declared itself to be without jurisdiction and dismissed the plaintiff's claim, whereas in *Hornsby,* the court assumed jurisdiction. What differentiated the two cases? In neither case was the domicile, or principal place of business of the carrier, or the place of destination located within the US, and in both cases the ticket in question had been purchased outside the US. Thus, under Article 28(1) of the Warsaw Convention, grounds did not exist under the four possible jurisdictions available. Indeed, this had been the very reason for the district court dismissal in the case of *Osborne.* The difference in the case of *Hornsby* was that her claim had not been brought under the Warsaw Convention, but under MC99. The specific advantage of which was the addition of a fifth jurisdiction which offered an additional choice of forum to a

[34] 198 F Supp 2d 901 (SD Tex 2002).
[35] 593 F Supp 2d 1132 (CD Cal 2009).

claimant, i.e. the fifth jurisdiction. This grants the claimant the option to bring an action against the carrier before the courts of claimant's home forum, provided the carrier has a sufficient business connection there. Although first made effective through MC99, the fifth jurisdiction had a longer history.

5.4.1 Guatemala City and the Impetus for the Fifth Jurisdiction

The impetus for a fifth jurisdiction came from US dissatisfaction with WCS. The low limits of liability were its chief complaint but the US was also concerned with the absence of a choice of law provision for establishing and quantifying damages. Whilst the Warsaw Convention makes provision for the application of the *lex fori* in specific circumstances, e.g. on tolling for the purposes of time limitations, it leaves other areas, not exclusively covered by the Convention, to *le droit commun*. Therefore, when it comes to the calculation of damages, there is the risk that the forum hearing the claim of a foreign claimant may apply rules which result in the plaintiff receiving a level or scope of compensation that is inadequate in comparison to that which he might have received in his home forum. Aside from choice of law issues, the perception in US quarters was that foreign courts would prove less favourable to American claimants and this would prejudice the interests of the US expat community working or travelling throughout the world.

The solution preferred by the US to the problems described above was to guarantee to the claimant jurisdiction in their home forum. This would give the claimant the security of knowing that they had access to a forum which would assure them of an equitable level of recovery. In addition, access to one's home forum also ensured the availability of benefits which that jurisdiction had elected to endow upon its citizens and residents. The home forum would be the most convenient one to hear the case since the court would apply the law with which the claimant is most familiar and would be best placed to calculate the level of compensation.

The possible amendment of the Warsaw Convention to make provision—in response to US insistence—for a fifth jurisdiction was raised at the 17th Session of the ICAO Legal Committee in 1970 and a draft proposal agreed.[36] This proposal was considered at the Diplomatic Conference at Guatemala City in 1971 where there was considerable support for it.[37] The only opposition to the fifth jurisdiction came from behind the Iron Curtain, from Czechoslovakia,[38] the Union of Soviet Socialist Republics (USSR)[39] and Poland.[40] The main substantive issue that caused problems was the meaning to be ascribed to the term "establishment", as it was to be a requirement of the fifth jurisdiction that the carrier have an establishment in the forum State.[41] Particularly noteworthy was the minimal concern expressed with respect to the risk of forum shopping posed by the addition of the fifth jurisdiction; the situation would be totally different in Montreal in 1999. Ultimately, the text approved at Guatemala City would have granted a fifth jurisdiction but GCP

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[36] See *International Conference on Air Law - Guatemala City, February-March 1971 ICAO Doc 9040-LC/167/2* vol 2 (ICAO 1971) 17.
[37] *International Conference on Air Law - Guatemala City, February-March 1971 ICAO Doc 9040-LC/167/1* vol 1 (ICAO 1971) 119.
[38] ibid 113.
[39] ibid.
[40] ibid 114.
[41] ibid 114 et seq.

never came into effect having failed to achieve the necessary number of ratifications. The attempts by the US to secure the fifth jurisdiction were thus ultimately unsuccessful but as momentum built for the conclusion of a new convention to replace WCS the opportunity remerged in the late 1990s.

5.4.2 Second Chance at a Fifth Jurisdiction

The fifth jurisdiction was a feature of the discussions from the very start of MC99's drafting history and featured prominently throughout that lengthy process. From early on there was a strong divergence of opinion on the matter. The US was ever the champion of the fifth jurisdiction and saw its inclusion in the new convention as essential. However, many other States were keenly opposed to it.[42] Nevertheless, a draft article for a fifth jurisdiction was produced and provisionally approved by the ICAO Legal Committee at its 30th Session in 1997.[43] The fifth jurisdiction remained deeply unpopular amongst most of the participating States.[44] It became apparent to all that the US ratification without its inclusion would be 'highly unlikely'.[45] The mind-set thus appeared to turn toward finding an acceptable formulation and several alternatives were proposed.[46] Eventually, at the Fourth Meeting of the SSG in late January 1999, a recommended wording was adopted and submitted to the SGMW for further consideration.[47]

During the meeting of the SGMW, opposition to the fifth jurisdiction was still in the majority.[48] However, an implicit ultimatum was issued when the US reiterated that its ratification of a convention was dependant on its inclusion.[49] A compromise proposal was agreed which it was hoped would be universally acceptable and promote uniformity.[50] Satisfied that it had completed its task, the SGMW forwarded its approved draft convention[51] to the ICAO Council who subsequently took the decision to convene a diplomatic conference.

5.4.3 Controversy at the Montreal Conference

The following account of the minutes of the Montreal Conference is vital for two reasons. First, as noted in the introduction to this chapter, the debate surrounding the fifth jurisdiction was both revealing as to State policy with respect to general issues of jurisdiction. Second, the fifth jurisdiction provided the context for lengthy discussions about FNC within MC99.

5.4.3.1 Expressions of Policy

As champion of the fifth jurisdiction, the US had submitted a comprehensive paper to the Conference reiterating why its inclusion represented an essential element of any revision to

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[42] MC99 Preparatory Materials (n 3) 177.
[43] ibid (n 3) 81-104.
[44] See ibid 177.
[45] ibid 303.
[46] For instance, see ibid.
[47] ibid 338.
[48] ibid 242–243.
[49] ibid.
[50] MC99 Preparatory Materials (n 3) 249.
[51] ibid 243.

WCS.[52] The US position remained fundamentally premised on the same policy considerations. First and foremost, that justice and fairness required that passengers and their heirs should be able to bring a claim to the courts of their home State provided the carrier conducted business there. Secondly, that a claimant's home forum was generally the most appropriate forum (at least for the claimant). Thirdly, that developments in the industry since 1929 which has seen it become a complex global network also made the inclusion of a fifth jurisdiction desirable. Support came from Japan, Colombia and Panama, who regarded it as desirable ("vital" in the case of Japan) for the promotion of consumer interests.[53] Norway was also in support.[54] As were the Latin American Civil Aviation Commission (LACAC).[55]

Opposition to the fifth jurisdiction was led by France who presented a paper containing three arguments.[56] These echoed the substance of the objections which had been voiced earlier in the process and were shared by many of the other States in attendance at the Montreal Conference. The French view was endorsed by India, Korea and China, as well as the 53 African Contracting States[57] and the members of the Arab Civil Aviation Commission (ACAC).[58]

The first argument was that the fifth jurisdiction simply was not necessary. Indeed, this point had been made by a number of States at different points during the drafting process.[59] France specifically argued that the fifth jurisdiction was not necessary to ensure the protection of passengers because the existing four bases would provide satisfactory resolution of the vast majority of cases.[60]

France's second argument fell within a category of objections which were economic in nature. States were concerned about the financial impact of the fifth jurisdiction, particularly on insurance premiums. Suggestions had been made during the early drafting history to limit the financial impact of the fifth jurisdiction, e.g. by imposing a monetary limitation specific to claims based upon it.[61] France argued in its paper that the operation of the fifth jurisdiction would have unfortunate consequences for the development of international air transport on account of the increase in insurance premiums and the resultant effect on fares.[62] This would be particularly worrisome for small to medium carriers, especially from developing nations. This was a view voiced by many States, e.g. India.[63] The fear being that exposure to claims in high award States could place an unbearable burden on such carriers and thus threaten their continued participation in the provision of international air transport. Another aspect of the economic argument against the fifth jurisdiction was that it would be largely detrimental to the interests of passengers. This was allegedly on account of the fact that the States advocating its inclusion were mostly very high damage awards jurisdictions. The resulting increase in insurance premiums would be paid for by the passenger in the form of higher fares which would fall disproportionally on consumers from developing

[52] MC99 Documents (n 11) 101.
[53] See MC99 Minutes (n 16) 106.
[54] ibid 107.
[55] MC99 Documents (n 11) 116.
[56] ibid 195–198.
[57] ibid 143–144.
[58] ibid 162.
[59] See MC99 Preparatory Materials (n 3) 4.19.
[60] See MC99 Documents (n 11) 198.
[61] See MC99 Preparatory Materials (n 3) 363.
[62] See MC99 Documents (n 11) 196.
[63] ibid 136.

countries. In essence, it was argued that high awards by certain States would effectively be subsidized by passengers from developing countries.[64] This is unquestionably a valid concern but it was totally overblown by France in the context of the fifth jurisdiction. The reason being that it was based on two erroneous assumptions. First, that the fifth jurisdiction was to be one based on nationality alone (addressed below). Second, leading on from the first, that the fifth jurisdiction would be frequently invoked. Both were wrong. Litigators on both sides recognize that in practice the fifth jurisdiction is very seldom invoked[65] and has only a very modest impact on the global recoveries for aviation accidents, a fact accepted by aviation insurers.

The third argument was that the fifth jurisdiction would create a regrettable precedent which would be inconsistent with the development of contemporary law. France maintained that this would run counter to recent instruments of international law which had expressly distanced themselves from jurisdictional competence based on nationality alone, e.g. the Brussels Convention 1968, the Lugano Convention 1996 and The Hague Convention 1971. In France's view, the fifth jurisdiction would expose carriers to litigation in a forum to which they had no real connection. This line of argument was based on the deliberate misperception—made purely for rhetorical effect—that the fifth jurisdiction was nothing more than what France called a 'true jurisdiction of nationality'.[66]

This challenge to the legality of the fifth jurisdiction was disingenuous. As argued by the US, a fifth jurisdiction was a feature of GCP[67] and is one of the Athens Convention.[68] Even more damning of the French argument is the simple fact that the fifth jurisdiction is not (and never was) based solely on nationality. This misconception had dogged the fifth jurisdiction from the start of MC99 drafting process. Despite the text of the proposal itself[69] and the clarifications given thereon,[70] which showed that the carrier would have to have a substantial commercial presence in the fifth jurisdiction State, the irrational suspicion and fear remained that the fifth jurisdiction was a blatant attempt to bestow a jurisdictional privilege on 'the wandering American'.[71] The text of the jurisdiction clause before the Conference and the comments submitted by the US with regard to the fifth jurisdiction clearly evidence that the proposal for a fifth jurisdiction actually on the table was not one based solely on nationality, it accepted that limiting connecting factors (for both claimant and carrier) to the fifth jurisdiction would be required.

The valid underlying objection was not so much a matter of legality as of legitimacy. The real concern was to ensure that there were sufficient connecting factors between the defendant carrier and the fifth jurisdiction to justify exposing the carrier to litigation of claims in that forum. Indeed, a constant issue throughout the drafting history was how to define the necessary connecting factor

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[64] ibid 196.

[65] For discussion of a small number cases in which jurisdiction was established on the basis of the fifth jurisdiction, see McClean (n 18) div VII ch 28 [441.1].

[66] MC99 Documents (n 11) 197.

[67] ibid 106.

[68] See Article 17(1)(d) of Athens Convention relating to the Carriage of Passengers and Luggage by Sea, 1974 (opened for signature 13 December 1974, entered into force 28 April 1987) 1463 UNTS 19 (Athens Convention).

[69] MC99 Preparatory Materials (n 3) 42.

[70] See e.g., ibid 4.19.

[71] Mendelsohn, AI 'The Warsaw Convention and Where We Are Today' (1997) 62 *J Air L & Com* 1071, 1077.

in sufficiently robust terms.[72] Therefore, the third category of objections pertained to *legitimacy* of the fifth jurisdiction as a forum for resolution of claims against carriers.

The presentation of opening positions and the discussion thereof took place over the first week of the Conference and then gave way to more intense deliberations on the core package of provisions within the Friends of the Chairman Group (FCG). Initial French opposition to the inclusion of the fifth jurisdiction ended up being a damp squib. By the time the FCG came to discuss the fifth jurisdiction, France had acquiesced to its inclusion and preferred instead to draw battle lines over the applicable conditions to be satisfied before it could be relied upon.[73] At its third meeting, the Chairman of the FCG indicated that the concerns expressed by those opposed to the fifth jurisdiction had their origin in the belief that there would be a tendency to resort to the fifth jurisdiction with the consequence that there would be excessive claims.[74] The question of including a fifth jurisdiction in the Convention was no longer at issue, the pressing concern to be addressed was how to accommodate it in such a way that would allay the fears expressed by a number of States, some of which the Chairman described as being 'purely imaginary'.[75]

It is often said that it was the fear of forum shopping that was at the heart of opposition to the fifth jurisdiction. It is submitted that this was not the case and that it is vital to appreciate the nuance involved. The theme of forum shopping arose at numerous points in the discussions of the fifth jurisdiction within the FCG, as well as within the Conference in general. It is curious how the question of forum shopping only emerged with respect to the fifth jurisdiction. In fact, at no point did anyone raise a concern about forum shopping under the existing four jurisdictions. This suggests that it was not forum shopping *per se* that worried the delegates but rather some aspect of the fifth jurisdiction. This factor, it is argued, was the purported lack of a sufficient nexus between the carrier and the fifth jurisdiction.

The existing four jurisdictions did not trouble the opponents of the fifth jurisdiction because, as the Chairman noted in his introductory remarks at the third meeting of the FCG, these were accepted by all to be appropriate forums.[76] This dovetails with the typical civilian position with respect to jurisdiction (as discussed in Chapter 3) where, it should be noted, a claimant is not regarded as a forum shopper where he chooses a forum which the law has predetermined to have sufficient links to the defendant. It was the possibility that the fifth jurisdiction might operate to expose a carrier to litigation in a forum to which it had insufficient connection that scared some delegates. The anxiety surrounding the fifth jurisdiction was based on concerns regarding the basis for its application and the potential negative consequences of which, foremost amongst which was the exposure to high damages awards but also the practical inconvenience for a carrier of being sued in a forum to which it had little (or no) connection. Much of this was rooted in the misperception of the fifth jurisdiction as one of mere nationality of the claimant, or, as one in which there was lacking a sufficient nexus to the carrier to render litigation in that forum justifiable. Could a sufficient nexus be defined, then the concerns relating to forum shopping would have dissipated (as indeed they did). It is submitted that it was this uncertainty surrounding the application of fifth

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[72] See e.g., discussion reported in MC99 Preparatory Materials (n 3) 244.
[73] See Mercer (n 10) 465.
[74] MC99 Minutes (n 16) 148.
[75] ibid.
[76] ibid.

jurisdiction that was the paramount concern and not forum shopping *per se*. Unfortunately, rather than focusing on defining this nexus, the FCG meetings got side-tracked by the notion of forum shopping and how to control it. A collateral benefit of this detour was that it provided the opportunity for FNC to emerge, *deus ex machina*, with a vital role.

5.4.3.2 FNC: *Deus ex Machina*

In the paper it submitted to the Montreal Conference, the US raised a number of arguments that it expected would allay the fears expressed by States with respect to forum shopping.[77] The US argued that the control of forum shopping would be facilitated by the inclusion of the fifth jurisdiction because where a claimant sues in the US, but has access to a home forum under the fifth jurisdiction, then there is a greater likelihood of FNC dismissal.[78] The US also submitted a paper during the conference which provided synopses of two cases which illustrated how FNC was applied by US courts.[79] Even prior to the Conference, the US had given assurances that the doctrine of FNC would 'provide discipline against unwarranted forum shopping.'[80] What is more, the French expressly recognized the application of FNC by US courts in convention litigation in their paper opposing the fifth jurisdiction.[81]

In an attempt to reconcile the desire to include the fifth jurisdiction with the fear that it might render the carrier subject to litigation in an inappropriate forum, the Chairman of the FCG proposed codifying the doctrine of FNC (or something similar) within the Convention.[82] In response, Australia put forward a proposal which captured the spirit of FNC (based on the Australian doctrine).[83] A misunderstanding emerged at this point. Whilst the Australian proposal had been intended to apply to all bases of jurisdiction,[84] the Chairman, described it as only being applicable to the fifth jurisdiction.[85] The US was vehemently opposed to such an idea. The US Delegate stated, in defiant terms, that 'the doctrine of *forum non conveniens* would be applied to all five jurisdictions in his country whether the Group prescribed that or not'.[86] Indeed, the US 'described the doctrine of *forum non conveniens* as it was currently applied in the Courts of the United States to the existing four jurisdictions and as it would be applied to a fifth, sixth, seventh or eighth jurisdiction, if such jurisdictions were created.'[87] There can have been no doubt as to what the US was saying, it was applying and would continue to apply FNC to cases where jurisdiction is established on the basis of the convention.

The US also had other concerns about codifying a rule for FNC. It worried about the ratifiability of the new Convention if it sought to impose the doctrine on States for whom FNC was a foreign concept and who had no desire to adopt it. Additionally, the US Delegate complained that

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[77] MC99 Documents (n 11) 101–109.
[78] ibid 108.
[79] ibid 151–152. The two cases were *Piper Aircraft Co v Reyno* 454 US 235 (1981) (see Chapter 2 supra); *Nolan v Boeing Co* 762 F Supp 680 (ED La 1989) aff'd 919 F 2d 1058 (5th Cir 1990) (see Chapter 7 infra).
[80] MC99 Minutes (n 16) 44.
[81] MC99 Documents (n 11) 196.
[82] MC99 Minutes (n 16) 148.
[83] MC99 Documents (n 11) 213.
[84] MC99 Minutes (n 16) 160.
[85] ibid 158.
[86] ibid 159.
[87] ibid.

codification of FNC by the Group might result in altering the already existing jurisprudence in the US. For these reasons, the US proposed amending the wording of the final paragraph of the jurisdiction paragraph to read: 'Questions of procedure shall be governed by the law of the Court seised of the case, *including the doctrine of forum non conveniens or other similar doctrines*.'[88] This additional wording was proposed in the name of giving comfort to some States who feared their carriers would be exposed to high US jury awards. What is crucial to note is that the context for the proposal was not to empower courts to apply FNC (or similar doctrines) but just to act as a form of comforting recognition of the doctrine's existing applicability.

The Delegate of Chile made the point that it and several other Latin American States would have difficulty with accommodating FNC within their legal (i.e. civilian) systems.[89] The Delegate of Sweden also noted the ratification problems that would arise for it and a large number of European States.[90] Both delegates noted the vagueness of the proposed wording and stated the need for further clarification before it could be decided.

Playing the role of pantomime villain, the Observer from the IUAI entered the stage at this point and gave the hornet's nest a kick. He referred to an English case (presumably *Milor*) which had rendered FNC a dead letter in England for Warsaw Convention cases.[91] He also noted that there were no reported cases of a carrier being able to secure dismissal of a case from a US court by way of FNC. The relevance of these observations requires closer inspection and clarification.

First, the Observer *did not say* that there were *no cases* in which FNC had been *applied* to a Convention action. It appears that the Chairman made this mistake. He is reported as having said, in his summary of the Observer's point, that '[i]f, as indicated by the Observer from the IUAI, there were *no cases* in the United States in which the principle of *forum non conveniens* had been *applied* to Convention cases …'.[92] What the Observer said was that there were no *reported* cases in which a carrier had been *able to secure dismissal*, i.e. had been successful in an FNC motion. This is a different proposition entirely because where a motion is denied the doctrine is nevertheless applied. Indeed, at the time, there were several reported cases in which FNC was applied but no dismissal granted.[93] Furthermore, the Observer was actually wrong. There was at least one reported case in which FNC dismissal was granted in a Warsaw Convention case;[94] there were also two unreported cases.[95]

Second, the Observer enigmatically suggested that the English High Court case might throw light on the reason why FNC dismissals were non-existent in the US. His implication being that US courts did not dismiss Warsaw actions because they, like the English court in *Milor*, thought it had no place under the Convention. If this is what he thought, then unless he could predict the

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[88] ibid.
[89] ibid 160.
[90] ibid 161.
[91] ibid. The case name is not cited but is more than likely that of *Milor v British Airways plc* [1996] QB 702 (CA).
[92] MC99 Minutes (n 16) 162 (emphasis added).
[93] See e.g., *In re Air Crash Disaster near New Orleans, Louisiana on July 9, 1982,* 821 F 2d 1147 (5th Cir 1987); *In re Air Crash off Long Island New York, on July 17, 1996,* 65 F Supp 2d 207 (SDNY 1999); *Recumar v KLM Royal Dutch Airlines* 608 F Supp 795 (SDNY 1985); *McLoughlin v Comm Airways (Pty) Ltd (Comair)* 602 F Supp 29 (EDNY 1985).
[94] *In re Disaster at Riyadh Airport, Saudi Arabia on August 19, 1980,* 540 F Supp 1141 (DC Cir 1982).
[95] *Feng Zhen Lu v Air China Int'l Corp* No 92-CV-1254, 1992 WL 453646 (EDNY 16 Dec 1992); *Byrne v Japan Airlines Inc* No 83-CV-9162, 1984 WL 1343 (SDNY 18 Dec 1984).

future he was wrong. Although the US courts did eventually come to that position in 2002 with *Hosaka v United Airlines Inc*,[96] at the time of the Montreal conference the one US court decision that had specifically made a finding on the issue had actually held that FNC was available.[97]

The Chairman took the comments of the IUAI on board and commented that: 'It would seem that if *forum non conveniens* was to play a role, that would have to be clearly indicated, having regard to the jurisprudence which might or might not exist in some countries.'[98] This comment has been read as proof that FNC cannot apply unless specifically provided for in the Convention.[99] Whilst this is suggested by the immediate context provided by the Observer's comments, the full context shows that the better and clearly intended meaning was otherwise. Let us recall that the Australian proposal was vaguely formed and it had been noted by some States that they would have difficulty implementing it into their legal systems. In other words, that the courts of civil law States would be unable to give effect to it since they did not have a doctrine of FNC or something akin to it. What the Chairman was recognising, was that if they were going to use FNC then, for those States, it would have to be explicitly provided for, i.e. courts would need to be empowered directly by the convention rule of FNC. In other words, this was not a matter to leave to national law to decide since that would not ensure its application, as evidenced by the UK and the purported practice of the US courts.

It is not clear that the significance of *Milor* was appreciated by the Chairman or anyone else. Unfortunately, the Delegate of the UK did not bring clarity to the issue. He noted, in reference to the comments made by the Observer, that FNC was unavailable in relation to the four Warsaw Convention jurisdictions 'as a result of implementing the Warsaw Convention into the national legislation of the [UK].'[100] He then went on to say that the Group would not really be 'modernizing and consolidating the Warsaw Convention' if it required the claimant to fight for his choice of forum by leaving it open for the Court to dismiss on FNC.[101] In his view, this could introduce litigation at a point where it did not currently exist—except presumably in those jurisdictions (e.g. the US) which applied FNC under the Warsaw Convention—and, furthermore, 'could lead to the possible elimination of the plaintiff's rights.'[102] In so doing, the Delegate of the UK was confirming the gist of the *Milor* decision and he hinted at its *ratio* by mentioning the possible elimination of the plaintiff's rights. Had the *ratio* of *Milor* been raised, i.e. the incompatibility of FNC with the substantive right of the claimant to choose his forum, it is unthinkable that it would not have provoked comment and debate at the Conference. It would have offered the civil law States, for whom the doctrine is anathema, a gilt-edged opportunity to banish it from this new convention entirely. The absence of any such debate is strong proof that the consistency of FNC with the convention was never questioned.

The Chairman admitted to being in a state of confusion at this point in the discussion.[103] To

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[96] 305 F 3d 989 (9th Cir 2002) cert denied 537 US 1227 (2003).

[97] *Air Crash Disaster near New Orleans* (n 93). The case is covered in Chapter 4.4.1.

[98] MC99 Minutes (n 16) 162.

[99] This argument was raised by the plaintiffs in *West Caribbean Airways* in their appeal brief submitted to the Eleventh Circuit. See Appellant's Initial Consolidated Brief at 27-28, *Pierre-Louis v Newvac Corp* 584 F 3d 1052 (11th Cir 2009) (No 07-CV-15828), 2008 WL 1840695.

[100] MC99 Minutes (n 16) 162.

[101] ibid.

[102] ibid.

[103] ibid.

the Chairman's way of thinking, the positions discussed were irreconcilable. In the UK, the claimant's choice was treated as final and FNC was not applied, but, on the other hand, it was being argued that the fifth jurisdiction's application should be somehow circumscribed. The Chairman summarized the two available options; either, (a) single out the fifth jurisdiction and circumscribe its application in such a way as to address those issues, or; (b) recognize that all the jurisdictions would be subject to an FNC rule.[104]

The Chairman thought the latter option, 'would modify even the existing Convention rules.'[105] It could be argued that this comment, taken in isolation, might be read as suggesting that to make FNC available under the Convention would require modifying the existing rules of the Warsaw Convention. In other words, that FNC was prohibited by the Convention. However, the Chairman's words ought to be read in context. Firstly, the discussion centred on the inclusion of express wording on the mandatory application of FNC which would naturally involve modification of the existing rules. As it stood, FNC was not mandated but it would be if codified. Second, making FNC applicable to all jurisdictions—rather than just the fifth—would amount to a modification of the Convention's rules for certain States, e.g. the UK, whose position had just been described. Third, aside from the reference to the *Milor* case, at no other point had any doubt been raised about the consistency of FNC with the Convention. The US had made several references, without any opposition, to its availability and discussions had always preceded on that basis. Fifth, in the same excerpt, the Chairman spoke of 'the rules being changed or *clarified',* a turn of phrase that demonstrates the Chairman was not speaking authoritatively but speculatively.[106] That he spoke of clarification proves that for those States which did apply FNC, the application of the doctrine by its court would be clarified by the Convention, there would not be a change of rule. The issue came down to whether the convention was going to mandate the application of FNC (and if so, whether for fifth jurisdiction only, or for all) or, whether it would leave the matter of applying FNC to national law. At no point was there a proposal to prohibit FNC.

The FCG moved ahead with drafting the Consensus Package which was then discussed at its fifth and sixth meetings. Yet again, the fifth jurisdiction dominated the discussion. The draft Consensus Package incorporated into the jurisdiction clause an FNC-like test based on the Australian proposal.[107] It applied only to the fifth jurisdiction and expressly *authorized* the court to decline jurisdiction (in favour of an alternative available forum) in certain specified circumstances. The Chairman explained that a convention rule had been necessary to ensure uniformity and because the doctrine did not exist in the legal systems of some States.[108] He did not say that it was necessary because the Convention would otherwise proscribe the application of FNC by those States which had the doctrine. The FNC-like rule was not mandatory, it was to be a permissive rule.[109] Although permissive, the Chairman did explain that the Court would be obliged "to address its mind" to the issues stated under the rule in coming to its conclusion, i.e. it was to be a quasi-permissive rule.[110]

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[104] ibid.
[105] ibid.
[106] ibid.
[107] See Article 27(4) of the first draft of the Consensus Package in MC99 Documents (n 11) 494.
[108] See MC99 Minutes (n 16) 171.
[109] Confirmed by the comments of the Chairman, ibid.
[110] ibid.

The rule perplexed the US who remained opposed to anything which would make reliance on the fifth jurisdiction more onerous than the other four.[111] Instead, the US proposed scrapping the rule and reverting to its former proposal which would have maintained the text of Article 28(2) of the Warsaw Convention (i.e. "questions of procedure shall be governed by the law of the court seised of the case") and adding the following clarification: 'that nothing here was intended to limit the ability of courts, in their discretion, applying the law of the court seised of the case to dismiss cases that more properly belonged in one of the other jurisdictions.'[112] This would maintain the status quo, which the US understood as meaning that FNC would apply to all five jurisdictions for those States which had the doctrine whilst leaving it open for other States to follow suit if they so chose.[113] The Delegate of Sweden voiced support for this proposal (echoed by the Observer from the European Community) and voiced concerns that the convention FNC rule could block ratification by many States of the civil law tradition. Of the US proposal, he observed: 'States who at the moment applied the principle of *forum non conveniens* could continue to do so'.[114]

The Delegate of Switzerland, who saw a number of problems with the convention FNC rule,[115] posed a highly salient point. In his view, the problem of FNC was not 'a matter of substance, but of procedure.'[116] The Swiss Delegate proposed that the Convention should limit itself to questions of substance only and 'should not try to unify one special element of procedure by adding an unclear rule in the Convention.'[117] Instead, the Swiss Delegate proposed maintaining the wording from Article 28(2) of the Warsaw Convention and deleting the remainder of the proposed text. This is how it would turn out. The final draft of the Consensus Package[118] was presented to the Commission of the Whole on 25 May 1999 to grand applause. Notable by its absence was any provision attempting to codify or affirming the application of FNC.

The Chairman's summation of the sixth meeting of the FCG suggests that the fate of the attempted codification of FNC into the Convention had been defeated by concerns relating to imposing the doctrine on the legal systems of States for whom it was foreign along with consequential issues of ratification.[119] It is also submitted, as already considered above, that the real issue had been ensuring that a sufficient nexus existed between the carrier and the fifth jurisdiction. This had been achieved by requiring certain links to exist between the fifth jurisdiction and both the carrier and the passenger. As a result, the French bogeyman of a fifth jurisdiction based on the sole criterion of nationality had been exorcized. That said, there was no longer the need—from the civil law State perspective—to codify a rule of FNC since the fifth jurisdiction had been sufficiently circumscribed that it was regarded as an appropriate forum.

It can be argued that the fact that Article 33 MC99 contains neither the codified version of FNC or the US proposal affirming the doctrine demonstrates that the drafters did not intend for FNC to play a role in MC99 at all. Insofar as this argument is limited to FNC playing an explicit role then

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[111] See ibid 180.
[112] ibid.
[113] ibid.
[114] ibid 181.
[115] See ibid 181–182.
[116] ibid 182.
[117] ibid.
[118] See MC99 Documents (n 11) 271.
[119] See Chairman's comments, MC99 Minutes (n 16) 183–184.

it is plainly correct and unobjectionable. However, if one wishes to argue that it shows the drafters thereby sought to proscribe the application of FNC under *le droit commun* (i.e. where available) then it is clearly wrong. The drafting history reveals the availability of FNC under *le droit commun* was frequently affirmed by the drafters from start to the finish. Although the *Milor* case was mentioned, its full significance was only hinted at but not appreciated. At no point was the proposition explicitly raised that FNC was not available under the Warsaw Convention on the grounds that it was inconsistent with its substantive provisions. Yet, this was what the plaintiffs in *West Caribbean Airways* sought to persuade the court of with respect to MC99.

5.5 The Availability of FNC under MC99

In this section, a thorough critical evaluation will be undertaken of the decision in *West Caribbean Airways* regarding the applicability of FNC under MC99. In addition, the appellate review of the decision by the Eleventh Circuit, as well as some other relevant court decisions, will be briefly considered. Having identified strong lines of argument for and against, as well as uncovering some of the shortcomings of those decisions, this chapter will conclude with the presentation of a new theory on the availability of FNC under MC99.

5.5.1 Back to West Caribbean Airways

The cornerstone of the plaintiffs' argument in *West Caribbean Airways* rested on the precedential value of *Hosaka*. Their hope was that the court would find FNC unavailable under MC99 just as *Hosaka* had done for the Warsaw Convention. However, as explained in Chapter 1, Ungaro J determined that the *Hosaka* decision was of 'limited precedential value'.[120] Consequently, Ungaro J treated the question of the availability of FNC under MC99 on its own merits.[121]

The approach to treaty interpretation employed in *West Caribbean Airways* was that laid down by the US Supreme Court in *Floyd v Eastern Airlines Inc*[122] and *Tseng v El Al Israel Airlines Ltd*,[123] as incorporating a number of points from *Saks v Air France*[124] and *Zicherman v Korean Air Lines Co Ltd.*[125] This approach was thus closely aligned to customary international law as codified by the Vienna Convention.[126]

5.5.1.1 The Text of the Treaty

Commencing with the text of Article 33, Ungaro J found it to be 'unambiguous and dispositive' in providing that questions of procedure shall be governed by the law of the forum.[127] Although FNC was not explicitly mentioned, the court held that since FNC was so firmly established as a rule of

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[120] *In re West Caribbean Airways SA* 616 F Supp 2d 1299, 1309 (SD Fla 2007) (No 06-CV-22748).
[121] ibid.
[122] 499 US 530, 534–535 (1991).
[123] 525 US 155, 167 (1999).
[124] 470 US 392 (1985) quoting *Choctaw Nation of Indians v United States* 318 US 423, 431–432 (1943).
[125] *Zicherman v Korean Air Lines Co Ltd* 516 US 217, 226 (1996). Quoted in *Tseng* (n 123) 167.
[126] The reader is referred back to Chapter 4.4.1 for description of the general principles of treaty interpretation.
[127] *West Caribbean Airways* (n 120) 1310.

procedure in the US at the time of the drafting of MC99 that the text, 'by implication',[128] clearly covered it. Unlike other courts which had addressed the same issue, the court in *West Caribbean Airways* based its textual interpretation on the whole text of Article 33 and not simply on Article 33(1) or 33(4).

It is glaringly obvious that the court's conclusion that 'the text unambiguously permits application of the [FNC] doctrine in Montreal Convention cases',[129] conflicts the conclusion reached in *Hosaka* and *Milor*. In both of those cases, the courts had regarded the text of Article 28 of the Warsaw Convention to be ambiguous. Naturally, this was something the plaintiffs in *West Caribbean Airways* were eager to point out given that the relevant text of Article 33 of MC99 and Article 28 of the Warsaw Convention are substantially the same. The key distinguishing feature is that in *Hosaka* and *Milor* the courts had not based their determination of ambiguity based solely on a literal interpretation of the text but had reached that view having interpreted the text in its context within the treaty and in light of its purpose. However, Ungaro J's approach had begun with a purely literal interpretation. Thankfully, she did not stop there. Despite declaring the text be 'dispositive',[130] she accepted that the interpretative task did not end with the text and acknowledged that the Court had the 'responsibility to interpret Article 33 consistently with the shared expectations of the contracting parties'[131] and that this obliged recourse be had to the other means of interpretation.

5.5.1.2 Historical Context

Whilst there exists textual identity between the two conventions in relation to rules of procedure being governed by the law of the forum, Ungaro J was quick to identify the difference in historical context. The decisions in *Milor* and *Hosaka* could be distinguished from *West Caribbean Airways* because in the former cases the courts had been concerned with the interpretation of a convention concluded in 1929, 'at a time when the [FNC] doctrine was rarely utilized, its contours were underdeveloped and its "procedural" character was unsettled.'[132] However, by 1999 FNC was firmly established and frequently utilized so any confusion relating to its doctrinal status as a rule of procedure, rather than one of substance, had been resolved by the US courts. Ungaro J even noted that in 1999 the *Hosaka* decision had not been made and the only US precedent at that time which had directly addressed the issue had found FNC to be available.[133] However, Ungaro J made no mention of *Milor* in this context. While not a US precedent, *Milor* was a judgment of a sister common law court—pre-dating MC99—which had rejected the availability of FNC under the Warsaw Convention.

What the consideration of the historical context above can be reduced down to is the question of interpretation of the words "questions of procedure" in Article 28(2) and Article 33(4) in the Warsaw Convention and MC99 respectively. The question is, did the meaning of those words

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[128] ibid.
[129] ibid 1311.
[130] ibid.
[131] ibid citing *Tseng* (n 123) 167.
[132] *West Caribbean Airways* (n 120) 1312.
[133] That precedent being, *Air Crash Disaster near New Orleans* (n 93).

encompass the doctrine of FNC? For Ungaro J, the varying historical context between the Warsaw Convention (as addressed *Hosaka*) and that of MC99 did not compel the Court to reach the same conclusion. Simply put, Ungaro J's view was the in 1929 the meaning of the term "questions of procedure" could not be interpreted as including FNC, whereas it could in 1999. This line of argument is open to three criticisms. First, its historical accuracy is questionable. Secondly, it is fundamentally wrong. Thirdly, it misunderstands the *rationes decidendi* of *Milor* and *Hosaka*.

From the history of FNC[134] it is clear that in 1929 the doctrine was far from firmly established in the US or in England, in fact it was still regarded as an oddity of Scots law. At the same time, there was sufficient doctrinal basis within English and US law to confirm the general discretionary power of a court to decline otherwise valid jurisdiction. The relevance of the US law perspective is weak given that the US did not actively participate in the drafting of the Warsaw Convention. More relevant, as was already noted, the British Delegate at Warsaw had made a proposal to include wording to the provide for a discretionary power to decline jurisdiction but he had not insisted upon it for reasons unknown. Thus, while the drafters of the Warsaw Convention may not have known of FNC by name, they certainly knew that something similar was a feature of the common law landscape at the time of the Warsaw Convention's drafting. The situation was not as clear-cut as Ungaro J appears to have assumed.

The veracity of the line of argumentation may be challenged on the grounds that it is irrelevant whether the delegates were aware of FNC or whether they did, or would have, regarded it as covered by the term "questions of procedure" in Article 28(2). Such a broad term was deliberately used in order for the precise purpose of avoiding the need to catalogue or make express provision for each and every rule of procedure. The cardinal purpose of the Warsaw Convention was to achieve uniformity of *certain rules* and inherent to this was the drafter's understanding that compromise was necessary given the diverse and distinct legal systems involved. Rather than seek the impossible (i.e. exhaustive unification) the scope of unification was limited only to essential matters. They intended to leave much to the *lex fori*, questions of procedure being one such example. All of which is to say, by way of a hypothetical, if Contracting Party to the Warsaw Convention had decided to create an entirely new rule of procedure in 1939, the compatibility of such a rule with the Convention could not be challenged solely on the basis that it was not specifically within the contemplation of the drafters in 1929.

The question that can legitimately be posed in the context of the distinctive historical background to the Warsaw Convention and MC99 is not so much a matter of the comparative meaning of Article 28(2) and Article 33(4), but one of Article 28(1) and 33(1). Did the drafters of Article 28(1) intend to create a substantive right making a plaintiff's choice of forum absolute and exclusive such that the meaning of Article 28(2) had to read as excluding FNC? *Hosaka* and *Milor* had both concluded that this was indeed the case in Warsaw in 1929. This was the *ratio decidendi* in both cases. Ungaro J did not appreciate this, she asked the wrong question. It is not a question of whether FNC was contemplated by the drafters as one of the rules of procedure under Article 28(2). The real question was whether Article 28(2) had to be read as qualified by Article 28(1),

[134] See generally Chapter 2.

i.e. as only including rules of procedure to the extent that they do not conflict with the substantive provisions of Article 28(1). Had she addressed herself to this question then she would have to ask whether the answer given in *Milor* and *Hosaka* held true for the case of Article 33(4) of MC99. This is the biggest failing in *West Caribbean Airways* and we shall return to it below in the final section of this chapter.

5.5.1.3 The Purpose of the Treaty

Plaintiffs in *West Caribbean Airways* had also sought to rely on *Hosaka* to argue that FNC was contrary to the general purposes of MC99. However, Ungaro J noted that the reasoning of the court in *Hosaka* (agreeing with that of *Milor*) was based on the accepted purposes of the Warsaw Convention and she correctly noted that it could not be assumed that the purposes of MC99 are identical.[135] Nonetheless, Ungaro J did not disregard the relevance of the Warsaw Convention to the interpretation of the purposes of MC99. Instead, her analysis mostly reveals an appreciation of their interrelationship and the continued relevance of the Warsaw Convention. However, her analysis of the purpose of MC99 raises a number of issues.

As a preliminary observation, the court was not unequivocal in defining the purposes of MC99. To begin with, in the authoritative statement as to the purposes of MC99, they are defined as being: (1) to modernise and consolidate WCS; (2) to ensure the protection of interests of consumers in international carriage by air and the need for equitable compensation based on principle of restitution.[136] Ungaro J based this on a mere reading the Preamble to MC99 and thereby failed to appreciate that the cardinal goal of MC99 remains, like that of the Warsaw Convention, the pursuit of uniformity of certain rules. However, a couple of paragraphs after this statement, Ungaro conceded that uniformity and predictability were amongst the objectives of the drafters of MC99, but referred to them as mere aspirations.[137] This is simply wrong and substantially downplays the cardinal importance of uniformity within MC99. Ironically, later in the section of the purpose of MC99, she referred to 'the predominant objectives' of MC99 as being 'the creation of a new uniform system of liability governing the international transportation of passengers and cargo, and the balancing of the interests of the air carriers and passengers.'[138] This latter description is actually more accurate but it was not presented as the authoritative statement that the first definition was. These two "definitions" are not fully consistent yet the court never attempted to assimilate or reconcile them, nor was one or other stated in the conclusion to the judgment.[139] The resulting difficulty is that we cannot be sure what the court's understanding of the purposes of MC99 was and thus how it informed its final decision. In addition to this, Ungaro J did not specifically address the question of the object and purpose of the MC99's jurisdictional scheme.

Moving to the specifics of the court's argument regarding FNC and the purpose of MC99. As modernization of the Warsaw Convention was one of the goals of MC99, Ungaro J surmised that

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[135] *West Caribbean Airways* (n 120) 1314–1315.
[136] ibid 1314.
[137] ibid.
[138] ibid 1316.
[139] ibid 1328.

this supported the availability of FNC as it would accord with modern practice at the time of the drafting of the Convention.[140] At that point in time, in the only US case to address the question under the Warsaw Convention the court had found the doctrine to be applicable.[141] There were many US cases which had applied the doctrine in the context of the Warsaw Convention and at least one foreign court decision could be cited in support.[142] Curiously, Ungaro J made no mention of *Milor* in relation to this point, despite it representing countervailing authority for the modern practice of the English courts. In any case, aside from the fact that it exposes a common law bias since it assumes the drafters intended to modernize the convention in the image of common law practice, Ungaro J's point is unpersuasive for another more fundamental reason. That is, it assumes that the object of modernization was intended to apply extensively. This was clearly not the case and is demonstrated by the twin object of consolidation. The drafters intended to consolidate the Warsaw system, indeed it might arguably be claimed that this was preeminent in their considerations because they took the text of the Warsaw Convention as their starting point. Having done so, they made adjustments in the name of modernization, e.g. the addition of the fifth jurisdiction. Other than that, the specific jurisdictional provisions in question remained largely unchanged. If anything, this suggests consolidation rather than modernization.

Within the context of the second articulation of the purposes of MC99, Ungaro J appeared to concede that FNC would, at first glance, appear to be inconsistent with uniformity. However, since MC99 (like the Warsaw Convention) only sought unification of *certain rules*, i.e. not *all rules*, Ungaro J was not prepared to presume that the goal of uniformity necessarily meant that FNC was inherently incompatible with MC99's jurisdictional scheme. That much is true, but at the same time it does not answer the question of the inconsistency between FNC and the goal of uniformity. To do this, Ungaro J referred to the *travaux préparatoires* of MC99. The delegates were clearly aware that FNC was routinely applied by US courts and no proposal was ever made to explicitly exclude the doctrine. While proposals of various types were made with respect to codifying FNC, the delegates had ultimately been unable to reach a consensus on the issue for fear that codification would result in mandatory application of the doctrine, even for those States whose legal system did not currently have such a doctrine. Instead, it was decided to retain the existing wording for Article 33(4). For Ungaro J, this suggested that the delegates had intended to maintain the status quo.[143] This point will be addressed further below, but for now it suffices to point out that the status quo was not so straightforward, one need only refer to *Milor* for proof of this.

Next, the court recognized that one of the predominant objectives of the Convention was to achieve a balance between the interests of the air carrier and the passenger.[144] The reasoning adopted by the courts in *Hosaka* and *Milor* had been to the effect that FNC would interfere with this balance by subverting the substantive right granted the claimant to choose from the available forums the one which in which he wishes to bring his claim. In *Milor* and *Hosaka,* the courts had placed great significance on the consistency of their interpretation of Article 28(2) with the creation

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[140] ibid 1315.
[141] That case being *Air Crash Disaster near New Orleans* (n 93).
[142] Such as, *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 (CA) (Sing).
[143] *West Caribbean Airways* (n 120) 1315.
[144] ibid 1316.

of what they viewed as a substantive right of the claimant to choose his forum under Article 28(1). So much so, that their interpretation that the application of FNC was precluded under the Warsaw Convention had fundamentally rested on that understanding of the Warsaw Convention's jurisdictional scheme. This was a critical nuance to the reasoning of those two decisions which was not adequately considered in *West Caribbean Airways*. Ungaro J simply failed to appreciate the *rationes decidendi* of *Milor* and *Hosaka* in respect of the substantive right under Article 28(1). In the end, she dismissed it by stating: 'The record does not reflect that drafters of MC99, assuming they understood [FNC] to be a jurisdictional question, accorded the objective of formulating a "self-contained jurisdictional code" the primacy ascribed in the *Hosaka* and *Milor* opinions to the drafters of the Warsaw Convention.'[145] This is very weak judicial reasoning.

In any case, from a practical perspective the court could not see how the doctrine would undermine the two purposes of MC99, i.e. uniformity and the balance of interests. Ungaro J focused on the latter, explaining that the jurisdictional scheme of MC99 ensures that the forum selected by the plaintiff has a significant connection to the carrier. She did not see FNC as being inconsistent with this because FNC is not capable of dismissing a case in favour of the courts of a State which does not have jurisdiction under the Convention. In one sense, the worst that FNC can do is require that a plaintiff bring proceedings in one of the other specified forums.[146] In any case, the eventual forum will be one of those envisaged by the drafters. The effect of the operation of FNC is thus not prejudicial to the balance of interests struck between passengers and carriers. The obvious weakness in this argument is that it depends on ignoring the substantive right argument. If the jurisdictional scheme of MC99 intended to grant the claimant a substantive right to choose his forum from amongst those available under the scheme, then FNC undoubtedly interferes with that right and therefore with the balance of interests. In simple terms, FNC takes the initiative away from the plaintiff.

5.5.1.4 Drafting History

The drafting history of MC99 provides the strongest support for the conclusion that FNC is available as a procedural tool under Article 33(4) so it is unsurprising a large portion of the judgment in *West Caribbean Airways* is taken up with recounting it. As it has been presented above, it will suffice for present purpose to deal with the conclusions reached by the court. The drafting history showed that the delegates were keenly aware of FNC and that it had occupied a good deal of their discussions over the fifth jurisdiction. No proposal was made which would have expressly excluded the application of FNC. On the contrary, various proposals were made with a view to either clarifying its applicability or for codifying a version of it for MC99. Ungaro J noted that the US 'actively and persistently opposed the inclusion of any *forum non conveniens* language except to clarify its general applicability, all while making it abundantly clear that United States courts would continue to employ the doctrine in Montreal Convention and other international cases.'[147] These proposals were ultimately not adopted, not because of a desire to

[145] ibid.
[146] ibid.
[147] ibid 1326.

exclude FNC but rather to avoid the difficulty of mandating its application by States for whom the doctrine (or something similar) was not already a feature of their legal system. Ungaro J concluded that the drafting history showed that 'the delegates determined to maintain the status quo'.[148] States that employed the doctrine would continue to do so.

5.5.1.5 Post-Ratification Understanding and the Position of the United States

With such a new treaty, there was little to go on in regard to post-ratification understanding. Although the parties had little to work with, the court had the benefit of *amicus curiae* brief outlining the position of the US Government.[149] It was the opinion of the Government that Article 33(4) meant that MC99, 'defers to the forum's laws on all question of procedure and manifests an intent by the drafters not to alter the judicial system of any country on questions of procedure.'[150] Such a position was seen as being compliant with US interests, especially in utilizing FNC as a means of controlling forum shopping and managing docket congestion.[151] In support of this viewpoint, the US Government's Statement of Interest cited *Breard v Greene*, thereby invoking the principle that absent express provision to the contrary, the procedural rules of the State shall apply.[152] In other words, if MC99 does not expressly prohibit FNC, then as a well-established rule of procedure it is applicable in MC99 cases.[153]

The US Government's Statement of Interest emphasized that at the time of its drafting and negotiation, the *Hosaka* decision had not been issued and US courts were uniformly applying FNC under the Warsaw Convention and that the delegates at the Conference were aware of this fact and had been encouraged by the US delegation to expect this to remain the case. If one overlooks the fly in the ointment that is *Milor*, it is exceedingly difficult to challenge this factual conclusion. Although Ungaro J only summarized the views of the US Government and did not state the degree of weight or deference actually afforded them, it is clear that the arguments put forth were received sympathetically by the court. Given the binding authority of *Sumitomo Shoji America Inc v Avagliano*, in which the Supreme Court stated, '[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight',[154] we can safely assume that she gave "great weight" to the views of the US Government in interpreting MC99.

5.5.2 Subsequent Authorities

Judge Ungaro's decision in *West Caribbean Airways* was reviewed by the court of appeals under the name of *Pierre-Louis v Newvac Corp.*[155] It raised nothing of striking significance with respect

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[148] ibid.
[149] Statement of Interest of the United States (Doc 116), *West Caribbean Airways* (n 120).
[150] ibid.
[151] ibid.
[152] ibid, citing *Breard v Greene* 523 US 371 (1998).
[153] For elaboration of this point, see 5.5.3 infra.
[154] 457 US 176, 184–185 (1982).
[155] *Pierre-Louis* (n 99).

to the availability of FNC under MC99, instead it briefly reviewed and affirmed the district court's reasoning. Whilst Ungaro J's opinion had been lengthy and comprehensive in its approach to treaty interpretation, the Eleventh Circuit's was patchy. It picked out only a handful of points from the district court judgment. It claimed to have considered the drafting history[156] but this is simply not in evidence. Although obliged to consider the object and purpose of the treaty when interpreting its terms, the court gave only sparse consideration to this means of interpretation.[157] The light touch adopted by the Eleventh Circuit is no doubt credit to the quality of Ungaro J's judgment to which the appellate court showed great deference. However, in the few areas in which it did venture to do more than merely affirm, it committed new errors.

Although Ungaro J had begun with a literal interpretation which she had described as dispositive, she had nonetheless taken the process of treaty interpretation much further than this. The Eleventh Circuit focused on the constrained literal approach. It found 'no ambiguity or limitation in the express language of Article 33(4)'[158] and endorsed the conclusion that this covered all rules of procedure of the forum State, including FNC.[159] It is a requirement of customary international law that 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 light of its object and purpose*.[160] The Eleventh Circuit did not do this. Unlike the district court, it took only the literal text of Article 33(4) and interpreted it without considering its meaning in the context of Article 33(1). This is clear from the court's statement: 'We therefore find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure—which can only reasonably be read to include *all* questions of procedure—are governed by the rules of the forum state.'[161] To find the text of Article 33(4) unambiguous is only tenable by neglecting to consider it in its proper context.

Like the district court, the court of appeals undervalued the precedential value of *Milor* and *Hosaka* by excluding them on the grounds that those cases involved interpretation of the Warsaw Convention rather than MC99 and that the status of FNC had changed between 1929 and 1999. The court made reference, on the one hand, to the uncertain status of FNC in 1929,[162] and, on the other hand, to the shared expectations of the parties to MC99 that FNC would continue to be applied by those States which recognize the doctrine.[163] These are valid observations which ought to be taken into account but, with respect to *Milor* and *Hosaka*, the courts' decisions in those cases did not hinge on the status of FNC in 1929 (although it was a factor). The truth seems to be that the Eleventh Circuit did not understand what the *rationes decidendi* in *Milor* or *Hosaka* actually were. *Milor* and *Hosaka* had held that FNC was not available under the Warsaw Convention because it was inconsistent with the substantive right of the claimant to choose his forum under Article 28(1). It is disappointing that the Eleventh Circuit did not consider this.

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[156] ibid 1058 n 8.
[157] See ibid 1058.
[158] ibid.
[159] ibid 1057–1058.
[160] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) Article 31(1).
[161] *Pierre-Louis* (n 99) 1058. See also ibid 1058 n 7.
[162] *Pierre-Louis* (n 99) 1058 n 7.
[163] ibid 1057–1058.

This failure to appreciate the *ratio decidendi* of *Hosaka* was also evidenced in *Re Air Crash Over the Mid-Atlantic on June 1, 2009*,[164] one of the few other cases to consider the availability of FNC under MC99. The case related to the crash of Air France Flight 447 on 01 June 2009 and was heard by the District Court for the Northern District of California. Again, the plaintiffs sought to rely on *Hosaka* to avoid FNC dismissal of their MC99 claim. The district court distinguished *Hosaka*, explaining that it did not compel the conclusion that FNC is not available under MC99 for two 'primary reasons'.[165]

The courts first "primary reason" boiled down to distinguishing *Hosaka* on the basis of the change in status of FNC between 1929 and 1999, i.e. the same argument put forth in *Pierre-Louis*. However, the district court's summary of *Hosaka* was inaccurate. It suggested, that at the time of the drafting of the Warsaw Convention, the doctrine of FNC was relatively new, therefore, it would have required some express provision in the treaty to authorize its application.[166] Since the Warsaw Convention was silent on the availability of FNC, it was not available.[167] However, the court found this logic did not apply to MC99 because, when it was drafted, the status of FNC was substantially different. Against this "changed backdrop", the court deduced that express provision was no longer required to authorise its application, ergo, it is available under MC99.[168] This was not the reasoning of *Hosaka*. The court in *Air Crash over the Mid-Atlantic* either failed to realize this or chose to ignore it.

That the court entirely missed the point of *Hosaka* is also clear from its dismissal of the plaintiff's second line of argument. Plaintiffs had also argued that FNC was inconsistent with the purpose of the fifth jurisdiction, which they claimed was to provide passengers with a forum in their home State. The court understood this as essentially arguing that FNC would render a plaintiff's right to choose the fifth jurisdiction meaningless. Taken at such a blunt level, the court was right to regard such a bald proposition as objectionable. However, just as Philips LJ in *Milor* had not intended his statement that to give a plaintiff a choice is to give him nothing, so too the plaintiffs in *Air Crash over the Mid-Atlantic* had not intended to be taken so literally. It seems abundantly clear that they were invoking the line of argument first raised by Philips LJ in *Milor* and then endorsed by Fisher J in *Hosaka*, that FNC was inconsistent with the purpose of MC99 to achieve an equitable balance of interests. This is the argument the court dodged.

The Eastern District of New York, in *Khan v Delta Airlines Inc*,[169] came close to exploring the true ratio of *Hosaka* in the context of MC99. The court initially determined that the literal text of Article 33(4) MC99 'clearly, and without limitation', provides that questions of procedure are governed by the court seised of the case[170] and this unambiguously includes FNC.[171] It based this finding solely on the text of Article 33(4) but the plaintiff was able to persuade the court that

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[164] 760 F Supp 2d 832 (ND Cal 2010).

[165] ibid 840. The second "primary reason" amounted to nothing more than an invocation of the authority of the *Pierre-Louis* and *Khan*. 'Secondly, those courts which have addressed this issue in the context of [MC99] have held that FNC is available.' ibid 841 referring to *Pierre-Louis* (n 99) 1058; *Khan v Delta Airlines Inc* No 10-CV-2080, 2010 WL 3210717 *2 (EDNY 12 Aug 2010).

[166] *Air Crash over the Mid-Atlantic* (n 164) 840.

[167] ibid citing *Hosaka* (n 96) 1002.

[168] *Air Crash over the Mid-Atlantic* (n 164) 840.

[169] *Khan* (n 165).

[170] ibid *2.

[171] ibid citing *Pierre-Louis* (n 99) 1058.

the *Hosaka* decision had not been limited to the text of Article 28(2) of the Warsaw Convention, it had interpreted it in light of Article 28(1). Since the text of Article 28 of the Warsaw Convention and Article 33 of MC99 were largely the same, the plaintiff in *Khan* convinced the court to consider the meaning of Article 33(4) in light of the other provisions of Article 33.[172] This allowed the court to acknowledge the core reasoning of *Hosaka*, i.e. that reading Article 28(2) as including FNC would conflict with the substantive right to choose one's forum under Article 28(1). Nevertheless, the court distinguished *Hosaka* on the basis that it decided the issue for the Warsaw Convention but held that the changed status of FNC between 1929 and 1999 did not mandate the same conclusion for MC99.[173] The laziness of the court's distinction is unfortunate because there is substance there which will be fleshed out below.

There are three other decisions that touch on the question of the availability of FNC under MC99. An Indiana district court in *Dordieski v Austrian Airlines AG*, and an Illinois district court in *Garcia v Aerovias de Mexico SA de DV (Inc)*, both cited *West Caribbean Airways* approvingly in finding FNC to be available under MC99.[174] However, in *Delgado v Delta Air Lines Inc*,[175] the District Court for the Southern District of Florida (the same court as Ungaro J) stated that although bound to find FNC available on account of the Eleventh Circuit's decision to affirm *West Caribbean Airways*, the decision of the French Cour de Cassation had caused a doubt.[176] It would seem that *West Caribbean Airways* is open to future challenge; but should it be?

5.5.3 The French Connection

It will be recalled from Chapter 1 that directly after Ungaro J's FNC order was granted in January of 2009, the claimants had commenced proceedings in Martinique petitioning the court to declare itself without jurisdiction on the grounds that their choice of a US forum was absolute under MC99. The trial court had found against the claimants and this was upheld on appeal. However, on 7 December 2011, the Cour de Cassation found in favour of the claimants.[177] The Cour de Cassation's holding with respect to Article 33(1) and 46 of MC99 was as follows:

> Whereas the choice of jurisdiction raised by the appellant through the abovementioned text is contrary to a dispute being decided by an equally competent jurisdiction other than the one that it has chosen; whereas, in fact, this choice, which has been accompanied by a restrictive list of competent forums in order to reconcile the different interests present, implies, in order to satisfy the objective of foreseeability, security and standardization sought by the Convention of Montreal; whereas the plaintiff, and he alone, has the choice of deciding before which jurisdiction the dispute will in fact be decided, without an internal rule of procedure leading to contradicting his imperative choice being able to be enforced on him.[178]

This official English translation (submitted by the defendants to Ungaro J in 2012) is less than satisfactory. The translation of *prévisibilité*, *sécurité et uniformisation* as 'foreseeability, security

[172] *Khan* (n 165) *3.
[173] ibid.
[174] *Dordieski,* No 15-CV-00180, 2016 WL 4437958 *2 (ND Ill 23 Aug 2016); *Garcia,* No 18-CV-05517, 2018 WL 6570461 *2 (ND Ill 13 Dec 2018).
[175] 43 F Supp 3d 1261 (SD Fla 2013).
[176] See ibid 1264.
[177] *Cass Civ (1ère) Arrêt n 1201 du 7 décembre 2011, Antoine X c Newvac, n 10-30919*. See Certified English Translation of Cour de Cassation Judgment (Doc 289-8), *West Caribbean Airways* (n 120).
[178] See Certified English Translation of Cour de Cassation Judgment (Doc 289-8) at 4, *West Caribbean Airways* (n 120).

and standardization' seems particular inapt. The better translation, it is suggested, would be "predictability, certainty and uniformity". Nevertheless, the thrust of the judgment of the Cour de Cassation was that the scheme of Article 33(1) and 46 provides a limited list of forums from which the plaintiff has the right to choose in which to have the dispute decided and that it would be inconsistent with this choice, once made, if another court were to hear the dispute. This scheme was adopted in order to satisfy the purposes of predictability, certainty and uniformity. By plaintiffs' choice of forum in the US, the Martinique forum became unavailable. Interestingly, the Cour de Cassation did not hold that the Martinique court lacked jurisdiction but rather that it was 'currently unavailable' given the plaintiffs' choice.[179] By assuming jurisdiction in the circumstances, the court of Martinique had violated the terms of MC99.

The *Cour de Cassation* judgment was made with express reference to Articles 33(1) and 46 of MC99; while Article 33(4) was cited as part of the plaintiffs' grounds for appeal, it is not clear if it featured in the Court's reasoning. It is nowhere referenced directly. If one were to be charitable, it could be suggested that consideration of Article 33(4) was implicit in the Court's reference to an "internal rule of procedure".[180] However, in the circumstances, the decision of the Court must be taken at face value as having been based solely on Article 33(1). In so doing, the Court failed to interpret Article 33(1) in the context of Article 33(4) and this is contrary to the general rule of treaty interpretation laid down by the Vienna Convention.

A further problem with the Cour de Cassation's decision is that it was given without any consideration of the drafting history (*travaux préparatoires)* of MC99; not surprising, given the brevity of the Court's judgment.[181] While not mandatory under customary international law—unless the general rule of interpretation does not resolve the ambiguity—the *travaux* may still be referred to in order to confirm the meaning arrived at from application of the general rule.[182] Even where convinced of its interpretation, one would have hoped that in such contentious and perilous circumstances the Court would exercise its common sense and at least refer to the *travaux* for confirmation. Its refusal to do so, along with its error in failing to consider Article 33(4) leave the decision open to legal challenge.

5.5.4 The Better Interpretation

It was noted above that Ungaro J had asked the wrong question in *West Caribbean Airways*. Instead of asking whether the reference in Article 33(4) MC99 to "questions of procedure" was intended by the drafters to include the doctrine of FNC, the question should have been whether Articles 33(1) and 33(2) MC99 were intended to create a substantive right granting the plaintiff the absolute and exclusive option to choose their forum from those available under MC99. If the

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[179] The Court stating in French: '*DECLARE l'indisponibilité actuelle du for français*.' *Antoine X* (n 177).

[180] One commentator—very much on the French side of the debate—holds to this interpretation. See S Adeline 'The Forum Non Conveniens Doctrine Put to the Test of Uniform Private International Law in Relation to Air Carriers' Liability: Lack of Harmony between US and French Decisional Outcomes' (2013) 18 *Unif L Rev* 313, 318.

[181] Mendelsohn and Ruiz levelled heavy criticism at the Cour de Cassation for not carefully examining, nor even mentioning, the *travaux*. AI Mendelsohn and CJ Ruiz 'US Court Rebuffs French High Court's Attack on Forum Non-Conveniens Doctrine' (2012) 37 *Air & Space L* 325, 330–331. See also GN Tompkins Jr 'The Continuing Development of the Montreal Convention' (2012) 37 *Air & Space L* 259, 261–262.

[182] Vienna Convention (n 160) Article 32. See 4.4.2 supra.

answer to this question is in the affirmative, then Article 33(4) must be read in a manner consistent with that substantive right, i.e. as only including rules of procedure to the extent that they do not conflict with the substantive provisions of Articles 33(1) and 33(2). With regard to the Warsaw Convention, the courts in *Milor* and *Hosaka* had correctly determined that this was the correct understanding of the relationship of between Article 28(1) and 28(2). The question now is whether it remains the correct understanding in the case of MC99.

Starting with the text of Article 33 MC99 we have to conclude that the text is ambiguous since it is capable of yielding two plausible interpretations. The option given the plaintiff to choose in which of the forums provided in Articles 33(1) and 33(2) to bring an action for damages is either to be regarded as an absolute right of choice, such that the Article 33(4) must be read as precluding the application of a rule of procedure (such as FNC). Or, the option given is not an absolute right of choice but is subject to the application of rules of procedure of the chosen forum even where they interfere with that right of choice (e.g. FNC). Whilst a purely literal reading of Article 33(4) would indicate the latter interpretation, this would not be a legitimate interpretative approach under customary international law (as codified by the Vienna Convention).

Article 31(1) of the Vienna Convention provides that '[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.'[183] In terms of purpose, it was established above that there is great commonality between MC99 and the Warsaw Convention. MC99 maintains the twofold structure of the Warsaw Convention. Its cardinal purpose remains that of avoiding conflict of laws through the unification of certain rules relating to travel documentation and air carrier liability. We have emphasized throughout that the purpose of uniformity is not all-encompassing but limited to certain (not all) rules. These include the matter of jurisdiction but do not extend, as shown by the language of Article 33(4), to questions of procedure; these are left to the *lex fori*. Yet, in pursuing a line of argument based on the purpose of uniformity, all we do is rehash the same points that were raised with respect to the Warsaw Convention and which were exhaustively analysed in Chapter 4. In the end it just leads to the same question: Would the drafters have considered FNC as inconsistent with the right granted under Article 28(1)? If a different answer is going to be found then it will have to be found where MC99 differs from the Warsaw Convention.

Whilst the cardinal purpose of MC99 may be the same, we concluded that the supplementary purpose has evolved substantially from that of the Warsaw Convention. We defined the purpose of the Warsaw Convention as being: 'Furtherance of the public interest in the development of air transport whilst striking an equitable balance of interests between carriers, users and claimants.'[184] The balance of interests was fundamentally altered by MC99, most dramatically by its recalibration in light of the interests of claimants qua consumers. Now, under MC99, we have defined this complementary purpose as: 'Assurance of an equitable balance between the interests of consumers in international carriage by air, the need for equitable compensation based on the principle of restitution and the orderly development of international air transport.'[185] This change is most strongly reflected in the alterations made to the core liability regime with MC99.

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[183] Vienna Convention (n 160) Article 31(1).
[184] See 4.2.4 supra.
[185] See 5.3.3 supra.

Although it did not result in the same overhaul of the jurisdictional regime, it did have an impact.

Like the Warsaw Convention, the key features of MC99's jurisdictional regime reflect two core policy considerations: (1) the need to ensure legal certainty and predictability; (2) the desire to accommodate the interests and convenience of the parties.[186] Again, like the Warsaw Convention, MC99's cardinal purpose is served by the former and its supplementary purpose by the latter. Both policies were in evidence with respect to the addition of the fifth jurisdiction. Whilst certainly a concession to the interests of the claimant passengers, it was the need to balance that against the interests of carriers and consumers in general which received most attention throughout the drafting history. The fifth jurisdiction was fenced-in so as to ensure that it would be a predictable forum for carriers and to minimise the risk of forum shopping which was regarded as synonymous with increased cost to the industry and ultimately to the consumer. It would be wrong to suppose that MC99's jurisdictional regime was recast with the interests of the consumer qua claimant as king. Although FNC is undoubtedly inimical to the interests of claimants, it can be seen as promoting the orderly development of air transport and the interests of consumers generally (i.e. as distinguished from consumers qua claimants). For a time, a codified version of FNC was the favoured solution. Thus, like the Warsaw Convention, both generally and specifically with regard to jurisdiction, MC99 is a balanced regime, but, with a new balance of interests, adjusted to reflect the changes in the industry and in the wider socio-economic landscape. The truth is that the FNC falls on both sides of the scales and trying to divine the relative weight the drafters would have assigned to its dual manifestations is likely an impossible task. Thankfully, such a task is unnecessary given another significant change between the Warsaw Convention and MC99, i.e. that MC99 has its own drafting history.

As detailed above, in adding the fifth jurisdiction the drafters specifically turned their minds to the jurisdictional regime of MC99. They engaged in lengthy and in-depth discussion during which the reality of FNC was repeatedly acknowledged and accepted. There was repeated insistence from the US—the most significant State in terms of aviation litigation—that it applied FNC to WCS cases and would continue to do so under MC99. This was even recognized by other States (including civil law States). When we consider what understanding the drafters would have had of the substantive right granted the claimant to choose their forum under Articles 33(1) and 33(2) MC99, then an inescapable conclusion imposes itself. Not only was the exercise of the doctrine of FNC *not inconsistent* with that right, it was plainly and openly contemplated by the drafters. This is the key distinction between MC99 and the Warsaw Convention. With MC99, FNC was clearly within the contemplation of the drafters, therefore the substantive right granted the claimant under Article 33 was not regarded as absolute in the sense that it would have been by the drafters of the Warsaw Convention. Whatever the precise balance struck between competing interests, it was one struck on the shared understanding of the drafters that FNC may be applied.

By reframing of the core interpretational question concerning the applicability of FNC under MC99 onto the nature and extent of the substantive right granted the claimant to choose their forum, rather than on whether the term "questions of procedure" referred to in Article 33(4) was intended to include FNC, we reach the following conclusion. The substantive right under Articles

[186] The reader is referred to the discussion of the purpose of the Warsaw Convention's jurisdictional regime in 4.3.2 supra.

33(1) and 33(2) MC99 grants the claimant the choice of forum (from those identified as available) in which to bring an action for damages. In the case of MC99, the claimant's right to choose their forum is not inviolable and absolute. Such right is, as per Article 33(4), subject to the procedural rules of the court seised of the case, including, where available, a rule of procedure which permits the court to reasonably exercise discretion to decline jurisdiction in favour of one of the alternative forums. FNC is not *prima facie* inconsistent with that right.

Conclusion to Part Three

The analysis conducted in Chapters 4 and 5 has led to the conclusion that whilst FNC is not available under WCS it is under MC99. Although the reasoning upon which that conclusion is reached is different to that put forth in *West Caribbean Airways*, it is essentially in agreement with respect to the outcome. When it comes to the decision reached by the Cour de Cassation in *Antoine X*,[1] its failure to consider Article 33(1) in its context, specifically Article 33(4), is reason enough to discount it. Furthermore, it would beggar belief if the Cour de Cassation could maintain its position in the light of full consideration of the drafting history. The Cour de Cassation is quite simply wrong.

Contracting States to MC99 undertook the obligation to make their courts available to claims brought before them in accordance with the jurisdictional regime of Article 33. We have established that FNC is not prima facie inconsistent with that regime. That being so, it is submitted that where a court declines to exercise jurisdiction on grounds of FNC and that action is then brought to one of the other forums permitted under MC99, then that other forum cannot invoke the exercise of FNC by the original court as justification for refusal to hear the case itself. To do so, it is suggested, would amount to a breach by that State of its duty of good faith under customary international law; unless of course that State could justify such action on some other basis. For instance, it could be argued that the application of the particular doctrine of FNC was in violation of MC99 or some other binding norm of international law. Indeed, there is room to argue that certain versions of the doctrine in the US discriminate between foreign and domestic claimants in a manner inconsistent with MC99. Another alternative justification for a court to refuse to accept jurisdiction over a case dismissed from another court on grounds of FNC might be on the basis of a rule of its own procedural law, provided such rule is not itself inconsistent with the substantive right granted the claimant under MC99. Although this was not the approach of the Cour de Cassation, we saw in Chapter 3 that devices such as the Latin American FNC blocking statutes could be employed to such effect. All of which is simply to say that concluding that FNC is available under MC99 is not the end of the issue.

Even if—as has been proved—FNC is not the interloper to MC99 that it is accused of being, there is still much wrong with it and we still stand in need of a better solution. In Part Two of this work it was shown that FNC is characterized by a lack of doctrinal uniformity. That it drives divisiveness between common law and civil law systems due to the essential differences between those systems with respect to jurisdiction. And we also observed that there has been a trend by which the doctrine has become liberalized with the consequence that litigation over where to sue has become more prevalent with resulting social and economic costs. These do not portend a happy future. It is unlikely that civilian States and their courts will find the resolution of the doctrinal conundrum regarding the availability of FNC within MC99 to be a sufficient reason to acquiesce to the employment of FNC by common law States.

FNC and MC99, *quo vaditis*? Before we begin to attempt to answer this question, we should first reflect further about where it is we think we are. FNC is a problem but it is not *the* problem.

[1] *Cass Civ (1ère) Arrêt n 1201 du 7 décembre 2011, Antoine X c Newvac, n 10-30919*.

In truth, FNC is itself an attempted cure to an underlying crisis. It is in essence a doctrine directed toward the question of resolving a dispute between the parties to litigation over choice of forum. The various competing interests of claimant passenger and defendant carrier that feed into the dispute over forum within WCS and MC99 have been described throughout the first five chapters. However, when we subject these interests to closer examination then a bigger picture is revealed. If we hope to find a solution to choice of forum within the context of MC99 then it is essential that we understand the interests of the parties within this bigger picture. A solution might be easier found if MC99 were a hermetically sealed system insulated and protected from outside influence, but the truth is that is it not. MC99 is just a part of a larger aviation accident passenger compensation system. Indeed, it is the very failure of MC99 to adapt itself to the reality of its place within this larger system that is a prime contributor to the discontent felt with respect to choice of forum.

In Part Four of this work, the extent of this bigger picture will be revealed and the thesis proved that MC99 is built upon an anachronistic understanding of itself as a discrete system grounded on a two-party paradigm of claimant passenger versus defendant carrier. It will be shown that this was a justifiable basis for the Warsaw Convention but that it no longer accords with the reality of international aviation litigation. Such litigation now takes place within a larger aviation accident passenger compensation system. To evaluate the options for reforming MC99's jurisdictional regime with respect to choice of forum, we must first understand how this larger system arose, how it is organized, how it operates and what it all means for choice of forum. This is the goal of Part Four.

PART FOUR
THE BIGGER PICTURE

Chapter 6: Alternative Remedies and Defendants

6.1 Introduction

So far, we have looked at the question of choice of forum within the context of the Warsaw Convention and MC99. We have seen that this system is predicated on the paradigm of the two-party liability relationship between carrier and passenger but it has become apparent that a bigger picture exists. The system created under the Warsaw Convention (to which MC99 is the successor) was more discrete and simpler because the passenger-carrier relationship could be largely insulated from third-party interests and influences. However, this is no longer the case under MC99 and it is the purpose of Part Four of this work to demonstrate that a bigger picture exists and to elaborate upon its nature and dynamics.

We begin Part Four by looking at the emergence of alternative remedies to those provided under WCS. It will be shown in this chapter, and in the one that follows, how these alternative remedies have resulted in a paradigm shift. This work argues that unlike the system envisioned by the drafters of the Warsaw Convention, we are now faced with a multi-faceted system in which the influence of third parties impacts greatly on matters of choice of forum. Aside from evidencing the existence of these alternatives and the identity of the relevant stakeholders, this chapter will lay the groundwork for the next chapter in which the role and impact of third-party actions will be examined.

6.1.1 The Kegworth Air Disaster

The Kegworth air disaster refers to the crash of British Midland Flight 92 on 8 January 1989 that took the lives of 47 people and seriously injured many of the 79 survivors.[1] The aircraft (a Boeing 737-400) was climbing to cruising altitude when a fan blade detached from its left (number 1) engine, a CFM 56 which had been manufactured and sold by CFM International. The detached blade caused secondary damage to the engine and as a result the airframe began to vibrate severely and fumes and smoke were ingested into the cabin of the aircraft through the air conditioning system. Believing, erroneously, that the air conditioning system was fed from the right (number 2) engine, the crew identified it as defective and decided to throttle it back and then shut it down. In response, the shuddering lessened and the smoke/fumes reduced. This induced the crew to believe that the problem had been mitigated and it was decided to divert to East Midlands Airport. On approach, thrust to the damaged left engine was increased which caused it fail and catch fire. There was a resulting abrupt loss of power. Without sufficient time to restart

[1] The following brief summary of some key facts is taken from, Air Accidents Investigation Branch (AAIB) 'Report on the Accident to Boeing 737-400 G-OBME near Kegworth, Leicestershire on 8 January 1989' (1990) Aircraft Accident Report 4/90 3–7.

the other engine, the aircraft crashed short of the runway, colliding with the embankment of the M1 motorway.

The UK's Air Accident Investigation Branch (AAIB) would ultimately identify the cause of the accident as the shutting down of the wrong engine by the flight crew.[2] Whilst this had been the theory from early on, it was challenged by some who argued that the true cause was down to the cross-wiring of an engine warning system by the manufacturer.[3] At the time at which the litigation in *Nolan v Boeing Co*[4] began, the AAIB report had not yet been published.[5] The plaintiffs in *Nolan* were 45 surviving relatives of passengers killed in the disaster, 76 survivors, 2 bystanders and various other people claiming loss of consortium from injuries to survivors.[6] As a crash occurring in the UK during a domestic flight between London and Belfast, operated by a British carrier, one might have expected that any resulting litigation would have taken place in the UK. Instead claims were brought before the courts of the United States against the defendants, Boeing Co, CFM International Inc and General Electric Co (GE). The engines had been marketed by CFM, a joint enterprise created by the American company, GE, and the French company, SNECMA,[7] who had each designed and manufactured components of the engines.

The case had been brought to the US because plaintiffs' English legal representation believed that they would fare better in the US on account of the availability of strict products liability and the likelihood of greater damages. Another likely reason was to avoid the limitation of liability imposed by the application of the WCS to any claim brought against the carrier. Given the strong connections to the UK, keeping the litigation in the US would require overcoming some serious obstacles, foremost amongst which was the prospect of FNC dismissal. The appointed US law firm's strategy was to avoid federal court and sue instead in the state courts of Louisiana which, at that point in time, did not recognize the doctrine of FNC.

The next hurdle to vault was the issue of diversity jurisdiction. Under the US Constitution (Section 2, Clause I of Article III) and as modified by the general diversity statute (codified under 28 USC § 1332), federal courts are granted subject matter jurisdiction in civil cases involving diversity of citizenship where the matter in controversy exceeds a certain amount (currently $75,000). Diversity of citizenship arises where the litigants are citizens of different states (e.g. a Florida plaintiff suing a Colorado defendant) or where one is a citizen of a state and the other is a citizen of a foreign State (e.g. a Florida plaintiff suing a French defendant, or vice versa). The generally accepted explanation for why the First Congress chose to bestow such jurisdiction on the federal courts is that they wished to avoid the possibility of prejudice by state courts against out-of-state parties by ensuring a neutral forum.[8] For the purposes of diversity jurisdiction, a corporation is considered to be a citizen of both the state of incorporation and its principal place of business.[9]

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[2] ibid 2.
[3] The AAIB report found no evidence to support this theory. ibid 145.
[4] 762 F Supp 680 (ED La 1989) aff'd 919 F 2d 1058 (5th Cir 1990).
[5] ibid 681.
[6] ibid.
[7] SNECMA (*Société Nationale d'Etudes et de Construction de Moteurs d'Aviation*) was a corporation organized under French law which merged with Sagem in 2004 to form SAFRAN. In 2016, SNECMA was renamed as Safran Aircraft Engines.
[8] CA Wright and others *Federal Practice and Procedure* vol 13E (3rd edn, 2008) § 3601.
[9] 28 USC § 1332(c)(1).

In the *Nolan* case, none of the victims of the crash were US citizens whereas the defendants were. It thus appeared that diversity jurisdiction existed and the defendants would be entitled to have the case removed to federal court. The plaintiffs knew that once in federal court FNC dismissal would be a virtual certainty so they attempted to employ an untested theory to resist removal. They narrowed in on a requirement of diversity jurisdiction that the diversity of citizenship must be complete. Simply put, if a party on the plaintiff side and a party on the defendant side both hail from the same state, then there is not complete diversity.[10] The theory being that in such cases there is no risk of prejudice where citizens of the same state are represented on both sides of the dispute. This is straightforward in simple two-party disputes but can be complicated in the case of multi-party disputes such as *Nolan*. Plaintiffs sought to exploit the requirement of complete diversity to avoid removal to federal court. Instead of filing actions under the names of the real plaintiffs in interest, the plaintiff lawyers filed actions under the names of the appointed legal representatives who shared citizenship with the defendants.[11] The case was initially removed to federal court where the plaintiffs appealed. Although the defendants sought to impugn the strategy as fraudulent, the district court had no choice (as the law then stood) but to accept the citizenship of the appointed representatives and to remand the case back to state court.

With removal successfully resisted, the case appeared to be stuck in state court. Since that court did not have the doctrine of FNC, the plaintiff lawyers thought they were home-free. However, Boeing and GE had an ace up their sleeve and sought to pull the rug out from under the plaintiffs by joining SNECMA as a third-party defendant. Although it was not alleged that SNECMA owed any liability to the claimants, it was under a contractual obligation to GE as part of their joint venture in CFM International and under which they shared profits and liabilities. This allowed GE to file cross claims for indemnification and contribution against SNECMA, thereby joining it to the litigation. At that time, SNECMA was owned by the French State and was thus entitled to have the case removed to federal court under the Foreign Sovereign Immunities Act (FSIA).[12]

Once back in the federal court, Boeing (with the support of the other defendants) moved for FNC dismissal arguing that England represented an adequate alternative forum for resolution of the dispute. Plaintiffs challenged dismissal on the grounds that the change in law would be so detrimental to their interests that it rendered England an inadequate forum. The court noted that the damages likely to be awarded in England would be much lower, that punitive damages would not be available, and it also averred to the possible unavailability of strict products liability in that jurisdiction. Nevertheless, it concluded that, ‘the plaintiffs’ remedy in the UK is not so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavourable change in law ought not to be given substantial weight.’[13] On the other hand, the court was able to stress the absence of any connection to the local forum in contrast to the overwhelming links to the UK.[14] The private and public interest factors all pointed toward dismissal and indeed the district court granted a conditional dismissal which was subsequently affirmed by the Fifth Circuit. The ultimate fate of

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[10] *Strawbridge v Curtiss* 7 US (3 Cranch) 267 (1806).
[11] *Nolan v Boeing Co* 919 F 2d 1058, 1060 (5th Cir 1990).
[12] 28 USC § 1441(d).
[13] *Nolan* (n 4) 682.
[14] ibid 683.

the plaintiffs' claims is not publically known. The likelihood is that they settled for sums substantially lower than what they would have been awarded had the litigation continued to a conclusion in the US.

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

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

Secondly, it provides an example of the reality that most aviation accidents can be attributed to several possible causes which may implicate a range of potential defendants. In other words, aviation litigation is usually multi-party in nature. This is all the more so at the preliminary stage when jurisdiction is litigated, precisely because the pool of potential defendants will be larger on account of there not yet having been any findings on the substance of the various claims.

Thirdly, the existence of multiple defendants (whether as co-defendants or third-party defendants) raises additional issues which influence jurisdiction, in the first instance, the claimant's choice of defendant and, subsequently, the choices made by the defendant(s). Although British Midland was the prime suspect from the outset, and thus the "proper" defendant for the plaintiffs' actions, the availability of US defendants and the plaintiffs' desire to secure a US forum resulted in the litigation being brought in Louisiana, even though British Midland were not susceptible to the jurisdiction of those courts. From a defendant perspective, *Nolan* illustrates how they too will exploit the multi-party nature of aviation accident litigation to secure a jurisdictional advantage by excluding, impleading or joining other parties (this will be taken up in Chapter 7).

The common denominator to these three points is choice of forum. Plaintiff lawyers will go to great lengths to secure the most advantageous forum while the defendants will bend over backwards to frustrate that goal. At the top of the list of desirable forums is the US. A good plaintiff lawyer will look at his jurisdictional options under MC99, if one of those is the US, and FNC dismissal can be avoided, then he is home free and can expect the airline—in reality its insurer—to settle post haste. Where MC99 does not offer a US forum then plaintiff lawyers will turn their attention to other potential defendants and theories of liability, anything that will get their foot in the door of a US court. A highly eligible alternative defendant in an aviation litigation context is the manufacturer, especially since an enormous share of the airframe and aircraft component market is owned by US manufacturing corporations. The manufacturer is all the more attractive where an action lies in strict products liability.

This all begs a rather obvious question. If the aviation manufacturer is such an obvious and attractive target for passenger claims, then why did the drafters of the Warsaw Convention not address it? Why did the drafters exclusively focus on the two-party relationship of the carrier-passenger and not take into account the existence of third-party defendants? It will be shown that

this oversight has had repercussions that undermine the effectiveness and fairness of MC99 (as successor to WCS) as an aviation accident passenger compensation system. The existence of alternative remedies against third-party defendants alters the dynamics of that system by giving the claimant additional choice of forum and by providing one avenue through which third-party interests can influence proceedings. In other words, they are an aspect of the bigger picture. We will build on this in Chapter 7 when we explore one of the consequences of the existence of alternative remedies against third-party defendants, i.e. third-party actions.

6.2 Legal Landscape at the Time of the Warsaw Convention's Drafting

We know that nowadays a claimant passenger is faced with a variety of options beyond suing the carrier via WCS or MC99. There is a range of defendants and remedies which widen his choice of forum. We have begun to see how this reality can translate into third-party influence in the claimant-passenger liability relationship, a point to which we will return in Chapter 7. For now, the immediate concern is to understand why the Warsaw Convention did not take this reality into account. Why did the Convention establish itself as a discrete system grounded on the two-party paradigm of claimant passenger versus defendant carrier? This section will seek to prove that this was a consequence of the legal landscape within which the Convention came into being. This will be done by looking to the drafting history of the Convention and the prevailing situation under the English common law and French civil law. It will be seen that alternative remedies for passengers against third parties, e.g. a manufacturer, did not generally exist at the time of the Convention's drafting. As a consequence of the subsequent emergence of alternative remedies, the foundation of WCS in the two-party paradigm of claimant passenger versus defendant carrier has become anachronistic. It is a core argument of this work that MC99, as successor to the WCS, is predicated on this same anachronistic understanding and it does not correspond to the reality of modern passenger litigation.

6.2.1 The Warsaw Convention *Travaux Préparatoires*

Given that the Warsaw Convention concerns the liability of the *carrier* for international carriage by air, it should not come as too much of a surprise that the aircraft manufacturer is very seldom mentioned in the *travaux* of the Warsaw Convention. However, a small amount of attention was given to the manufacturer in respect of the carrier's liability for inherent defects in the aircraft.[15] At the second session of the Warsaw Conference, Rapporteur de Vos provided a commentary on the substantive provisions of the Final CITEJA Draft.[16] Moving from article to article, de Vos outlined the reasoning and objectives behind the adoption of specific principles and explained various alternations made to the text since the Conference of 1925. In treating the topic of the possible exoneration of the carrier on proof that the carrier had taken all reasonable measures, it was noted that the draft no longer permitted for such exoneration in the case of inherent defect

[15] RC Horner and D Legrez (trs) *Second International Conference on Private Aeronautical Law, October 4-12, 1929 Warsaw: Minutes* (Fred B Rothman 1975) 21, 36, 43–54.
[16] ibid 18–23.

of the aircraft. Rather, the carrier was to be held strictly liable.[17] Paragraph 1 of Article 22 of the draft provided:

> The carrier shall not be liable if he proves that he and his servants have taken the reasonable measures to avoid the damage or that it was impossible for them to take them, unless the damages arises out of an inherent defect in the aircraft.[18]

This solution had been adopted for the benefit of the passenger, who, it was stated, could not 'turn against the manufacturer'.[19] Instead, the carrier was to bear the burden of liability with any unfairness being mitigated by the fact that the carrier, unlike the passenger, would have 'recourse against the manufacturer.'[20] As explained by Pittard (the Swiss Delegate and Rapporteur of the 1925 Conference), excluding exoneration of the carrier in the case of inherent defect ensured that the victim would have access to a remedy against someone (i.e. the carrier) rather than no one.

The written submissions made by the UK,[21] France[22] and Sweden[23] on the Final CITEJA Draft had expressed misgivings about the inherent defect provision. During the Conference itself, proposals were made for its removal. Sympathetic though the delegates were to the humanitarian interests involved,[24] it was nevertheless regarded as inequitable to impose liability on the carrier in the absence of its fault and in circumstances where the defect could not reasonably have been detected by its exercise of due diligence. The then unperfected state of aeronautical science was also highlighted as further reason not to adopt this instance of strict liability. Manufacturing defects were regarded as unavoidable, even where the greatest care and expertise was employed. Therefore, even assuming recourse was available, one could not rely on the carrier recovering against the manufacturer. Indeed, the delegates acknowledged that manufacturers were not generally disposed to offer carriers warranties. Therefore, in practice, the carrier would often have no right of recourse against the manufacturer.[25] In the end, the drafters elected to remove the inherent defect proviso of Article 22 altogether,[26] granting the carrier the possibility of exoneration in all cases where it could prove that it and its servants had taken all necessary measures to avoid the damage or that it was impossible to take such measures.[27]

What this brief dalliance with the prospect of holding the carrier liable in the absence of fault for damage caused by the presumptively wrongful conduct of the manufacturer shows is twofold. First, it demonstrates that the delegates did not understand the passenger as generally having a cause of action against the manufacturer under *le droit commun*, nor was there any attempt to provide any such cause of action under the Convention. Secondly, the delegates contemplated, even endorsed, the existence of recourse actions by carriers against manufacturers (albeit subject to limitations in practice). There was no intention to insulate the manufacturer from liability, in fact, one of the benefits of making the carrier strictly liable for inherent defects in the aircraft

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[17] ibid 21.
[18] ibid 265.
[19] ibid 21.
[20] ibid.
[21] ibid 296–297.
[22] ibid 286.
[23] ibid 316.
[24] See, in particular, the views expressed by the Swiss Delegate, ibid 44–45.
[25] ibid 296.
[26] ibid 54.
[27] Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention) Article 20(1).

was that it would create an indirect means of making the true culprit (against whom the passenger had no action) liable via a recourse action. That this proposal was not adopted was not as a result of any desire to protect manufacturers (although this was a practical effect) but for the immediate goal of protecting the carrier, even though it would clearly leave the claimant passenger without a means of recovery. This favouring of the carrier's interests over those of the claimant passenger was justified by the nascent state of aeronautics and the perilous financial position of carriers.

6.2.2 Historical Inadequacy of the Common Law

Circa 1929, a claimant passenger's options for commencing proceedings for damages suffered in an aviation accident were extremely limited under the common law. The fact that there was a need for the Warsaw Convention is itself recognition of this fact. The practice of carriers at the time was to exempt themselves from liability under the contract of carriage with the passenger. With no contractual remedy, the injured passenger would also find himself unable to succeed in tort. This was as a consequence of the rule in the 1842 case of *Winterbottom v Wright* which precluded the possibility of an action in negligence without privity of contract between the injured party and the tortfeasor.[28] Lord Abinger had baulked at endorsing a principle that would allow sufferers of an accident to reach back through the series of contracts to grasp the manufacturer since he feared it risked opening the doors to 'an infinity of actions'.[29] Even though *Winterbottom v Wright* was decided on contractual grounds, the decision was misapprehended as deciding a much broader question and accepted as standing for the proposition that no cause of action, whether in contract or tort, lay against a manufacturer in the absence of privity of contract.[30]

The rule in *Winterbottom v Wright* represented, in the absence of privity, a de facto immunity for manufacturers for their defective products.[31] The rule was subject to only a small number of exceptions, e.g. in the case of inherently dangerous articles.[32] In these limited cases, the absence of privity of contract could be remedied by the existence of a legal duty owed by the manufacturer to the public at large. This was not a contractual right of action but one in tort.[33] This helped to ameliorate the harshness of the rule in *Winterbottom v Wright* but so limited were these exceptions that they offered little help in the vast majority of cases.

As it stood at that time, there was no accepted general principle of tortious liability for negligence. In *Heaven v Pender*,[34] Brett MR (later Lord Esher) attempted to articulate such a principle from the accepted instances in which a manufacturer or supplier of goods could be held liable without privity of contract. He stated:

> [W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other,

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[28] (1842) 10 M & W 109; 152 ER 402, 405.
[29] ibid 403.
[30] CW Gillam 'Products Liability in a Nutshell' (1957) 37 *Or L Rev* 119, 133.
[31] FH Bohlen 'Liability of Manufacturers to Persons Other than Their Immediate Vendees' (1929) 45 *LQR* 343, 343.
[32] ibid 344.
[33] *Thomas v Winchester* 6 NY 397, 397 (1852).
[34] (1883) 11 QBD 503 (CA).

> a duty arises to use ordinary care and skill to avoid such danger.[35]

Even though the case was decided by the majority on narrower grounds, Brett MR's principle was a precise and potent articulation of what would become—with some adjustment—the accepted principle for the duty of care in *Donoghue v Stevenson* in 1932. However, prior to this seminal case, Brett MR's principle found favour in the US where it was referred to in a 1916 case that would lay the foundation for products liability in the US, i.e. *MacPherson v Buick Motor Co.*[36] In that case, Cardozo J, of the New York Court of Appeals, stated that '[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.'[37] In finding for the plaintiff, the court concluded that where there is an element of danger and knowledge that the thing will be used by third parties, then, 'irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.'[38] Cardozo J thus laid down a general rule of manufacturers' liability for negligence.

In 1932 the English courts reached a similar view in *Donoghue v Stevenson* with Lord Atkin's famous neighbour principle, by which was meant '[t]he rule that you are to love your neighbour becomes in law, you must not injure your neighbour',[39] that one 'must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'[40] Lord Atkin found inspiration in the principle articulated by Brett MR but, acknowledging that it was framed too wide,[41] he constrained it with his concept of "neighbourship", more elegantly expressed as "proximity".[42] Expressed in a manufacturing context, the general principle was:

> [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take the reasonable care.[43]

Of course, *Donoghue v Stevenson* came after the deliberations in Warsaw in 1929. Even then, the initial tendency of English courts was to reject liability if there was any substantial possibility of intermediate inspection. With the development of a general principle of liability for negligence, an avenue for recovery was opened for injured parties against parties with whom there was no privity of contract. Looking at this from an aviation perspective, it became possible for a passenger to bring a direct claim against a third party, most notably the manufacturer or service provider (e.g. the airport or ATC) and, sovereign immunity permitting, against the State's aviation authorities. The claimant passenger was no longer constrained by privity of contract to suing only the carrier with whom the contract of carriage had been formed. Now, the claimant passenger could hope to establish liability against other parties. In other words, there was now the possibility of an alternative remedy.

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[35] ibid 509.
[36] 217 NY 382 (1916).
[37] ibid 389.
[38] ibid.
[39] [1932] AC 562, 580 (HL) (appeal taken from Scot).
[40] ibid.
[41] ibid.
[42] ibid 581.
[43] ibid 599.

However, the alternative remedy provided under the general principle of negligence was not to prove particularly useful to the claimant in the context of an aviation accident claim. In these types of cases, the circumstances were frequently such as not to allow a claimant an easy road to recovery, certainly not in comparison to the regime of presumed liability established under the Warsaw Convention. Then, as now, a claim on the general theory of negligence was not usually an attractive option to a claimant passenger because of the need to prove the fault of the manufacturer. This was (and still is) an onerous burden to overcome, especially in the field of aviation products liability given the technical sophistication of the industry.[44] Even today it can be extremely difficult for a claimant to prove negligence where the aircraft has been destroyed in the accident or lost altogether, not to mention that that potential witnesses have been killed? [45] Even where it is possible to establish proof of negligence, the actual expense involved in doing so in the case of an aviation accident may be prohibitively expensive and beyond the means of the claimant.

The doctrine of *res ipsa loquitur* would seem particularly well suited to aiding plaintiffs in aviation cases.[46] For the doctrine to apply, the real cause of the damage must be unknown and the instrument or circumstances causing the damage must have been within the exclusive control of the defendant.[47] This latter requirement excludes its application in manufacturer cases or other third-party cases because they are seldom in exclusive control (the carrier is). It was initially argued that the doctrine was inapplicable to aviation due to the inherent perils of the air which meant that the defendant was never truly in exclusive control of the circumstances.[48] Some support was found for this viewpoint in the early days of aviation.[49] Although accepted as applicable in modern times due to technological advancements and resulting improvements in safety and performance,[50] the authors of *Shawcross & Beaumont* state that the courts have nevertheless been reluctant to apply the doctrine in cases of aircraft crashes or disappearances.[51]

6.2.3 The Situation under French Civil Law

The inadequacy of private law for those injured in aviation accidents against third parties was not much better under the French civil law at the time of the Warsaw Convention's drafting. The obvious starting point is with Articles 1382 and 1383 of the Civil Code which are grounded on the concept of *faute délictuelle*. Under these, a claimant has to prove harm (*dommage*)[52] causally linked (*lien de causalité)*[53] to the fault (*faute*)[54] of the defendant. On the face of it, delictual liability under Articles 1382 and 1383 is extremely broad and we might thus expect that it would have provided a good source of redress against the manufacturer and other third parties. However, this

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[44] See D McClean (ed) *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019) div 4 [195].
[45] See e.g., *Cox v Northwest Airlines Inc* 379 F 2d 893, 895 (7th Cir 1967).
[46] For discussion of the doctrine, see McClean (n 44) div VII [50]-[60].
[47] ibid.
[48] ibid.
[49] *Morrison v Le Tourneau Co* 138 F 2d 339, 341 (5th Cir 1943).
[50] See WL Prosser *Law of Torts* (3rd edn, West Publishing 1964) 220–221.
[51] McClean (n 44) div VII [63].
[52] K Zweigert and H Kötz *An Introduction to Comparative Law* (T Weir tr, 2nd edn, Clarendon Press 1987) 657.
[53] ibid 659.
[54] ibid 661.

was not the case. Firstly, for much the same reasons as the common law, proving such fault in defective product cases was very difficult. Second, at the time of the Warsaw Convention's drafting, it was not generally accepted that placing a defective product into the market constituted an example of *faute délictuelle* upon which an action could succeed under Articles 1382 and 1383. Indeed, this was not recognized as a *faute délictuelle* until the 1970s.[55] For these reasons, actions based on contract or on the strict liability provision of Article 1384 were preferred.

The problem of privity was also at issue for the aviation claimant seeking a remedy in contract under French civil law. However, the French civil law was less constrained by privity than the common law.[56] Particularly relevant to the field of defective products claims is the concept of the *action directe en garantie*.[57] This permits a buyer to pursue sellers further up the chain of commerce. Therefore, the claimant sub-buyer who has a contract of sale with his immediate seller, but not with the manufacturer, is permitted to reach back through the chain of contracts to sue the manufacturer directly for latent defects. In effect, the sub-buyer becomes the successor in interest to the original-buyer's rights against the manufacturer. The action *directe en garantie*, which is contractual, was introduced precisely because the sub-buyer did not have a cause of action in contract or delict against the manufacturer.[58] This form of recourse was available at the time of the Warsaw Convention's drafting; in fact, well prior to it.[59] However, this remedy was limited to sub-buyers and thus would not have availed the aviation passenger claimant who purchases services, not goods.[60]

The final option for the claimant was Article 1384(1) of the French Civil Code. Similar to *res ipsa loquitur*, Article 1384(1) provides for strict liability of the *gardien*[61] of a thing which causes damage.[62] Initially it only countenanced responsibility for damage caused by animals or buildings but was subsequently interpreted as providing a much broader principle of liability of the *gardien* for any thing which causes damage.[63] Since 1930, it has been established that Article 1384(1) of the Civil Code establishes a presumption of strict liability for damage caused by things (*le fait d'une chose*).[64] This presumption arises regardless of whether or not the thing is defective or dangerous and is not based upon any notion of fault of the *gardien*. The only defences available are contributory negligence and *force majeure* (albeit a simpler definition of which as unforeseeable and unpreventable harm).[65] It proved an ample means of recourse for victims of motor vehicles, who could then secure recovery against the *gardien* without needing to show fault. Whittaker observes that '[i]n this way, French courts imposed a strict liability for physical things

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[55] S Whittaker *Liability for Products: English Law, French Law and European Harmonization* (OUP 2005) 51.

[56] See S Whittaker 'Privity of Contract and the Law of Tort: The French Experience' (1995) 15 *Oxford J Legal Stud* 327, 367.

[57] See Whittaker (n 55) 96.

[58] ibid 97.

[59] Whittaker cites authorities from 1884, 1885 and 1886. ibid 96 n 344.

[60] ibid 139.

[61] A meaning of this legal term is difficult to translate into English but the terms *keeper* or *custodian* come close to conveying the gist. Zweigert and Kötz (n 52) 703.

[62] See Article 1384.1 of 'French Civil Code (English Translation)' Article 1384.1 <www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf> accessed 23 February 2019.

[63] Whittaker (n 55) 52.

[64] *Cass Ch Réunies Arrêt du 13 février 1930 (Jand'heur).*

[65] Whittaker (n 55) 52.

some 65 years before implementation of the EC Product Liability Directive imposed strict liability for defective products.'[66]

This might appear an ideal theory upon which to pursue a manufacturer but it is entirely dependent on the definition of *gardien*, and that was not generally held as being applicable to manufacturers. The definition attributed to *la garde* centres on the possession, use, direction and control of the thing.[67] For instance, the legal owner of a car is presumed to be its *gardien* but may rebut this presumption by showing that control (i.e. *la garde)* has been transferred to another party. In the context of aircraft, such control at the operative moment when harm is caused to the passenger is not vested in the manufacturer but more likely in the operator (or potentially the legal owner). It has since become accepted that there can be two *gardiens* at the same time, one in respect of its behaviour (*gardien du comportement*), the other in respect of its structure (*gardien de la structure*).[68] In the context of an aircraft, the carrier would be the *gardien* of its behaviour, while the manufacturer could be regarded as the *gardien* of the thing's construction and thus potentially liable under Article 1384(1). However, this does not appear to have been the law at the time of the Warsaw Convention's drafting.[69] Thus, Article 1384(1), useful though it might be against the carrier, would not have aided the claimant passenger against third parties circa 1929.

6.2.4 Vindication of the Two-Party Paradigm

What this legal history shows, is that during the period of the Warsaw Convention's gestation and at its adoption in 1929, a third party to the passenger-carrier relationship (e.g. aircraft manufacturer) was practically immune from direct liability toward an injured passenger. Privity of contract was the great stumbling block. Such liability could only be established in very limited and defined circumstances. There was not yet the general principle of negligence. It is true that a New York court enunciated a principle of general products liability in 1916 and that this decision, i.e. *MacPherson*,[70] 'found immediate acceptance'.[71] However, such acceptance was, pre-Warsaw, limited to US jurisdictions. As noted earlier in this work, the US did not actively participate in the drafting of the Warsaw Convention and it does not appear from the record that the actual drafters were aware of the emergence of products liability in the US. The French civil law was similarly beneficial to the manufacturer and other third parties. Aside from the difficulty of establishing fault, delictual liability was not recognized against manufacturers under Articles 1382 and 1383 of the Civil Code. The strict liability of Article 1384(1) did not avail the aviation claimant against a third party since he was not regarded as the *gardien* of the thing. Likewise, contractual remedies were of no avail to the aviation claimant due to the problem of privity.

The drafters of the Warsaw Convention would not have needed to take into consideration the potential impact of the existence of alternative remedies against third parties. It was reasonable, at the time, to rely on the liability relationship involved in the international carriage of passengers

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[66] ibid 27.
[67] ibid 53.
[68] Whittaker (n 56) 341; Zweigert and Kötz (n 52) 717.
[69] Whittaker (n 56) 341 n 121 (citing cases dating from 1956 and 1960 for this theory).
[70] *MacPherson* (n 36).
[71] Prosser (n 50) 643.

by air as being essentially two-party in nature, i.e. passenger and carrier. Since the passenger could not sue a manufacturer, there was no risk of that manufacturer seeking recourse against the carrier; that aspect of recourse did not arise at all.

On the other hand, the manufacturer had little to fear from the carrier in terms of recourse. The Minutes show that the delegates were aware of the possibility of recourse actions by carriers against third parties, they even endorsed them, but they acknowledged that they were unlikely to arise in practice.[72] They were right. The aircraft purchase agreement between manufacturer and carrier would invariably contain express warranties against defects in material and workmanship, as well as a remedy limitation section in the event of defect, and various disclaimers of liability. As one legal counsel for a manufacturer later put it, 'any manufacturer having reasonably competent legal counsel can exempt itself from virtually all liability from manufacturer caused damages to aircraft that the manufacturer has sold to the air carrier.'[73] In addition, recourse actions taken against manufacturers resulting from the carrier's liability to the passenger under the Convention were generally blocked by the rule against contribution amongst tortfeasors (a topic covered Chapter 7). Therefore, the other aspect of recourse actions, i.e. the carrier seeking recourse against third parties for its liability to the passenger, was not a concern to the delegates and further reinforced their two-party understanding of the aviation liability system they adopted.

The drafters were quite content to leave the manufacturer and other third parties out of the system. They had no desire to protect them as they were already amply protected by the law and by their own business practices. The drafters did not foresee that the law would evolve to provide the claimant passenger with a choice of defendants and a selection of remedies through which the scope for the involvement and influence of third parties in the carrier-passenger relationship would be greatly expanded. This is precisely what happened with the development of the general doctrine of negligence, strict products liability and other new remedies. Indeed, strict products liability is particularly relevant to aviation litigation, not only because of the technological quintessence of the industry, but also because it is, in practice, one of the principal alternative remedies pursued by claimants.

6.3 Concluding Remarks

We began exploration of the bigger picture in this chapter by tracking the emergence of alternative remedies for claimant passengers in international aviation litigation. The Warsaw Convention was premised on the paradigm of such litigation as being two-party in nature, i.e. claimant passenger versus defendant carrier. The emergence of alternative remedies and defendants means that third parties (i.e. third parties to the contract of carriage) are now directly implicated in the litigation of passenger claims. Whereas at the time of the Warsaw Convention the drafters could rely on the law insulating third parties from passenger claims, the development of the general theory of negligence and especially the birth of strict products liability has expanded the claimant passenger's options. The present reality is that MC99 is just one of several potential remedies

[72] Horner and Legrez (n 15) 21. See 6.2.1 supra.
[73] H Hughes 'Aircraft Manufacturer Warranties - Protection for the Manufacturer or the Purchaser?' (1977) 2 *Air Law* 71, 71.

available and this impacts upon the efficacy of MC99 and upon the wider issue of choice of forum. The attractiveness of MC99's jurisdictional scheme is ultimately conditional upon it granting the claimant passenger with a choice of the most desirable forum. Where an alternative remedy exists that offers a preferable forum, then claimants will forego an MC99 action, even if that alternative remedy is otherwise a less attractive option. This was not something contemplated by the drafters of the Warsaw Convention but which must now be taken into account when evaluating choice of forum under MC99.

Chapter 7: Third-Party Actions

7.1 Introduction

The previous chapter showed that the drafters of the Warsaw Convention, worked on the basis that the liability relationship involved was essentially two-party in nature, i.e. claimant passenger versus defendant carrier. As a result, the drafters did not realize the potential impact that alternative remedies against third parties would have on their regime. The evolution of the legal landscape of international aviation litigation has now retroactively proved this to be an oversight.

The emergence of alternative remedies has led to another development which also impacts significantly on the bigger picture. This is the reality of third-party actions for contribution or indemnification, the impact of which is twofold. Firstly, they provide a route through which alternative remedies become directly implicated into the carrier-passenger liability relationship. Second, they can undermine the goals and objectives of the WCS and MC99 by facilitating the circumvention those regimes.

Third-party actions can also have a direct bearing on choice of forum. Whether the defendant to the main action is the carrier (or some other party) the existence, or even just the prospect, of the defendant bringing a third-party action against another party alters the jurisdictional power-play. As will be shown, third-party actions are a strategic tool used by defendants in aviation litigation to win a jurisdictional advantage over the claimant. This raises new questions: Is this fair to the claimant passenger? Is it consistent with the goals of MC99?

This chapter begins by summarizing the basis upon which non-contractual third-party actions are founded, i.e. the liability of joint and concurrent tortfeasors and the doctrines of contribution and indemnification. The relevance of third-party actions to aviation litigation and particularly choice of forum will be revealed by elaborating on how they permit third-party influence and introduce the risk of circumvention of the special liability regimes of WCS and MC99. In so doing, a central and highly controversial question will arise regarding the applicability of those regimes to third-party actions. The potential impact of third-party actions is hugely dependent on whether they fall within or outside of WCS/MC99. The later sections of this chapter will critically assess this matter and reach a conclusion which will further develop our understanding of the bigger picture.

7.2 Third-Party Actions

What is a third-party action? This question is best answered by way of an example. Where a claimant passenger brings an action for damages against a carrier, that carrier may in turn allege that another party, e.g. the manufacturer of the aircraft, is also to blame and that this other party should reimburse the carrier for some (or all) of the liability that the carrier ends up owing to the claimant passenger. In the *West Caribbean Airways* case, the court noted the likelihood that the defendant carrier would seek recourse (via third-party actions) against the airframe manufacturer (Boeing Co), the engine manufacturer (Pratt & Whitney), and the manufacturer of the weather

radar system (Honeywell).[1] Various other configurations can arise, instead of the carrier the claimant passenger might sue an agent of the carrier (e.g. in negligence) or a component manufacturer (e.g. in products liability) and that defendant may wish to seek recourse against the carrier for some share (or all) of the liability.[2]

The most common examples of a third-party action are claims for indemnification or contribution. A distinction must be made between a third-party action for contribution/indemnification arising as a matter of law from one arising as a matter of contract. While indemnity might arise by way of contract and/or by operation of law, the right to contribution arises only by operation of law.[3] A right to indemnification arising under contract will be treated in the next chapter which focuses on the influence of third parties via contractual indemnities and contracts of insurance. This chapter is concerned with the influence exerted by third parties via their right to contribution or indemnification as it arises by operation of law. This occurs in the case of joint or concurrent tortfeasors; a common occurrence in aviation litigation which is often multi-party in nature (as demonstrated in Chapter 6).

A third-party action is distinct from, but conditional upon, the main action between a claimant and a defendant. Where contribution/indemnification is sought by a third-party claimant against a third-party defendant based on common tort liability (as distinct from a contractual basis) then a condition of recovery is that both parties (to the third-party action) bear common liability to the claimant in the main action. Obviously, if the defendant is not himself liable to the claimant then no judgment will be given for the third-party claimant against a third-party defendant. Likewise, for a defendant to the main action to succeed on a third-party action he must not only be liable to the claimant himself but must also prove that the third-party defendant would be liable to the claimant. This commonality may be expressed either in the tortious act (and consequently in the damage) or solely in the damage. Where the commonality is in the tortious act *and* damage then the parties are defined as joint tortfeasors. Where the commonality is *only* in the damage then they are defined as concurrent tortfeasors. What both species of tortfeasors (generally referred to solidary tortfeasors in the civilian law tradition) share is the fact that their torts must 'run together' to produce the same damage.[4]

7.2.1 Contribution

In the simplest of terms, contribution allows one tortfeasor, who has paid for the total liability to the plaintiff, to seek a portion of the total liability from another non-paying tortfeasor(s). The right of contribution is essentially a concession to fairness and rests upon the recognition of the need for equity between those with a common obligation, even where the obligation in question has not arisen from a consensual transaction between the parties.[5] Each legal system has its own doctrine of contribution, or indeed may have a rule against it. However, it must be noted that the

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[1] Order Granting Defendants' Motion to Dismiss (Doc 184) at 4, 10 n 18, *In re West Caribbean Airways SA* 616 F Supp 2d 1299 (SD Fla 2007) (No 06-CV-22748).
[2] See cases discussed below in 7.3.3.
[3] FJ Gorman 'Indemnity and Contribution under Maritime Law' (1981) 55 *Tul L Rev* 1165, 1167.
[4] GL Williams *Joint Torts and Contributory Negligence* (Stevens & Son 1951) 1.
[5] See RA Leflar 'Contribution and Indemnity between Tortfeasors' (1932) 81 *U Pa L Rev* 130.

right of contribution at common law is generally denied an intentional tortfeasor,[6] a similar exclusion applies in the civil law.[7]

Although contribution between tortfeasors is now commonplace, it was not always so. Under the rule in *Merryweather v Nixan* (1799) there was no contribution between joint tortfeasors at common law.[8] A related rule, i.e. the exclusionary rule of contributory negligence.[9] The policy justification for these rules was expressed in the legal maxims, *in pari delicto (potior est conditio defendantis)* and *ex turpi causa non oritur actio.*[10] In simple terms, the courts would not come to the aid of a wrongdoer and elected to let the losses lie where they fell. These could be harsh rules which worked an injustice on parties who bore only a small proportion of the fault. In addition, it undermined the deterrent effect of tort liability. Nevertheless, the common law did not—strictly speaking, it still does not—permit a right to contribution. However, under English law a statutory right was provided by s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935.[11] This Act was subsequently repealed and replaced by the Civil Liability (Contribution) Act 1978.[12] Under which, any party liable for damage suffered by another person may recover contribution from any other person liable for the same damage (whether jointly or otherwise).[13] Therefore, beyond the Act and outside of admiralty,[14] there is no common law right to contribution in England.[15]

Although the common law in the US varies from state to state, it can be broadly said that it firmly adhered to rule against contribution, as well as the contributory fault exclusionary rule. This led various state legislatures to introduce exceptions by way of statute. In 1955, the great majority of states maintained the contributory fault exclusionary rule but in the 1960s and 1970s there was strong movement toward comparative negligence.

When it comes to the civil law tradition, Szalma states that whilst Roman law recognized delictual solidary obligations, therefore permitting the injured party to recover all losses from one of a number of tortfeasors, the law did not permit contribution claims between tortfeasors.[16] Although Szalma claims that the majority of European civil law systems followed the Roman law he describes provisions under Austrian, German, Swiss, and French Codes, which allowed for contribution between solidary tortfeasors.[17] Indeed, this appears to be the current general position of the European civilian law tradition.[18]

Therefore, unlike the common law, the civil law tradition has long provided for contribution

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[6] ibid 139.

[7] H Drion *Limitation of Liabilities in International Air Law* (Springer 1954) 103.

[8] (1799) 8 Term Rep 186; 101 ER 1337.

[9] See FH Bohlen 'Contributory Negligence' (1908) 21 *Harv L Rev* 233; EE Davis 'Indemnity Between Negligent Tortfeasors: A Proposed Rationale' (1952) 37 *Iowa L Rev* 517, 557–558. For an aviation example, see *Bowen v US* 570 F 2d 1311 (7th Cir 1978).

[10] Leflar (n 5) 132.

[11] Law Reform (Married Women and Tortfeasors) Act 1935 (UK) s 6.

[12] Civil Liability (Contribution) Act 1978 (UK).

[13] ibid s 1.

[14] An exception did arise, but only in admiralty in England and the US. See *The Woodrop-Sims* (1815) 2 Dods 83; 165 ER 1422, 1423; *The Schooner Catharine* 58 US 170 (1854).

[15] M Jones, A Dugdale and M Simpson (eds) *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell 2017) [4.13].

[16] J Szalma 'Solidary and Divided Liability of Joint Tortfeasors - with Special Regards to the Provisions of the New Hungarian Civil Code' (2017) 8 *J Euro Hist L* 66, 66–67.

[17] ibid 69.

[18] See European Group on Tort Law 'Principles of European Tort Law' (*www.egtl.org*) <http://civil.udg.edu/php/biblioteca/items/283/PETL.pdf> accessed 26 June 2018.

between solidary tortfeasors. However, as demonstrated in Chapter 6,[19] this was still problematic because it required establishing the liability of the parties in the first instance, this was very hard to do against third parties to the contract of carriage so the availability of contribution was more theoretical than real. In other words, the need for contribution seldom arose in the context of carriage because the underlying requirement for liability of a third-party to the claimant did not arise.

7.2.2 Indemnification

In essence, "indemnity" means the duty to make good the liability incurred by another. The right of indemnity can arise either by contract or by operation of law. It is with the latter that we are currently concerned, the former is addressed in Chapter 8. The origin of the non-contractual indemnity is to be found in equity where it was founded upon the doctrines of restitution and unjust enrichment.[20] A party can bear a legal responsibility to compensate another individual without necessarily bearing any fault. The imputation of liability by operation of law may arise on account of a special relationship between the wrongdoer and the liable party, e.g. *respondeat superior*, or from rules of strict or absolute liability. In these cases, the courts have recognized an equitable right for a tortfeasor to recoup his loss from the other tortfeasor who was truly at fault. As one commentator described it, '[i]ndemnity is given to the person morally innocent but legally liable, as against the actual wrongdoer whose misconduct has brought the liability upon him.'[21] Indemnity results in the 'shifting of the entire loss from one tortfeasor to another'.[22]

The rule against contribution/indemnification could be harsh on a joint/concurrent tortfeasor, especially in circumstances where the paying tortfeasor's liability was vicarious in nature (i.e. where he was personally faultless) or their share of fault was minor. Therefore, it is not surprising that some jurisdictions developed exceptions to the rule. However, unfortunately, it is not possible to discern a common doctrinal foundation to these various exceptions.[23] At most it could be said, as Judge Learned Hand stated in *Slattery v Marra Bros Inc*, that indemnity ought to arise where 'faults differ greatly in gravity'[24] between the tortfeasors. Thus, the lower one's degree of fault, the likelier it is that the court will grant a right of indemnity against the other tortfeasor. However, the right to equitable indemnification was only available in those circumstances where the paying tortfeasor was *de jure* liable but *de facto* "fault-less". Where the paying tortfeasor bears a more than *de minimis* level of fault, then the right of indemnification is not available and he must instead rely on the availability of a right to contribution.

The need to rely on equitable indemnification has been substantially reduced by the introduction of statutory regimes for contribution which generally permit contribution on a proportional basis all the way up to, and including, full indemnification.[25] In the context of aviation

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[19] See Chapter 6.2.3.
[20] MR Yeates, PB Dye Jr and R Garcia 'Contribution and Indemnity in Maritime Litigation' (1990) 30 *S Tex L Rev* 215, 223.
[21] Bohlen (n 9) 243.
[22] *Ingham v Eastern Air Lines Inc* 373 F 2d 227, 240 n 12 (2d Cir 1967).
[23] Davis (n 9) 536; Bohlen (n 9) 242; GM Hodges 'Contribution and Indemnity Among Tortfeasors' (1947) 26 *Tex L Rev* 150, 153–157.
[24] 186 F 2d 134, 138 (2d Cir 1951).
[25] See e.g., Contribution Act 1978 (n 12) s 2(2).

accident litigation, indemnification is much more likely to actually arise through an insurance agreement or contractual indemnities, which will be the subject-matter of Chapter 8.

7.2.3 Relevance to Aviation Litigation

The availability of a right to non-contractual contribution or indemnification was not a feature of the common law at the time of the Warsaw Convention and its availability within the civilian legal system was largely theoretical. On the international law plane, there was some precedent for recourse. The Collision Convention of 1910[26] provided for apportionment of liability between joint tortfeasors according to their relative degree of fault. The international regime governing the carriage of goods by railway had contained provisions on recourse since the Berne Convention in 1890[27] and continued in 1924 with the CIM[28] and the CIV.[29] However, the recourse provisions contained in the rail conventions dealt only with recourse between carriers who were party to the contract of carriage.[30] However, neither the CIM nor the CIV made any provision in relation recourse actions by, or against, third-parties. The Hague Rules 1924 made no provision for recourse between carriers or third-parties in the carriage of goods by sea.

What all of this suggests, is that recourse actions were not a common feature of the legal landscape at the time of the drafting of the Warsaw Convention and this is reflected in the fact that the Convention does not address them. This is in stark contrast to the state of affairs that exists at the present moment when third-party actions for contribution and indemnification are a regular feature of civil litigation around the world. This fact alone has fundamentally changed the legal landscape of international aviation litigation and has exploded the myth of the two-party paradigm upon which WCS (and thus MC99) was established. The bigger picture is one in which the emergence of third-party actions had resulted in third party influence.

7.2.3.1 The Influence of Third Parties

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

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[26] Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, (adopted 23 September 1910) (Collision Convention) Article 4.

[27] Convention Internationale concernant le Transport des Marchandises par Chemins de Fer (signed 14 October 1890) (CIM 1890).

[28] Convention concernant le transport des marchandises par chemins de fer (signed 12 October 1924, entered into force 1 October 1928) 77 LNTS 367 (CIM 1924).

[29] Convention concernant le transport des voyageurs et des bagages par chemins de fer (signed 23 October 1924, entered into force 1 October 1928) 78 LNTS 17 (CIV 1924).

[30] ibid Articles 48 & 49.

which Chapter 6 began).[31]

In *Nolan*, a factor militating in favour of FNC dismissal was the inability of the defendants to join the carrier (British Midland) as a third-party defendant to the US proceedings. It was argued that unfortunate consequences would arise if FNC dismissal were not granted, because the defendants, if found liable, would be forced to seek indemnification or contribution from British Midland through a separate action in England. Ironically, the defendants in *Nolan* had complained of their inability to join British Midland as a third-party defendant due to the court's lack of jurisdiction over the carrier. However, it is highly unlikely that Boeing did not have a contractual indemnity in place with British Midland upon which jurisdiction could have been secured. Indeed, jurisdiction over SNECMA had been established on a similar basis. To the cynical observer it might seem that the defendants (including potential third-party defendants) were coordinating their efforts to ensure a jurisdictional advantage that served their common interest. Strategically, it made sense for the defendants to keep British Midland out of the litigation altogether. They had done likewise with SNECMA, only bringing them into the litigation as a last resort so as to secure removal to federal court.

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

7.2.3.2 Circumvention of the Convention

Having departed from Yerevan, Armenia, on 03 May 2006, Armavia Flight 967 crashed into the Black Sea close to its destination of Sochi, Russia, killing all 113 people on board. The aircraft involved was an Airbus A320 and was operated by the Armenian airline, Armavia Airline Co Ltd. The published accident report noted several shortcomings with the crew's performance as well as with the airline's management.[32] On the matter of the airline's liability toward its passengers, the applicable regime was that of the unamended Warsaw Convention. However, a number of claimants opted instead to bring a product liability action against Airbus in the courts of Toulouse, France. From the claimants' perspective, an action against Airbus was clearly preferable because it provided the possibility of recovering under broad heads of damage without the limitations and conditions imposed by the Warsaw Convention. Airbus sought to join Armavia to the litigation in Toulouse by bringing third-party actions against the airline for indemnification and contribution. It was this move that created the mischief of circumvention of the Warsaw Convention.

Armavia challenged the jurisdiction of the French court, essentially arguing that it could not be made party to litigation of passengers' claims before the courts of a jurisdiction not specified by Article 28 of the Warsaw Convention. The airline's argument was that if the court allowed Armavia

[31] *Nolan v Boeing Co* 762 F Supp 680 (ED La 1989) aff'd 919 F 2d 1058 (5th Cir 1990).

[32] See Interstate Aviation Committee 'Final Report on the Investigation into the Accident Involving the Armavia A320 near Sochi Airport on 3 May 2006 (English Translation)' (2006) 52–53 <https://www.bea.aero/docspa/2006/ek-9060502/pdf/ek-9060502.pdf> accessed 26 March 2019.

to be joined as a third-party defendant to the claimant passenger's product liability action against the aircraft manufacturer then the claimants would effectively circumvent the application of the Warsaw Convention. Armavia maintained that the Court ought not to allow Airbus to separate the third-party claim from the underlying passenger tort claim against the carrier, essentially arguing that they were not distinct causes of action. Airbus maintained the view that the Warsaw Convention applied only to claims between the carrier and passengers and not to its own claim against the carrier. As such, Airbus argued that the French courts had jurisdiction under national law (specifically Article 333, *Code de Procédure Civile*).

Armavia was successful at first instance and also on appeal.[33] However, Airbus appealed the matter to the Cour de Cassation which found that Airbus' claim against Armavia did not come within the scope of the Warsaw Convention and, therefore, the jurisdictional provisions of Article 28 did not apply to it.[34] In consequence, Armavia could not contest the jurisdiction of the French courts to hear Airbus' third-party claim against it, even though the claimant passenger could not have sued the carrier directly in France.

This issue is not just limited to the Warsaw Convention. It arose also in the context of litigation brought under MC99 in *Re Air Crash Over the Mid-Atlantic on June 1, 2009.*[35] The majority of the plaintiffs were non-US domiciliaries for whom jurisdiction against the airline could not be established in the US. Instead, these plaintiffs brought separate tort actions against US component manufacturers in a number of US courts. These actions were eventually consolidated before a California district court where the defendant manufacturers brought third-party actions against Air France for indemnification or contribution.

In considering a motion for FNC dismissal, the court noted the potential tension which would arise if it held that the third-party actions against the carrier were not covered by MC99. The cause of this potential tension was twofold: firstly, the airline would not be presumptively liable to the plaintiffs as contemplated by MC99; and secondly, it would undermine the jurisdictional provisions of MC99 by forcing Air France to indirectly answer the passengers' actions for damages in a forum not specified by the Convention.[36] On the other hand, if MC99 did apply, the defendants would be unable to seek contribution/indemnification in the same proceedings. Instead, they would be forced to bring their claims against the carrier in France. Unfortunately, rather than make a determination on the question, the court decided that the "tension" could be avoided by a granting the FNC dismissal.[37] Indeed, it is more than likely the main reason that the defendants brought the third-party action was to secure FNC dismissal. It was in the combined interest of Air France and the manufacturing defendants to be sued in France where their final liability would be less.

Cases like these demonstrate the risk of circumvention posed by third-party actions. It is not just limited to the issue of jurisdiction. It can apply, as shall be shown below, to the time bar under WCS and MC99. It is theoretically possible that in appropriate circumstances it might even allow for circumvention of the limits of liability. All depends upon the doctrine of contribution or

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[33] The text of the lower court's judgment is reproduced in the Cour de Cassation judgment: *Cass Civ (1ère) Arrêt n 327 du 4 mars 2015, Airbus c Armavia, n 13-17392* [2015] RFDAS 92.
[34] ibid.
[35] 760 F Supp 2d 832 (ND Cal 2010).
[36] ibid 846–847.
[37] ibid 846

indemnification to be applied under *le droit commun*. However, the better view is that circumvention of conditions and limits of liability under WCS or MC99 is not going to be at issue where non-contractual indemnification or contribution is at issue. As described above, these doctrines are built on the premise of common liability between tortfeasors. As such, the duty of the third-party defendant to provide indemnification or contribution to the third-party claimant is conditional upon the third-party defendant bearing liability to the injured party (i.e. the claimant in the main action). This liability must be proved according to the applicable law which will be determined by the forum's choice of law rules. In the majority of cases, this will result in the applicable law being that of WCS or MC99 so its theory of liability and available defences will apply. In most cases, the doctrine of contribution/indemnification will respect the extent of liability, such that any applicable limitations and reductions will apply. For example, under s 2(3) of the UK's Civil Liability (Contribution) Act 1978, the extent of a person's duty to provide contribution cannot exceed the amount to which he would have been liable to the injured party.[38] It must be admitted that the risk exists that some jurisdictions will not permit the third-party defendant to limit the extent of their liability and may apply a different theory of apportionment of damages, e.g. a pro-rata basis.

More problematic, however, is the existence of contractual indemnities. These will be explored in Chapter 8, but for now, it suffices to note that where a claimant passenger sues a third party for damages, if that third party has agreed a contractual indemnity with the carrier then it could bring a third-party action against the carrier. The basis of that third-party action would be the contractual indemnity, rather than the common liability. This would mean that unless the contract incorporated the terms of WCS or MC99, then the carrier would be unable to invoke its conditions or limits of liability. It would be faced with providing contribution/indemnification in accordance with its contractual obligation without the benefit of defences or limitations under a WCS or MC99 action taken directly by the passenger.

This is one reason why it is important to distinguish between contractual and non-contractual rights to contribution or indemnification. A non-contractual right of contribution or indemnification will thus not, in practice, result in the same risk (in terms of extent) of circumvention as a contractual right. The conditions and limits of liability under WCS or MC99 will usually apply. This is not the case with a contractual indemnity. A carrier is entitled to agree to exceed the limits of liability or to agree terms which do not conflict with the Convention.[39] Thus, a contractual indemnity clause is perfectly legitimate and should be enforced blind to the Convention's provisions.[40]

However, one area in which the risk of circumvention is equally at issue in contractual and non-contractual indemnities/contribution is with respect to the jurisdictional provisions of WCS and MC99. The magnitude of the risk of circumvention of jurisdiction is more pronounced with MC99, precisely because the limitation of liability is much less likely to apply. In other words, under MC99 (unlike the Warsaw Convention) the carrier is seldom going to be able to limit itself to tier-one liability but will usually face unlimited (i.e. tier-two) liability. Circumventing jurisdiction

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[38] Civil Liability (Contribution) Act 1978, s 2(3).
[39] Article 22(1) and Article 33 of the Warsaw Convention and Articles 25 and 27 of MC99.
[40] See Drion (n 7) 104.

can be highly beneficial in such circumstances. This is best illustrated in practical terms. If a claimant passenger successfully sues a manufacturer in a US state court—where the carrier would not be subject to an MC99 action by the claimant passenger in the US—then where that manufacturer brings a third-party against the carrier, the carrier will be liable for a quantum of damages established by a US jury which will almost always be more than it would otherwise have been.

Cases like that of *Armavia* and *Aircrash over the Mid-Atlantic* demonstrate the controversy involved with third-party actions. There is a real risk of circumvention of WCS and MC99, not just its substantive and jurisdictional provisions but also its underlying purposes. Indeed, the decision in *Armavia* not to apply the Warsaw Convention to third-party actions has been condemned by some commentators as undermining the very uniformity that the Convention sought to achieve.[41] Some have argued that the Conventions ought to apply to third-party actions brought against carriers.[42] It has even been argued in some cases (most notably in *Reed v Wiser*[43] which is analysed below) that the Conventions ought to apply to actions brought by claimant passengers against specific categories of third parties for damages arising out events occurring during international carriage by air. The goal behind both lines of argument is to insulate the Conventions from circumvention. It remains a hotly contested issue. To resolve this, it is necessary to examine the applicability of WCS and MC99 to third-party actions, which in turn will inform us as to their place in the bigger picture.

7.3 The Applicability of WCS and MC99 to Third-Party Actions

Placing third-party actions within the bigger picture of international aviation litigation requires determining the applicability of WCS and MC99 to such actions in the first place. This requires looking at what place (if any) *actions against third parties* have within those regimes before turning attention to the specifics of *third-party actions*. The distinction involved is key. We shall start by looking at the question of the applicability of WCS to actions brought against agents, servants, employees, *préposés*, etc., of the carrier. These are third parties vis-à-vis the contract of carriage between the claimant passenger and defendant carrier. Where the passenger sues the agent of the carrier, then they are suing a third party, although it is not a third-party action. However, a third-party action may well arise during such litigation, i.e. where the third party decides to seek contribution or indemnification from the carrier. Revealing how the courts and the international community have dealt with the problem of actions taken by claimant passengers against third parties will lead us directly to the issue of the risk of circumvention via resulting third-party actions.

[41] PMJ Mendes de Leon 'Jurisdiction under the Exclusivity of Private International Law Agreements on Air Carrier Liability: The Case of Airbus versus Armavia Airlines (2013)', *From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law (Essays in Honour of John Balfour)* (Martinus Nijhoff 2013) 273; L Chassot 'Le Domaine de La Responsabilité Du Transporteur Aérien International à La Lumière de Deux Dédisions Rédentes' [2016] *RFDAS* 5, 23.

[42] See e.g., Drion (n 7) 104.

[43] 555 F 2d 1079 (2d Cir 1977).

7.3.1 The *Préposé* Problem

Both common law and civil law systems provide for vicarious liability of the master for his "auxiliary".[44] But, there is one important distinction between the two systems which has created some controversy within the context of WCS. The authentic French text of the Warsaw Convention employs the term "*préposé*" which is translated as "agent" in the US and UK translations and as "servant and agent" in the Hague Protocol. However, neither of the English translations are adequate to describe the full meaning of term *préposé.* The general position in civilian legal systems is that a *préposé* may be an independent contractor,[45] whereas 'vicarious liability in English law does not generally extend to the acts of independent contractors.'[46] *Préposé* is thus a broader concept than the common law one of servant or agent.[47] In light of this divergence, and as the French is the only authentic language version of the Warsaw Convention, the term "*préposé"* shall be used hereinafter.

The question arose whether the provisions of the Convention applied in an action brought by a passenger/shipper against a carrier's *préposé*. Aside from being of academic concern, this lacuna was exploited by claimant lawyers as a possible means of avoiding the Convention's provisions. If not covered by the Convention, then an action against a *préposé* could be brought under *le droit commun*. The advantage of which is it may allow a forum not specified under Article 28, a more generous period of limitation and, most importantly, yield unlimited liability without having to prove wilful misconduct. Aside from the obvious inequity involved in a *préposé* facing unlimited liability while his employer could limit its liability, the more pernicious effect of this strategy was that in reality it was the carrier who would end up paying the bill for his *préposé's* liability. This would arise either due to indemnities given by the carrier to the *préposé* in the employment contract or by means of a claim for contribution or indemnification by the *préposé* against the carrier. This meant that the Convention was being effectively circumvented and its objectives undermined.

The risk of circumvention posed by contribution/indemnification actions raised two critical questions. Does the Convention apply to actions brought by claimants against *préposés*? If not, does the Convention apply to claims brought by *préposés* against the carrier?

The Warsaw Convention embodies a basic rule by which the carrier is *prima facie* liable for the acts and omissions of its *préposés*. At no point does the unamended Warsaw Convention address the personal liability of the *préposé*. This is confirmed by the drafting history and background to the Warsaw Convention which demonstrate that the drafters exclusive focus was on the liability of the carrier to passengers/shippers, they were not at all concerned with the personal liability of *préposés* or any third party.[48] In fact, the only liability angle with respect to *préposés* contained in the Convention is the liability of the carrier for the acts of its *préposés*, i.e.

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[44] The term "auxiliary" is used for descriptive purposes only as a means of collectively referring to agents, employees, servants, contractors, *préposés,* etc., it is not intended to convey a specific juridical meaning.

[45] RH Mankiewicz *The Liability Regime of the International Air Carrier* (Kluwer Law 1981) 45.

[46] JW Salmond *Jurisprudence* (GL Williams ed, 10th edn, Sweet & Maxwell 1947) 414 n k.

[47] RH Mankiewicz 'Judicial Diversification of Uniform Private Law Conventions' (1972) 21 *Int'l & Comp LQ* 718, 740.

[48] See RC Horner and D Legrez (trs) *Second International Conference on Private Aeronautical Law, October 4-12, 1929 Warsaw: Minutes* (Fred B Rothman 1975) 246.

vicarious liability. On the face of it, this means that actions brought by passengers/shippers against *préposés* fall outside the Convention and are governed by *le droit commun,* thereby creating the loophole by which the carrier, via the *préposé*, could be exposed to liability outside the terms of the Convention.

Faced with this dilemma, two alternative responses were taken. The first was to accept that this loophole existed and to close it by amending the Warsaw Convention. The second response was to interpret the unamended Warsaw Convention in such a way that the loophole would not arise in the first place.

7.3.1.1 The Hague Protocol

The first response was adopted by the international community at the Hague Conference in 1955. The reality was acknowledged that the indemnification of *préposés* by the carrier meant that an action taken directly against a *préposé* could result in circumvention of the Convention and its limits of liability.[49] The solution was the adoption of the Hague Protocol. It amends the Warsaw Convention so as to include a new provision (i.e. Article 25A) extending the limits of liability to *préposés*.[50] It must be noted that only the monetary limitation of liability is extended to *préposés*, in all other respects, e.g. jurisdiction, the Convention remains inapplicable to the action against the *préposé*. This has changed with MC99, under Article 30(1) of which, the servant or agent may rely on the *conditions* and limits of liability under the Convention.

One might imagine, that the mere fact that the international community took the step of amending the Warsaw Convention in this way is proof positive of the recognition of a gap in the Warsaw Convention, i.e. acknowledgement that it did not extend to *préposés*. In fact, only Professor Ambrosini (a member of the Italian delegation) voiced any view to the contrary and even this was made in the context of acquiescence to the inclusion of Article 25A rather than in defence of the interpretation of the Warsaw Convention. He is reported as having said that he always thought:

> [T]hat the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents, and especially for the simple reason that, in his opinion, the carrier and his servants or agents were, from the legal point of view, the same person.[51]

Professor Ambrosini's comments do carry authority since he was one of the drafters of the Warsaw Convention. However, by far the stronger position is that Article 25A was not a mere clarification but actually a substantive addition. So, while it cannot be stated with utter conclusiveness, the minutes of the Hague Conference and the adoption of Article 25A provide very strong support for the view that the Warsaw Convention does not govern the personal liability of *préposés*. After the adoption of the Hague Protocol, the issue was settled (at least insofar as

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[49] See comments of delegate from Mexico. *International Conference on Private Air Law (The Hague September 1955) Doc 7686-LC/140 (Volume 1: Minutes)* (ICAO 1956) 216. See also comments of the Greek and Belgian delegates. ibid 218.

[50] Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (opened for signature 28 September 1955, entered into force 1 August 1963) 478 UNTS 373 (Hague Protocol) Article XIV.

[51] *International Conference on Private Air Law (The Hague September 1955) Doc 7686-LC/140 (Volume 1: Minutes)* (n 49) 220.

préposés and the limit of liability was concerned) for those States who chose to adhere to it. The fly in the ointment would be that the US would not ratify the Hague Protocol until 2003.

7.3.1.2 The Lamentable Authority of *Reed v Wiser*

Having not ratified the Hague Protocol, the US opted—through its courts—for an alternative response to the unforeseen problem of *préposés*. *Reed v Wiser*[52] concerned claims brought by the relatives of decedent passengers against the senior management of the carrier (Trans World Airlines) for their alleged negligence in not preventing a bomb being planted aboard the aircraft. Seeking to rely on the Convention's limitation of liability, the defendants argued that for the purpose of the Convention the term "carrier" was not limited to the corporate entity but also included employees and agents acting on its behalf.

The trial court had agreed with the plaintiffs. Although it accepted that there were strong policy reasons supporting the defendant's position, the court determined that the correct interpretation of the Convention was that it did not apply to an action against *préposés*.[53] The trial court was right, the drafting history confirms that the delegates regarded the carrier and *préposé* as being distinct legal entities, in line with general principles of law.[54]

It was a different story on appeal. The Second Circuit was in no doubt as to the adverse effects of not permitting employees to rely on the protections of the Convention, it stated:

> Should employees not be covered by the provisions of the Convention, the entire character of international air disaster litigation involving planes owned and operated by American airlines, would be radically changed. The liability limitations of the Convention could then be circumvented by the simple device of a suit against the pilot and/or other employees, which would force the American employer, if it had not already done so, to provide indemnity for higher recoveries as the price for service by employees who are essential to the continued operation of its airline. The increased cost would, of course, be passed on to passengers.[55]

This excerpt is suggestive of a court preparing the way for a purely policy driven conclusion. Indeed, this is precisely what transpired. What reference there was to legal principle in the court's holding served only to lend the thinnest doctrinal gloss to a blatant example of judicial legislating. The court never clearly established a *ratio decidendi*. Instead, the court hedged its bets by providing two half-baked attempts at a *ratio* but failed to follow through on either.

On one hand, the court asked itself if the term "carrier" was intended to cover just the corporate entity or whether it 'was intended to embrace the group or community of persons actually performing the corporate entity's function.'[56] Whilst the answer under the common law would be in the negative, the US court showed itself uncharacteristically open to considering what the views of other jurisdictions might be.[57] Without any authoritative basis,[58] it determined that in some civil law systems, the employer and employee were treated as one and that this could have been the

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[52] 414 F Supp 863, 866 (SDNY 1976) rev'd 555 F 2d 1079 (2d Cir 1977).
[53] ibid.
[54] See Horner and Legrez (n 48) 64–66.
[55] *Reed v Wiser* (n 43) 1082.
[56] ibid 1083.
[57] G Miller *Liability in International Air Transport* (Kluwer Law 1977) 281.
[58] *Reed v Wiser* (n 43) 1083–1084. All the court could point to were the comments of Professor Ambrosini (quoted above at 7.3.1.1) raised at during the Hague Conference in 1955 and repeated at the Guadalajara Conference in 1961.

intention of the drafters of the Warsaw Convention. As shown above (see 4.2.2.2), this is simply not the case. Rather than follow through on this line of argument, the court just left the matter hanging with the declaration that it could not deem a common law reading as controlling.[59]

On the other hand, the court looked to Article 24, indulging itself in an expansive reading of that article. Article 24(1) provides: 'In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.'[60] The court read this as meaning that any action for damages arising out of the events anticipated by Articles 17, 18 and 19, is governed by the provisions of the Warsaw Convention. On application to the facts of the case, the court explained that since the action was one for damages and because it arose out of the death of a passenger during international carriage by air, that it was therefore covered by the Convention and subject to its monetary limitation.[61] The implicit reasoning of the Second Circuit was that the scope application of the Warsaw Convention was effectively determined by Article 24, i.e. that the claimant's action be one for damages arising out of an event covered by the Convention. Yet again, the court failed to follow through on its reasoning and elected, once again, to leave its *ratio* half-baked.

What is missing from its equation are the identities of the parties to the litigation. If one follows through on the logic, the Warsaw Convention would apply to all actions for damages arising during international carriage from an event described in Articles 17, 18 or 19, regardless of the identity of the defendant (or indeed the plaintiff). An action by a passenger against a manufacturer would be covered, as would the third-party action taken by that manufacturer against the carrier. Of course, not even the Second Circuit thought an action against a manufacturer was covered. It took it for granted that the defendant must be a carrier but this would not explain why the *préposé* should be covered. Why should one third party (i.e. the manufacturer) be outside the Convention but another (i.e. the *préposé*) be within it? This line of argument just reverts back to the original question of whether the definition of the carrier was intended to include its *préposés*.

The doctrinal basis for the court's ultimate decision was decidedly patchy and left deliberately vague. On the one hand its interpretation of the term "carrier" was dubious given the court's poor appreciation of civilian law. On the other hand, its unjustly expansive interpretation of Article 24 and the purported scope of the Convention was misleading. It is submitted that it was not the intention of the court to resolve the matter through doctrinal reasoning. Instead, the court was satisfied to fumble around in the text of the Convention until it could rustle up some ambiguity to act as the shakiest of pegs on which to hang its purely policy driven decision. While the doctrinal basis was feeble, the court could, in contrast, rely on several powerful policy considerations which justified extending the protections of the Convention to *préposés*. Foremost amongst which was that it would ensure the protection provided by the Convention to the carrier was not circumvented by plaintiffs bringing actions against its *préposés*, thus safeguarding the objects of the Convention.[62] The action of the Second Circuit in *Reed v Wiser*, though well-intentioned, was nonetheless a dimly-veiled example of judicial amendment of an international treaty. Simply put,

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[59] ibid 1084.

[60] Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention) Article 24.

[61] *Reed v Wiser* (n 43) 1084.

[62] ibid 1089.

the US did not want to adhere to the Hague Protocol so instead it attempted to cherry pick what it liked about the Hague Protocol, i.e. extension of the limits of liability to *préposés*. At its base, *Reed v Wiser* is judicial ratification of part of the Hague Protocol and is a poor decision which should be erased altogether. Fortunately, its influence has been curtailed by US adherence to the Hague Protocol in 2003 and by MC99.

Reed v Wiser committed two major errors which have been hugely troublesome for the question of third-party actions under both to the WCS and MC99.

First, although the court had limited its judgment to the specific issue before it, i.e. the applicability of the monetary limitation, once it accepted that the monetary limitation applied, it was inevitable that subsequent decisions (discussed below) were going to be made which extended the coverage of the remainder of the Convention (e.g. time limits) to actions against *préposés*—not even the Hague Protocol had done that.

Secondly, it fostered the notion that the identity of the claimant is not of critical importance to determining the application of the Convention. This was not mischievous on the facts of *Reed v Wiser* because the plaintiffs were the representatives of decedent passengers and thus their standing was unquestioned. However, subsequent cases would take *Reed v Wiser* to mean that the identity of the plaintiff is irrelevant so long as the action is against a carrier for loss covered by the Convention.[63] This meant the Convention might apply to a third-party taken against a carrier, which is the question that directly concerns us.

7.3.1.3 MC99 and *Préposés*

It would be remiss not to briefly mention the state-of-play under MC99 with respect to *préposés* and actual carriers. Thankfully, the provisions introduced by the Hague Protocol and the Guadalajara Convention[64] have been replicated almost verbatim in MC99. Articles 30 and 43[65] of MC99 were modelled on Article 25A of the Warsaw Convention (as amended by the Hague Protocol)[66] and Article V of the Guadalajara Convention respectively. Thus, under MC99, a *Reed v Wiser* type scenario involving an action against a *préposé* will be covered. In the context of MC99, the reality is that insofar as the limits of liability are concerned, there is almost no incentive for a claimant to pursue a *préposé* since unlimited recovery against an insured carrier on the basis of strict liability is guaranteed in most cases. It would be rare indeed if the basis for liability against a *préposé* offered an easier route to recovery than a cause of action under the Convention. However, as we shall see in the following sections, an action against a servant or agent might prove preferable where it guarantees a forum in a generous jurisdiction which is not available under MC99.

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[63] See cases discussed below in 7.3.2.2.

[64] 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 18 September 1961, entered into force 1 May 1964) 500 UNTS 31 (Guadalajara Convention).

[65] Convention for the Unification of Certain Rules for International Carriage by Air (signed 28 May 1999, entered into force 04 November 2003) 2242 UNTS 309 (MC99) Article 43.

[66] Article 25A had also been incorporated into the Warsaw Convention System by Additional Protocol No 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955 (opened for signature 25 September 1975, entered into force 14 June 1998) 2145 UNTS 31 (MAP4).

7.3.2 Third-Party Actions and WCS

As noted above, *Reed v Wiser* left the door open for courts to reach the conclusion that the Warsaw Convention applied to third-party actions taken against carriers. Unsurprisingly, some courts would take this opportunity whereas others would not. Which is the correct position?

7.3.2.1 The Orthodox Position

The Warsaw Convention makes no mention of recourse actions (which include third-party actions for contribution/indemnification). The topic did emerge during the Diplomatic Conference of 1961, at which was adopted the Guadalajara Convention. This Convention neither creates nor presumes the existence of a right of recourse between actual carriers and contracting carriers. In fact, it limits itself to merely facilitating recourse actions where they exist under *le droit commun* by ensuring a right of joinder for each carrier against the other.[67] The first *explicit* reference within WCS to a right of recourse came in 1971 with the Guatemala City Protocol (GCP).[68] However, this reference was only made, 'in order to remove any doubts'.[69] Such rights were already enforced in the context of WCS, not in the sense that it was recognized that a right of recourse existed under the Convention, but that such rights, however founded, were not incompatible with the Convention. GCP never entered into force, but the right of recourse provision contained therein was included in Montreal Additional Protocol No. 4 (MAP4) of 1975,[70] which entered into force in 1998. What this shows is that the understanding was that WCS (with the exception of the right of joinder under the Guadalajara Convention) does not regulate recourse actions.

This is reflected in the orthodox position adopted by some courts, for example, in a Canadian case from 1978, *Connaught Laboratories Ltd v Air Canada*.[71] In this case, involving successive carriage, one carrier had been found liable to the shipper and brought a third-party action against the other carrier for contribution or indemnification. The other carrier sought to rely on the time limitation contained in the Warsaw Convention (i.e. Article 29) to defeat the third-party action. The Ontario Supreme Court addressed the issue by asking itself whether the Convention applied to claims between carriers, reaching the view that:

> In short, while the Convention deals with the claims of passengers, consignors and consignees, and the liability of carriers therefor, it does not deal with the claims of carriers *inter se*. Consequently, it is my view, that Article 29 does not apply to the action of Air Canada against Andes Airlines and does not constitute the statutory bar it is said to represent.[72]

The manifest common sense of the ruling in *Connaught Laboratories* seems unassailable. In

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[67] See *International Conference on Private Air Law (Guadalajara 1961) ICAO Doc 8301/LC/149 (Volume I - Minutes)* (ICAO 1963) 32, 157.

[68] 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 (opened for signature 8 March 1971) 10 ILM 613, ICAO Doc 8932 (Guatemala City Protocol or GCP) Article XIII (would have inserted a new Article 30A to Warsaw Convention).

[69] *International Conference on Air Law - Guatemala City, February-March 1971 ICAO Doc 9040-LC/167/1* vol 1 (ICAO 1971) 197 (per the reported comments of the Dutch Delegate).

[70] See Article XI of MAP4 (n 66).

[71] (1978) 94 DLR 3d 586 (ON SC).

[72] ibid [26].

stands for the position that the Warsaw Convention governs actions between passengers (or shippers) against the carrier. The claimant's cause of action arises from the carrier's liability to the claimant under the Convention. The identity of the parties to the cause of action is thus crucial to determining the question of its applicability. If the action is not one between the proper parties then it is, by definition, not covered by the Convention. Therefore, an action taken by one carrier against another, or by a carrier's servant or agent against a carrier, or by a passenger against manufacturer, and so on, is not governed by the Convention, but either by some other international treaty or by *le droit commun*.

7.3.2.2 The Alternative Position

The alternative position is grounded in the same reasoning as applied in *Reed v Wiser* which broadens the meaning of a Convention action, firstly, to include actions taken against *préposés* (since these are to be identified with the term "carrier") and secondly, to apply to any action for damages against a carrier (including *préposés*) covered by the Convention.

In the 1985 case of *LB Smith Inc v Circle Air Freight Corp*,[73] the Supreme Court of Onondaga County, New York applied the Warsaw Convention's two-year limitation to a third-party action brought by the contracting carrier against the actual carrier, Iberia.[74] This was supported, in the court's view, by the wording of Article 24(1) which it construed liberally to mean that 'an action "however founded" would include an action for contribution.'[75] Whilst *Reed v Wiser* was not cited as authority for this point, the reasoning is based on the same misreading of Article 24. Likewise, in a series of cases in the late 1980s (including *Split End Ltd v Dimerco Express (Phils) Inc*), the District Court for the Southern District of New York approved the proposition in *LB Smith* that the Convention applies to third-party actions taken against carriers (including *préposés*).[76] Disappointingly, the courts did not outline the doctrinal basis for their holdings, instead they merely followed precedent.[77] The only reasonable conclusion is that the courts in these cases applied the Convention because they understood *Reed v Wiser* as holding that the Convention governs any action for damages against a carrier (or its *préposé*) arising out of an event covered by the Convention irrespective of who the claimant is. In addition, they also reached the inevitable construction—implicit in *Reed v Wiser*—that the Convention's provisions applied generally to third-party actions, not just its monetary limitations.[78] Similar decisions were reached in a number of subsequent cases.[79]

A couple of US cases involving third-party actions taken against carriers for damage arising out of events covered by the Convention deserve special attention because the courts in those

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[73] 488 NYS 2d 547 (1985).
[74] ibid 550.
[75] ibid 549.
[76] *Split End,* No 85-CV-1506, 1986 WL 2199 (SDNY 11 Feb 1986); *Data General Corp v Air Express Int'l Co* 676 F Supp 538 (SDNY 1988); *Mitchell, Shackleton & Co Ltd v Air Express Int'l Inc* 704 F Supp 524 (SDNY 1989).
[77] *Split End* (n 76) *4 citing *LB Smith* (n 73); *Data General* (n 76) 540 citing *LB Smith* (n 73); *Split End* (n 76).
[78] In most cases, the provision at issue was the time limitation for commencing suit. See e.g., *Motorola Inc v MSAS Cargo Int'l Inc* 42 F Supp 2d 952 (ND Cal 1998).
[79] *Royal Insurance Co v Emery Air Freight Corp* 834 F Supp 633 (SDNY 1993); *Motorola* (n 78).

cases did not apply the Convention to third-party actions against carriers. These two cases are *Re Air Crash at Agana, Guam*[80] and *Re Air Crash Near Nantucket, Massachusetts on October 31, 1999*.[81] In both *Guam* and *Nantucket*, the defendants to the main action (the US State and ATC providers in *Guam*, Boeing and Parker Hannifin in *Nantucket*) had brought third-party actions for indemnification or contribution against the carrier (Korean Air Lines in *Guam*, EgyptAir in *Nantucket*). Both airlines argued that the third-party claim was governed by the Warsaw Convention and that the US court had no jurisdiction because the US was not one of forums available under Article 28. In *Guam*, the California district court held that the text of the Warsaw Convention applied exclusively to actions by passengers or shippers. Therefore, an action taken by a manufacturer against a carrier was not subject to the Convention's provisions.[82] In *Nantucket*, the New York district court referred to *Guam* approvingly, stating that, '[t]he identity of the parties is central to the Convention.'[83] The court continued by stating that '[t]he express purpose of the Convention was to regulate litigation between passengers and carriers',[84] noting that the Convention is silent as to contribution and indemnification claims between manufacturers and carriers.[85] The *Nantucket* court concluded that 'to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.'[86] The result of which meant that the third-party plaintiffs' actions could be brought in the US since they were not pre-empted by the Convention's jurisdictional provisions.

The position reached by the courts in *Guam* and *Nantucket* is at odds with the one adopted by the US courts in the decisions discussed earlier (such as *Split-End*). Although it is submitted that *Guam* and *Nantucket*, were correctly decided, both failed to distinguish themselves from the precedents established under the reasoning first laid down in *Reed v Wiser*. It is would seem the courts are reluctant to overrule *Reed v Wiser* and its progeny, while at the same time, the need to staunchly support its lamentable authority has been greatly reduced by US adherence to MAP4 in 1998 and MC99; the result being that fewer—yet still some—actions will be taken under the unamended Warsaw Convention. Indeed, the fact that decisions in *Guam* and *Nantucket* date from 1998 from 2004 respectively, would suggest as much.

The result is that in the US there is conflicting decisions on the question of the applicability of the Warsaw Convention to third-party actions. With no satisfactory conclusion, the issue has carried over into the litigation of third-party actions under MC99.

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[80] The details provided herein are taken from commentary on the case provided by AH Collier and SN Brie 'The Battle over Air France: Does the Montreal Convention Apply to Manufacturer Claims for Carrier Indemnity' <http://www.fitzhunt.com/sites/default/files/news/The%20Battle%20Over%20Air%20France%20Does%20the%20Montreal%20Convention%20Apply%20to%20Manufacturer%20Claims%20for%20Carrier%20Indemnity-Collier-Brie.pdf> accessed 28 February 2019; B Rodriguez 'Recent Developments in Aviation Liability Law' (2000) 66 *J Air L & Com* 21; SA Sundvall and MC Andolina 'The Status of Pending Air Carrier Litigation' (2000) 66 *J Air L & Com* 167; BF Benson and J Dahlman Rosa 'The Status of Pending Air Carrier Litigation' (2001) 66 *J Air L & Com* 1367; AM Huarte 'Korean Air Flight 801: Warsaw and the FTCA' <http://www.mcmc-law.com/korean-air-flight-801-warsaw-and-the-ftca/> accessed 14 April 2019.

[81] 340 F Supp 2d 240 (EDNY 2004).

[82] Collier and Brie (n 80) 20.

[83] *Air Crash near Nantucket* (n 81) 243.

[84] ibid.

[85] See ibid 243–244.

[86] ibid 244.

7.3.3 Third-Party Actions and MC99

MC99 contains two articles relating to third-party recourse actions: one regarding any right of recourse against third-parties (Article 37) and the other regarding any right of recourse between contracting and actual carriers (Article 48). In this regard, MC99 is merely a consolidation of the provisions on recourse from the Guadalajara Convention and MAP4. Therefore, one would expect that the courts would reach the same conclusions regarding the applicability of MC99 to third-party actions as they did in respect of WCS.

The first cases to address the applicability of MC99 to third-party claims for contribution/indemnification emerged in the US and were the subject of two district court cases in 2008 and a third in 2010. The first was *Chubb Insurance Co of Europe SA v Menlo Worldwide Forwarding Inc* (*Chubb I*)[87] before the District Court for the Central District of California, the second was *American Home Assurance Co v Kuehne & Nage (AG & Co) KG,*[88] before the District Court for the Southern District of New York. In *Chubb I*, the court applied the time-limitation of the Convention to a third-party claim brought by a contracting carrier against the actual carrier, referring to authorities for the same proposition under the Warsaw Convention.[89] Strictly speaking, the court in *Kuehne & Nagel* did not have to decide the question of the applicability of MC99 to a claim between a contracting carrier and an actual carrier because the parties had not contested it. However, in the course of its opinion, the court did express its agreement with *Split End* that the time limitation would apply in an action between a contracting and actual carrier.[90] In a third case, this time in 2010, *Chubb I* was followed by the District Court for the Northern District of California in *Allianz Global Corporate & Speciality v EMO Trans California Inc*.[91] In each case the courts had adopted the same perspective on the issue as had been applied to WCS, in other words that MC99 applied to third-party claims. However, the proverbial cat would be set amongst the pigeons in 2011 when *Chubb I* reached the Court of Appeals for the Ninth Circuit.

7.3.3.1 A New Line of Argument

In the *Nantucket* case, a new line of argument was raised to the effect that the third-party action brought by the manufacturer defendants was *coextensive* with the underlying passenger claim and ought, therefore, to be governed by the same law, i.e. the Warsaw Convention.[92] The court was outright in its rejection of this proposition, stating that the manufacturing defendants' contribution and contractual claims were based on legal and equitable relationships with the carrier which were distinct from any passenger claim.[93] The court took the view that the contribution/indemnification claims were grounded in a separate and distinct source.[94] This line

[87] [2008] Av L Rep 10988806 (CCH), 2008 WL 10988806 (CD Cal 14 Jan 2008) rev'd 634 F 3d 1023 (9th Cir 2011).
[88] 544 F Supp 2d 261 (SDNY 2008).
[89] *Chubb I* (n 87) citing *Motorola* (n 78) 955; *Data General* (n 76) 540.
[90] *Kuehne & Nagel* (n 88) 264 citing *Split End* (n 76).
[91] No 09-CV-4893, 2010 WL 2594360 (ND Cal 22 June 2010).
[92] *Air Crash near Nantucket* (n 81) 242–243.
[93] ibid 244.
[94] ibid.

of argumentation was taken up by the Court of Appeal for the Ninth Circuit in *Chubb II,*[95] this time in the context of MC99.

As noted above, the Californian district court's dismissal of the third-party complaint in *Chubb I* on the grounds that the claim was time-barred by Article 35 of MC99 was appealed to the Ninth Circuit. In *Chubb II*, O'Scannlain J neatly summarized the issue by stating: 'We must decide whether the Montreal Convention's two-year statute of limitations on "the right to damages" in connection with international air cargo shipments applies to suits seeking indemnification and contribution.'[96] His analysis began with the text of Article 35 MC99 with the court asking itself whether UPS's claims against Qantas fell within the single right recognized by it, i.e. a right to damages.[97] The substantive elements of that right are provided in Articles 17 to 19 of MC99 i.e. that 'by which a passenger or consignor may hold a carrier liable for damage sustained to passengers, baggage, or cargo.'[98] The right to damages referred to in Article 35 was thus identified with the cause of action under MC99.

Turning to the facts, a right to damages was present in the main action between the shipper and the contracting carrier but not in the third-party action—which was the one at issue—between the contracting carrier and the actual carrier. The third-party action was not based upon the Convention's right to damages but upon a right of recourse; the court drawing a strong distinction between the two.[99] The Ninth Circuit stated that a cause of action for contribution/indemnification is not created by the Convention, but neither is it pre-empted where available under *le droit commun*.[100] In conclusion, the Ninth Circuit reversed the district court's decision and held that MC99 did not apply to the third-party action.[101]

In 2012, the Court of Appeal for New South Wales, Australia, issued a judgment in the case of *United Airlines Inc v Sercel Australia Pty Ltd*[102] in which it articulated the distinction between the right to damages and the right of recourse in similar terms to Ninth Circuit in *Chubb II*. However, the case was not one under MC99 but was taken pursuant to the Australian Civil Aviation (Carrier's Liability) Act 1959[103] which gives force of law to the Warsaw Convention (as amended by the Hague Protocol and MAP4). Like *Chubb II*, the Australian court distinguished between the causes of action. The cause of action granted the passenger arises under the Convention and consists of a claim made by a passenger against a carrier seeking to hold it liable to compensate the claimant for damages arising from personal injury. In contrast, a third-party action is not one for damages for the injury of a passenger but is one which seeks to hold the carrier liable to provide contribution or indemnification, the cause of action for which is sourced, not in the Convention, nor in the Act, but by other provisions of *le droit commun*.[104] On that basis, the court held that the Convention's time-bar did not apply to the cause of action for

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[95] *Chubb Insurance Co of Europe SA v Menlo Worldwide Forwarding Inc* 634 F 3d 1023, 1025 (9th Cir 2011) (*Chubb II*).
[96] Ibid 1025.
[97] ibid 1026.
[98] ibid.
[99] ibid.
[100] ibid.
[101] ibid 1028.
[102] [2012] NSWCA 24 (Australia).
[103] Civil Aviation (Carrier's Liability) Act 1959, Compilation No 29 (Australia).
[104] *Sercel* (n 101) [67].

contribution/indemnification.[105] In Allsop P's view, '[c]laims by persons other than passengers their estates or heirs were not picked up by the words of the Convention.'[106]

This may seem a rather formalistic perspective to adopt since the liability of the carrier to provide contribution/indemnification is conditional on its primary liability toward the passenger. However, if one looks at the matter from the perspective of the right being vindicated by each cause of action, it becomes clear that they do represent independent and separate causes of action. A right to damages seeks to compensate the passenger for the injury suffered during carriage by air. A right to contribution/indemnification seeks to reimburse a paying tortfeasor or indemnifier who has paid more than its actual fault demands, the purpose is not to compensate the passenger for his loss but to redistribute the liability between the responsible parties.

Whilst the Ninth Circuit's decision in *Chubb II* is to be regarded as the correct one, its authority is open to some doubt. First, the court did not expressly address the case law on WCS which had determined that the regime *did apply* to third-party actions. The court merely noted that it had considered the cases but found them unpersuasive. Perhaps the court was reluctant to step too heavily on the toes of *Reed v Wiser*. A more thorough examination and critique would have been welcome, as it stands this omission diminishes the persuasive value of *Chubb II* in other circuits. More unfortunate is the fact that the *ratio decidendi* limited itself to stating that Article 35 of MC99 did not apply to third-party claims and stopped short of holding that MC99 does not apply to third-party actions at all. It was not helped in this by the manner in which the case was initially pleaded. The parties had not contested the application of MC99 to the third-party claim but had differed only as to the extent of its application. Had the court being free to do so, then it seems likely a broader holding might have been made since in the concluding paragraphs it expressed its agreement with *Connaught* on the point that the Warsaw Convention was only intended to deal with claims between passengers/shippers/consignees and carriers, and not claims of carriers *inter se*.[107] *Sercel* was braver on this front, but being a decision in respect of WCS its rationale may not be immune from challenge in the context of MC99.

7.3.3.2 An English Authority?

The UK courts have yet to issue an opinion on the issue, possibly because it is generally accepted that the MC99 is not applicable to recourse actions.[108] However, in 2015, the Court of Appeal did deliver a judgment on the matter of a third-party action for contribution in the context of the Athens Convention[109] in *Feest v South West Strategic Health Authority*.[110] Although not an MC99 case, nor even an aviation case, it is submitted that Tomlinson LJ's judgment should be recognized as bearing strong persuasive value because the Athens Convention was modelled on the Warsaw Convention and the provisions at issue are substantially the same in both instruments. The Athens Convention, in the simplest of terms, does for carriage of passengers by sea what WCS and

[105] ibid [69].
[106] ibid [99].
[107] *Chubb II* (n 95) 1028.
[108] See D McClean (ed) *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019) div VII [446].
[109] Athens Convention relating to the Carriage of Passengers and Luggage by Sea, 1974 (opened for signature 13 December 1974, entered into force 28 April 1987) 1463 UNTS 19 (Athens Convention).
[110] [2016] QB 503 (CA).

MC99 do for carriage of passengers by air. The carrier sought to invoke the two-year time limitation provided by the Athens Convention, arguing that the Convention applied to the claim for contribution.[111]

Before the Court of Appeal, Tomlinson LJ had to answer the question of whether the Athens Convention governs a third-party claim for contribution made against a carrier.[112] He rejected the trial judge's suggestion that a claim to damages and a claim to contribution were the same creature, holding instead that there existed a distinction between them, such that a claim to contribution could not be regarded as an action for damages for personal injury to a passenger.[113] This holding was supported by noting that the Athens Convention only purports to unify certain rules and not to provide 'a complete code governing all liability of sea carriers to whomsoever owed'.[114] In addition to distinguishing a Convention claim from contribution on the basis of the identity of the parties, the court also found support in the distinct sources of each cause of action. Recognizing of course that 'the liability of the carrier to contribute is critically dependent on its own liability to the passenger',[115] the court emphasized that the cause of action for contribution is provided under *le droit commun*, being an autonomous cause of action,[116] distinct in source from the Convention's action for damages. Tomlinson LJ stated, therefore, that '[i]t is unsurprising that the claim in itself is unaffected by the provisions of the Athens Convention.'[117] In so doing, Tomlinson LJ opined that the Warsaw Convention likewise does not apply to claims for contribution,[118] citing *Chubb II* and *Sercel* approvingly.[119]

7.4 Concluding Remarks

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

The two-party paradigm upon international aviation litigation was originally conceived was valid at the time of the Warsaw Convention. The then existing legal landscape under the common law and civil law systems meant that such litigation was seldom multi-party in nature. However, with the emergence of alternative remedies and the consequent introduction of third-party actions for contribution/indemnification, the two-party paradigm was exploded. These actions provided a new avenue by which third parties became involved in international aviation litigation and could exert their influence, specifically, for our purposes, on the matter of choice of forum. Carriers and third parties routinely cooperate to ensure their preferred choice of forum succeeds against that of the claimant passenger. This is a reality that has not been taken into account when regulating choice of forum within the jurisdictional regime of WCS or MC99.

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[111] ibid 509.
[112] ibid 507.
[113] ibid 510.
[114] ibid.
[115] ibid 514.
[116] ibid.
[117] ibid.
[118] ibid 512 citing *Connaught* (n 71).
[119] *Feest* (n 110) 512–513 citing *Chubb II* (n 95); *Sercel* (n 101).

Although still the subject of debate, the balance of opinion has come down on the side of holding that third-party actions are not governed by WCS or MC99. It is submitted that this is the correct view. Therefore, the decision reached by the Cour de Cassation in *Armavia* was the right one. Furthermore, this view is supported by the authorities of *Chubb II*, *Sercel*, and *Feest*. The argument put forth that a third-party claim is derivative of the passenger's Convention cause of action can thus be rejected. Insofar as passenger related claims are concerned, WCS and MC99 are exclusively concerned with actions for damages taken by passengers against a carrier. A brief note must be made with respect to death actions which are, strictly speaking, actions taken by third parties. These are governed, to a limited extent, by the WCS and MC99.[120] However, these are distinguishable from third-party actions for contribution/indemnification. First, WCS/MC99 apply to such actions only because those instruments specifically provide as much; no such provision is made for third-party actions for indemnification/contribution. In other words, the application of WCS/MC99 to wrongful death is the exception that proves the general exclusionary rule. Second, a wrongful death action is distinguishable in nature from a third-party action for contribution/indemnification insofar as the former is an action for damages whilst the latter is not.

Unfortunately, the non-application of the Conventions to third-party actions has the consequence of opening up the possibility of circumvention of WCS or MC99. However, we must be careful when employing the term "circumvention". Although it is often used in a pejorative sense, the circumvention involved here is not illegal or dishonest. The claimant is entitled to pursue a third party under an alternative cause of action rather than pursue the carrier via WCS or MC99. However, where that third party then brings a third-party action against the carrier, the result can be that the carrier indirectly answers a passenger claim in a forum which he would not have been subject to in an action brought by the passenger directly. This is the reality of international aviation litigation and policymakers and legislators are entitled—if not obligated—to take this into account when assessing the efficacy of MC99 within the bigger picture that this work is describing.

Is it desirable that the carrier should face higher net liability as a result of an accident on account of third-party actions than it would have had the claimant passenger sued it directly under MC99 (and WCS to a lesser extent)? Although many doctrines of contribution/indemnification will abide by the theory and extent of liability provided by WCS or MC99 in assessing the liability of the carrier qua third-party defendant, there is the risk that in some jurisdictions the carrier may face liability in excess of the limits provided by the conventions or for heads of damages not covered by them, e.g. punitive damages. Is this not a possibility that should be guarded against? These and other questions will be returned to in the concluding chapter to this work.

[120] Warsaw Convention (n 60) Article 24; MC99 (n 65) Article 29.

Chapter 8: Risk Management Devices

8.1 Introduction

Given its history, the extent of potential liability involved, and the sophistication of parties within the aviation industry, it should come as no surprise that complex networks of arrangements are established to channel and allocate risk associated with carriage by air between the various stakeholders. These can be broadly split into two groups: (1) Contractual indemnities; (2) Insurance. But why should this work take an interest in contractual indemnities and insurance? First, they play a critical role as devices for the management of risk in aviation. As such, they may either promote or frustrate the objectives of MC99 which itself plays a role in risk management. Both seek to control and allocate the risks related to liability for damages suffered by passengers during international carriage by air. Second, insurance for passenger liability in international carriage by air is so ubiquitous nowadays as to be almost universal.[1] Whilst neither WCS nor MC99 make carrier insurance compulsory, Article 50 of MC99 does provide that the Contracting States shall require their carriers to maintain "adequate" insurance covering their liability under the Convention. The quasi-universality of insurance coverage is not limited to air carriers, all commercial aviation entities—whether by law or mere prudence—insure themselves against risk. This means that in aviation litigation it is the insurer, rather than the liable party, who is settling the bill with the victim of an accident. This fact invariably influences the litigation of claims. Third, the concluding chapter of this work will require some evaluation of MC99 as a system of compensation and it is submitted that this can only be done where the actual exposure of the carrier is known and, even more importantly, the full extent of the insurer's role is brought to light.

Beyond these specifics, the purpose of this chapter, along with the previous chapters covering product liability and recourse actions, is to present the bigger picture within which passenger claims under WCS and MC99 are only a small part. Contractual indemnities provide an avenue through which third parties can become part of and influence litigation between the claimant passenger and the defendant carrier. Behind all of which stands the insurer(s), who is not some benign presence whose only role is to sign the cheques for its insured. Instead, it occupies—through subrogation—a staggeringly important place in the process of defending and settling claims. Yet, the insurer's role is seldom noted and even less often analysed. Collectively, this matrix of contractual indemnities and insurance agreements bind those parties together in opposition to the interests of the claimant passenger. This is felt in particular with regards to FNC. As demonstrated throughout Part III of this work, potential defendants facing claims after an aviation accident will frequently cooperate to ensure a jurisdictional disadvantage for the claimant.

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[1] Pursuant to Article 50 MC99, the EU introduced Regulation 785/2004 which requires certain carriers operating within the EU to have minimum levels of insurance in respect of their liability under MC99 for passengers, baggage and cargo. See Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L 138/1. Beyond the EU, compulsory insurance for air carriers has been a feature of national licensing regimes of commercial air carriers for many years. For details in respect of some national law regimes, see RD Margo *Margo on Aviation Insurance* (K Posner, T Marland and P Chrystal eds, 4th edn, LexisNexis 2011) [3.19] et seq.

8.2 Contractual Indemnities

This section is concerned with indemnities arising from contract as opposed to those which arise by law or equity.[2] In the simplest of terms we are concerned here with a particular type of clause frequently included in contracts between commercial aviation entities. For example, an aircraft lease or purchase agreement will nearly always contain a clause by which the operator of the aircraft agrees to indemnify the lessor or manufacturer against any losses arising from the operator's use of the aircraft. Therefore, if the manufacturer is sued by a passenger injured during carriage by air, the manufacturer will turn to the operator in the expectation that it will hold the manufacturer harmless against such liability. This form of indemnification must be distinguished from that which takes place in the case of insurance. Whilst a non-life insurance contract is a contract of indemnity, it is distinguishable from a non-insurance contract of indemnity. For instance, indemnities in insurance contracts are subject to legal doctrines which are not applicable in a non-insurance context, such as the duty of utmost good faith and the principle of fortuity.[3] Insurance will be considered in the following section; for now, our concern is solely with the contractual indemnities in non-insurance contracts.

The labyrinthine complexity of contractual indemnities within the aviation industry is well illustrated by the facts *Re Air Crash near Peggy's Cove, Nova Scotia on September 2, 1998*.[4] A Swissair operated McDonnell Douglas MD-11 crashed into the Atlantic Ocean during a flight from New York to Geneva resulting in the deaths of all 215 passengers on board. The crash was the result of an inflight fire started due to faulty wiring in the inflight entertainment system which had ignited flammable insulating blankets. The plaintiffs sued not only Swissair, Boeing (as successor in interest, having acquired McDonnell Douglas) and Interactive Flight Technologies (the designers of the inflight entertainment system), they also sued the manufacturers of the thermal blankets, the sub-contractor who installed the system, and two other sub-contractors who provided certification of the installation. The spaghetti-like criss-crossing of third-party actions between these seven defendants was mitigated by Swissair and Boeing settling with the plaintiffs and reaching agreements with all but one of the other defendants. However, even still, Interactive Flight Technologies' refusal to settle resulted in it seeking contractual indemnification from four of the six other defendants, including Swissair. Multi-party litigation such as this is a common occurrence in the field of aviation litigation. Even if only one defendant appears on the docket, the truth is that the contractual indemnities between the various parties feed into the nexus and demand that attention be expanded beyond the illusory paradigm of a simple two-party dispute.

8.2.1 Key Features in an Aviation Context

In the context of contractual indemnities, Courtney defines a promise of indemnification as 'a promise of exact protection against loss.'[5] This concept of exact protection consists of three elements, the first of which concerns the efficacy of protection, the second, the exactness of

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[2] Indemnification need not be contractual. *Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177, 182–183 (PC) (appeal taken from Straits Settlements).

[3] See W Courtney *Contractual Indemnities* (Hart 2015) 9.

[4] [2005] AMC 183, 2004 WL 2486263, (ED Penn 2004).

[5] Courtney (n 3) 6.

protection and the third, the loss itself.[6] The desired effect of an indemnity is to protect a party (the indemnified) from loss. The party undertaking to protect the indemnified is obliged to either prevent such loss arising in the first place or to compensate for loss already incurred.[7] The element of exactness can be summarized as being that '[t]he indemnified party should not be under-protected nor over-protected in respect of a given loss.'[8] The protection required is thus dependent on the nature of the loss covered by the indemnity, i.e. the loss(es) within the scope of the indemnity. Being a creature of contract, the scope of a contractual indemnity and the manner in which it may be performed is ultimately a matter of construction and thus subject to the relevant legal principles.

Once a loss is within the scope of the indemnity, the indemnified is entitled to full indemnification and there is no rule providing for apportionment of liability between the indemnifier and indemnified based on any comparative fault.[9] Subject to limitations imposed by statute or public policy, a party may undertake to indemnify another party against any conceivable loss. Of relevance to this work is indemnification relating to liability to passengers for personal injury or death sustained during international carriage by air. As has been noted on several occasions, the claimant passenger has a range of possible defendants to sue in the event of an accident. In addition to the carrier, he may opt to pursue the airframe or component manufacturer, the lessor of the aircraft, a maintenance or service provider of the carrier, an airport or ATM service provider, and so on. Therefore, to the extent that these possible defendants have pre-existing contractual relations, they have an interest in securing contractual indemnities from each other. Of course, the buck has to stop with at least one of them, with the question of who shall carry the risk being a matter for commercial negotiations between the parties.

Contractual indemnity clauses in non-insurance agreements vary significantly from one agreement to the next but some common features are easily discerned. To take the example of a general indemnity clause taken from a lease agreement[10] between a leasing subsidiary of a major aircraft manufacturer and an international air carrier, it contains an indemnity clause which provides under its first sub-section:

> The [lessee] agrees to indemnify and hold harmless the [Indemnitee] against any and all Losses which the Indemnitee may at any time suffer or incur, whether directly or indirectly as a result of (i) ownership, registration, import, export, storage, modification, leasing, ... use, operation whether in the air or on the ground, delivery or re-delivery of the Aircraft or any part thereof, and which relate to the Aircraft, during the lease period, and (ii) any act or omission which invalidates or which renders voidable any of the Insurances.[11]

What is immediately notable is that the scope of the general indemnity is incredibly broad, covering every conceivable act involving the aircraft resulting in any and all loss to the

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[6] See ibid 7.
[7] See ibid 17–18.
[8] See ibid 7.
[9] See ibid 80–81.
[10] Operating Sublease Agreement (Doc 128-7), *Esheva v Siberian Airlines* 499 F Supp 2d 493 (SDNY 2007) (Case 1:06-CV-11347).
[11] Operating Lease Agreement ibid at 21. A general indemnity provision is also found in the agreement between lessor and carrier quoted by the English High Court in *Pindell Ltd v AirAsia Bhd* [2012] 2 CLC 1, 35–36 (Com Ct) ('Lessee hereby agrees at all times to indemnify, protect, defend and hold harmless each Indemnitee from and against all and any liabilities, losses, claims, proceedings, damages, penalties, fines, fees, costs and expenses whatsoever [any of the foregoing being referred to as a "Claim"] that any of them at any time suffers or incurs'.).

indemnified. It applies whether the loss be direct or indirect, the latter covering claims by third-parties such as passengers. There is no requirement of fault on the part of the lessor, it is expected to assume the obligation to indemnify the lessee for any and all risks. Indeed, the next sub-clause specifies that the indemnities apply even where the loss is attributable to an act or omission of the lessor, or to a defect in the aircraft or to strict liability.[12]

Subsequent sub-clauses of the lease agreement do provide exceptions in which the lessee is not required to indemnify the lessor.[13] Most significant of which, for our purposes, is the exclusion of indemnity where the loss is caused by the indemnified's *fraud, wilful misconduct or gross negligence* (this exclusion applying only to deliberate wrongdoing and not to mere negligence). However, these exceptions to the general indemnity only apply *to the extent* that the loss for which the indemnity is made is attributable to the particular exception. For example, where the lessor is guilty of wilful misconduct, he may still claim indemnification from the lessee for the extent of the loss not caused by such wilful misconduct.

Generally speaking, aircraft manufacturers tend to have far-reaching indemnity clauses in their aircraft sales agreements which allocate the risk of liability to the carrier. The scope of these indemnities can be surprisingly broad. This is well illustrated by the case of *Pakistan International Airlines (PIA) v Boeing Co*.[14] Although the facts of the case involved first party damage to the carrier's aircraft, the indemnity clause at issue in the case extended to include third-party liability for injury to or death of any person(s). The carrier's aircraft had been damaged in a hard landing at Ankara, Turkey. Boeing had sent a survey team to inspect the damage and submitted a repair proposal to PIA. After completing the repairs, Boeing agents were towing the aircraft when a component of the main landing gear broke resulting in the $500,000 in damage to the aircraft. Naturally, PIA sought recompense from Boeing, arguing that the damage had been the result of its negligence in failing to detect the problem. Unfortunately for PIA, its attempts were frustrated by an indemnity clause in the aircraft sales agreement which provided:

> Buyer will indemnify and hold harmless Boeing and each employee of Boeing assigned pursuant to paragraphs (a), (d) and (e) above from and against all liabilities, costs and expenses incident thereto, which may be suffered by, accrue against, be charged to or recoverable from Boeing or any such employee, or both, by reason of injury to or death of any person or persons … or by reason of loss of or damage to property, including the Aircraft, arising out of or in any way connected with the performance by said employee of services in connection with any of the aircraft after delivery thereof to Buyer.[15]

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

An easily accessible example of a contractual indemnity which is almost universally employed by air carriers engaged international carriage by air is to be found in the Standard Ground Handling Agreement (SGHA) of the International Air Transport Association (IATA). This SGHA is a model agreement of standard clauses which carriers (members and non-members of IATA

[12] See clause 14.2, Operating Lease Agreement (n 10) at 21.
[13] Clause 14.3, Operating Lease Agreement ibid at 22.
[14] 575 F 2d 1268 (9th Cir 1978).
[15] Reproduced in ibid 1269.

alike) use as the basis for the contracts with ground handling agents. Ground handling agents provide the vast majority of ground operations for carriers at their outstations, e.g. baggage and cargo handling/loading, de-icing, aircraft marshalling, load control, fuelling, surface transport and so on. Article 8 of the 2018 edition of the IATA SGHA includes several clauses pertaining to liability and indemnity. Article 8(1) provides, *inter alia*, that the carrier indemnifies the ground handling against liability for claims for liability for passenger death or personal injury arising from the act or omission (including negligence) falling short of wilful misconduct.[16] A similar indemnity is provided by Article 8(2) which includes death or personal injury to third parties, i.e. non-passengers.[17]

8.2.2 Enforceability

That contracts between the various commercial entities involved in international carriage by air contain such far-reaching indemnity clauses is one thing, whether such clauses will be enforced by the courts is another. The purported influence achieved through contractual indemnities in the litigation of passenger claims is conditional on their enforceability. A contractual indemnity is undoubtedly capable of being construed as an exemption clause[18] and this is one area in which they may run into trouble. The English courts introduced strict controls for exemptions clauses, i.e. the general rules[19] and the special, stricter, *Canada Steamship* rules for negligence liability.[20] There is no question that these principles apply as much to indemnities as they do to exemption clauses.[21] However, it is submitted, that in the context with which this work is concerned, i.e. indemnities between commercial parties with respect to third-party liability, not only will such indemnities usually not be classified as exemption clauses, even where they are so defined the chance of such a clause falling afoul of the restrictions is slim to none.

There are three qualifications which must be noted in respect of the enforceability of contractual indemnities in the aviation context. Firstly, there has been a major shift in judicial attitude in recent times which has seen the courts adopt a much more flexible approach to the construction of exemption clauses in a commercial context.[22] In these cases, these principles (such as the *Canada Steamship* rules) may still be applied but with much less vigour, the courts

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[16] See IATA Standard Ground Handling Agreement 2018, available from < http://www.swissport.com/fileadmin/downloads/publications/2018/SPI-GH_Agreement_181115.pdf > (accessed 05 January 2019).

[17] ibid Article 8(2).

[18] *Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, 420 (CA); *Phillips Products Ltd v Hyland* [1987] 1 WLR 659, 666 (CA).

[19] The general approach was described by Coulson J in *William Hare Ltd v Shepherd Construction Ltd*: 'The principle which the courts have always applied to clauses by which a party seeks to relieve itself from legal liability, i.e. that to do so they must use clear words, should ... be the dominant principle', and that any ambiguity or lack of clarity must be resolved against that party, i.e. *contra proferentem*.' *William Hare Ltd v Shepherd Construction Ltd* [2010] EWCA Civ 283, [18].

[20] Formulated by the Privy Council in *Canada Steamship Lines Ltd v The King* [1952] AC 192 (HL) (appeal taken from Canada).

[21] *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 (HL); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, 814 (HL); *Hair & Skin Trading Co Ltd v Norman Airfreight Carriers Ltd* [1974] 1 Lloyd's Rep 443, 445 (QB).

[22] See Lord Hoffman's comments, *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896, 912 (HL). See also *Caledonia North Sea Ltd v British Telecommunications PLC* [2002] 1 Lloyd's Rep 553 (HL).

referring to them more in the nature of guidelines.[23]

The second critical qualification is that a distinction must be made between an indemnity clause as it pertains to the liability between the parties to the contract (i.e. between the indemnitee and indemnifier) and an indemnity clause pertaining to the liability owed by one of the parties to the contract (i.e. the indemnitee) to a third party.[24] In the latter case, it is the third party who has suffered loss for which the indemnitee is liable on some basis (e.g. negligence). Here, the indemnitee turns to the indemnifier and seeks to enforce the contractual indemnity whereby the indemnifier will assume the liability to hold harmless the indemnitee for the economic loss it has incurred from compensating the third party. This is sometimes referred to as a risk-allocation clause.[25] The key point is that such a clause is not regarded as an exemption clause because it does not involve the exemption of a legal duty or obligation which one party would other bear the other. Therefore, the common law principles applicable to exemption clauses would not apply.

This is exactly the scenario with which we are concerned in this work. To give an example, a carrier gives a contractual indemnity to a manufacturer in an aircraft purchase agreement by which it agrees to indemnify the manufacturer for any liability that the manufacturer incurs for death or personal injury of a passenger arising from the use of the aircraft by the carrier. There are two liabilities involved, the one owed by the manufacturer to the claimant passenger (i.e. liability in tort) and the one owed by the carrier to the manufacturer (i.e. liability to indemnify). The indemnity clause does not affect the liability owed by the manufacturer to the claimant passenger, all it does is determine who should pay the final bill for that liability.[26]

The third critical qualification to be noted is the introduction of specific legislation aimed at controlling exemption and indemnity clauses. The first point to note is that such legislation is often specific to consumer contracts and thus not applicable to commercial contracts. Secondly, even where legislation is directed at commercial contracts, such as the Unfair Contract Terms Act 1977 (UCTA), the scope of application to aviation contracts is narrow and the regime non-hostile. Although UCTA is directed at terms seeking to avoid what it calls “business liability”[27] it is not concerned with all exemption clauses. Like the common law, it does not apply to risk allocation clauses.[28] In addition, the application of the Act is specifically excluded from certain types of contract, most relevant for our purposes, is the non-application of UCTA to insurance contracts[29] or to international supply contracts, e.g. aircraft lease or sales agreements.[30] Also, and of great relevance to aviation is the non-application of UCTA to certain contracts with a foreign element; which of course covers many commercial aviation contracts. The scope of application of UCTA to the type of indemnity clause employed between commercial aviation parties is thus very narrow. Even where an indemnity clause would be subject to UCTA’s provisions, it would only be

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[23] See e.g., *Photo Production v Securicor Transport Ltd* [1980] AC 827, 851 (HL); *Mir Steel UK Ltd v Morris* [2013] 2 All ER 54, [35] (CA); *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

[24] This distinction is illustrated by contrasting two cases, i.e. *Phillips Products Ltd v Hyland* (n 18) and *Thompson v T Lohan (Plant Hire) Ltd* [1987] 1 WLR 649 (CA).

[25] Courtney (n 3) 92–94.

[26] R Christou *Drafting Commercial Agreements* (6th edn, Sweet & Maxwell 2016) pt 1.7.

[27] Unfair Contract Terms Act 1977 (UK) s 1(3).

[28] *Thompson* (n 24) 657.

[29] For other exemptions, see UCTA 1977 (n 27) Schedule 1.

[30] ibid s 26.

subject to the test of reasonableness required under s 2(2).[31] Given the commercial context and the sophistication of the parties involved, the courts in today's judicial climate are unlikely to find such clauses unreasonable.

For all these reasons, contractual indemnities between commercial entities in the aviation industry can, for the most part, be regarded as iron clad. In an aviation context, these contractual indemnities make carriers the repositories of the risk of third-party liability to passengers. Even where a passenger claim is brought against an aircraft or component manufacturer, or whichever other aviation business entity one cares to mention, the reality is, with few exceptions, that the complex web of contractual indemnities will lead back to the carrier. The carrier will have little option but fulfil its assumed contractual duties to indemnify other parties and pick up the bill. But, there is one further aspect to be explored, that is, the fact that carriers arrange for this risk to be shifted to an insurer. It is to the role of insurance that this work now turns.

8.3 Insurance

The contractual indemnities agreed by carriers with third parties such as manufacturers allocate the risk of liability to passengers (and much more besides) to the carrier. This is not done for charitable, ethical or legal reasons but for purely commercially motivated reasons and is predicated on the fact of insurance. The carrier prefers to accept the allocation of risk because it knows it will transfer that risk to the insurance market and because it believes that the ultimate cost of doing so will be cheaper where it sources the insurance coverage itself. Were the carrier to refuse to accept the allocation of risk then the manufacturer (or other third party) would be required to purchase the extra coverage necessary and this would be factored into the purchase price of the aircraft. In simple terms, carriers prefer to buy cheaper aircraft and assume the risk and cost of insuring against liability. Through contractual indemnities and similar risk allocation devices, the parties agree between themselves who is going to carry the risk of liability, but, more realistically speaking, it is a matter of deciding who is going to assume the primary obligation to insure against that risk.

This section begins by providing some background on aviation insurance agreements. The greater share of this section will be focused on the doctrine of subrogation, the device by which the insurer is able to assume claims control and acquires the right to bring third-party actions. This shall be presented from an English law perspective, this being justified by the size, importance and influence of the UK aviation insurance market globally. As one distinguished commentator on aviation insurance notes, '[w]ith the London market being recognized as the international centre for aviation insurance ... common law principles have a strong influence in the formulation and interpretation of aviation insurance policies.'[32]

8.3.1 Aviation Insurance Policies

Aviation insurance comprises policies issued to aircraft operators (e.g. carriers), aircraft

[31] ibid s 2(2).
[32] W Müller-Rostin 'Insurance' in S Hobe, N von Ruckteschell and D Heffernan (eds), *Cologne Compendium on Air Law in Europe* (Carl Heymanns Verlag 2013) 1095.

manufacturers, component manufacturers, airports, aviation maintenance and repair providers, aviation service providers and so on.[33] As is to be expected, there are substantial differences between various aviation insurance policies. Nevertheless, there is also a great deal of standardization to be found in the documentation employed by the aviation insurance market. This is in large part thanks to the efforts of various groups within the market who have produced voluminous libraries of standard clauses which are combined and utilized by the market to tailor individual policies to meet specific requirements. In 1949, the Lloyd's Aviation Underwriting Association (LAUA) drafted a standard aircraft policy referred to as AVN 1. This standard has been amended over the years, most recently by the Aviation Insurance Clauses Group (AICG) who produced AVN 1D in 2014. However, it is its predecessor, AVN 1C, which is still more commonly used.[34] For commercial airlines, it is more common for the broker to prepare a policy specific to the airline but generally utilizing various standard clauses from AVN 1C and augmenting it with others produced by the AICG and other groups. These standard clauses will be relied upon in this work because actual airline policies are not publically available.

Within the field of aviation insurance, coverage for several categories of risk can be purchased. In some respects, an aviation insurance policy can be regarded as amalgamation of separate policies under a single document. As a result, a policy may contain a schedule of insurance which consists of multiple sections each addressed to a particular risk. Aviation insurance falls into several categories of cover which are listed in the policy as separate sections, such as loss or damage to the aircraft (i.e. hull), liability to passengers, liability to third-parties,[35] and war and allied perils. Each of these sections will usually provide specifics as to coverage, exclusions, conditions and possibly extensions of cover. The limits, deductibles and premiums are generally itemized for each type of insurance provided under the policy. When it comes to liability for death or injury to passengers and third-parties, aviation policies do not usually have deductibles but an overall limitation will be specified, generally between $1.5 and $2 billion per occurrence.[36]

We are concerned with the category of risk referred to as aviation legal liability. This is a type of "liability insurance" defined by Clarke as covering 'the monetary impact of legal claims against policyholders and, crucially, sometimes the cost of defending claims'.[37] The aviation insurance market categorizes aviation legal liability into several categories and a fundamental distinction applies between liability to passengers and liability to third-parties. From the airline perspective, our attention is on passenger liability insurance as this is the category into which WCS and MC99 claims fall.

Subject to applicable limitations and deductibles, aviation legal liability insurance for passengers grants the insured airline an indemnity from the insurer against all sums which the insured shall become legally liable to pay as damages for bodily injury to passengers or property damage to baggage or personal articles caused by an occurrence arising out of, or in connection

[33] See Margo (n 1) 12.
[34] ibid [10.01] n 3.
[35] Here, the term "third party" is used to refer to non-passengers, i.e. third parties to the contract of carriage, rather than third parties to the contract of insurance.
[36] Margo (n 1) [12.05] n 1. Viccars also cites a limit of liability as high as $1.5 to $2 billion (USD). PJC Viccars *Aviation Insurance: A PlaneMan's Guide* (2nd edn, Witherby Insurance & Legal 2012) 20.
[37] MA Clarke 'Insurance' in A Burrows (ed), *English Private Law* (OUP 2013) 785.

with, the insured's operation of aircraft.[38] This cover includes liability of the airline for losses caused by the negligence of its employees, i.e. vicarious liability. It will usually cover the insured carrier's defence costs too.[39]

It goes without saying that insurance coverage is not absolute, in addition to monetary limitations there are also limitations on coverage. The description of cover contained in the schedule of insurance in a policy provides, in and of itself, a form of exclusion insofar as it defines the circumstances in which the duty to indemnify will arise. Prima facie, if the loss suffered does not fall within the description of cover then the insurer is not on risk and no duty to indemnify can arise. Supplemental to the basic coverage provided by a policy are exclusions; usually laid down in an exclusions section. The significance of an exclusion, whether it be general or specific, is that where the loss suffered by the insured comes within the scope of the exclusion the insurer is entitled to refuse to indemnify the insured against the loss.[40] An example of an exclusion clause is one to the effect that the policy will not apply where the aircraft is operated outside the geographical limits specified in the policy schedule.

The general exclusions portion of the policy will usually also include detailed exclusions which are attached from standard clauses produced by the aviation insurance market. The most relevant attached exclusion clause is the "War, Hi-Jacking and Other Perils Exclusion Clause" (AVN 48B). This particular exclusion clause operates to exclude claims arising from a range of perils. Aside from the obvious cases of war and hijacking, AVN 48B excludes claims arising from, *inter alia*, 'strikes, riots, civil commotions or labour disturbances', and '[a]ny malicious act or act of sabotage.'[41] It is very common for these general exclusions to be written back into the policy by way of an *endorsement*.

Broadly speaking, an endorsement is a document (standard or non-standard) attached to an insurance policy which modifies the policy in some way. An endorsement may provide additional coverage to the basic policy, for instance, by increasing the limits of liability or by extending cover to a type of risk not covered by the basic policy. In simple terms, endorsements are add-ons to the basic policy which allow the parties to customize the coverage to their needs. Another common usage for an endorsement is for "writing back" something excluded in the basic policy. Since war and related perils are always excluded by the policy, some cover may be reinstated for this via an endorsement. AVN 52E is the standard clause currently in use for this purpose. To illustrate this, let us take the tragic case of the Germanwings Flight 9525. Here, the co-pilot—in an apparent act of suicide—deliberately crashed the aircraft into the French Alps killing himself and all others on board. Such an event would certainly be construed as a malicious act which is excluded by an aviation insurer under AVN 48B. Therefore, but for that clause the insurer would be liable to indemnify the insured. However, in all likelihood an insurer would likely be liable to indemnify a carrier in such circumstances but only because coverage for war risks (including malicious acts) would have been written-back into the policy by way of an endorsement, albeit

[38] See Margo (n 1) [12.01]. See also D McClean (ed) *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019) div IX [38].

[39] Margo (n 1) [23.39].

[40] ibid [10.49] See also *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550 (Com Ct).

[41] See "War, Hi-Jacking and Other Perils Exclusion Clause (Aviation)" (AVN 48B).

under differing terms.[42] A standard endorsement exists within the aviation insurance market for this purpose, i.e. AVN 52E. Alternatively, the carrier may separately arrange cover from a specialized war risks insurer. In either case, the norm is that carriers will be amply covered.

This brief overview of aviation insurance contracts intends only to demonstrate the fact and ubiquity of aviation insurance, specifically of carriers, and the extent of the coverage involved. As explained in the introduction to this Chapter, insurance coverage for carrier liability to passengers is mandated by law, so much so that it is all but universal. The sophisticated contracts of insurance employed within the aviation industry provide the insureds with very comprehensive protection against loss, damage or liability arising from accidents. Not only can the insured shift the risk of liability to the insurer under these policies, it can also immunize itself against its own legal costs and those awarded to the claimant passenger incurred in the process of defending claims brought against it. Naturally, to enjoy these benefits the carrier must pay a premium, but the cost of these premiums is negligible in comparison to the potentially disastrous consequences of a major disaster. Indeed, one distinguished commentator has stated that '[w]hilst insurance is an indispensable prerequisite for an air carrier's operation, its actual cost is relatively small, usually averaging less than two percent of the total operating cost of the flight.'[43]

The facts are, the carrier (as well as other commercial aviation parties) is comprehensively insured against passenger liability, in most cases not having to pay a penny itself to the victim of an aviation accident, neither in compensation nor as costs. In addition, deductibles are not generally a feature of aviation insuring agreements for passenger liability and the overall limits provided under policies are massive (ranging from $1.5 to $2 billion per occurrence).[44] The near universal existence of such insurance almost guarantees that in the event of an aviation catastrophe the resources are in place to provide the victims and their families with the compensation that they are entitled to under the terms of the applicable conventions, even where the carrier has long since become insolvent or has been wound-up. However, insurance has its limitations and there remain circumstances—however rare—in which the carrier remains vulnerable to the risk of liability and where the passenger is left at the mercy of the carrier's solvency. This is a factor which must not be overlooked and to which this work shall return in the concluding chapter.

8.4 Subrogation

The doctrine of subrogation has its origins in *Mason v Sainsbury*, a case concerning the destruction of a house during riots in 1780. The owner of the house had been indemnified for losses under an insurance policy. The insurers then sought to recover against the hundred (i.e. the local district) by bringing an action against it in the name of the insured under the Riot Act 1714. The defendant argued that the owner had had a choice between suing under the Riot Act or recovering under his insurance contract; having elected the latter, the owner's loss had been

[42] See Viccars (n 36) 59–62. Whilst the AVN 52E will provide a different limit of liability (e.g. $150 million) to that provided under the main policy (a limit of $1.5 billion) the sub-limit would usually not be applied to the insured's liability for passengers.

[43] Müller-Rostin (n 32) 1094.

[44] Margo (n 1) [12.05] n 1.

satisfied and therefore, the action could not be maintained in his name. Nor, it was argued, did the insurer have any cause of action since it had suffered no loss by the defendant's acts, its risk was covered by the premium it received from its insured. The question posed by the facts of this case was when should an insurer be able to recover from third-parties for sums paid to the insured by way of indemnification for a loss which the third-party is liable for? The doctrine of subrogation provides the answer and Lord Mansfield's judgment in *Mason v Sainsbury* is frequently cited as authority of its application in non-marine insurance cases.[45]

Under the common law, a contract of indemnification might permit an insured party to recover more than his actual loss because his right to indemnification from the insurer is not affected by his having a right of action against a third-party for the same loss.[46] In other words, it is no defence to the insurer to argue that the insured has a claim against the wrongdoer. Likewise, where the insured sues the wrongdoing third-party for the loss, the fact that he has insurance does not affect his claim against the third-party.[47] Therefore, the injured party could theoretically recover twice for his loss, once by way of a claim against the wrongdoer and the other by way of indemnification by his insurer. As stated in *Arnould's Law of Marine Insurance and Average* (hereinafter *Arnould*), 'it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once.'[48] For this reason, the common law recognizes that the indemnifying party has rights against the indemnified which are collectively referred to under the doctrine of subrogation. Subrogation is inherent to the contract of indemnification and is established upon the basic principle that a party shall not be over-indemnified.

8.4.1 Two Aspects of Subrogation

In its broad sense, subrogation is identified as giving rise to two entitlements. First, the right of the insurer to step into the insured's shoes and exercise any causes of action vested in the insured against third-parties. Second, the right of the insurer to recover from the insured any sums received from third-parties in respect of the insured loss. *Colinvaux's Law of Insurance* (hereinafter *Colinvaux*) argues that the first is the only true instance of subrogation.[49] It is submitted that this view is to be preferred. While the term subrogation is used to refer to the second case, it is does not strictly amount to subrogation since it involves the exercise of a personal right of the insurer against the insured and not the subrogated exercise of the insured's cause of action against a third-party.

In the first, the doctrine of subrogation grants to the insurer the right to the benefit of any rights or remedies of the insured against third-parties which may relieve or lessen the loss for which indemnification has been paid. This aspect of subrogation was alluded to by Lord Mansfield in *Mason v Sainsbury* and probably accounts for why it is considered the first authority on subrogation in non-marine insurance, he said: 'Every day the insurer is put in the place of the

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[45] (1782) 3 Douglas 61; 99 ER 538, 64 (KB).

[46] J Gilman and others *Arnould's Law of Marine Insurance and Average* (17th edn, Sweet & Maxwell 2008) 1485 (*Arnould*); J Birds, B Lynch and S Milnes *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) [24-002] (*MacGillivray*).

[47] *Arnould* 1485; *MacGillivray* [24.002].

[48] *Arnould* (n 46) 1487.

[49] See R Merkin *Colinvaux's Law of Insurance* (10th edn, Sweet & Maxwell 2014) 622 n 3 (*Colinvaux*).

insured. … The insurer uses the name of the insured.'[50] In practical terms, the insurer's right of subrogation gives to it the right to control proceedings against third-parties in the name of the insured, i.e. claims control.[51]

The second aspect to which the term subrogation is applied typically entitles the insurer to receive from the insured any money received in damages from third-parties liable for the indemnified loss.[52] As stated in *Arnould*, '[a]n insurer is therefore entitled both to the benefit of any recovery actually made by the assured in diminution of his loss, and to the benefit of any such recovery that the assured has the right to make (but has not yet made).'[53]

It is the first aspect of subrogation that we are primarily concerned because it is this which gives the insurer the power of claims control. However, insurers will usually include a contractual clause to this effect in the policy rather than rely on common law subrogation. The major consequence is that it is the insurer—not the insured—who is really calling all the shots in proceedings brought against the insured as the party allegedly liable to the claimant. As Brett LJ said in 1882 in *Wilson v Rafflalovich*:

> The underwriters are, in the sense in which the phrase is always used, the real plaintiffs, that is, they are the persons instructing the solicitors, the persons paying for the action, the persons to benefit by the action, and the persons to lose by the action if it is lost; but in point of law they are not the plaintiffs, the plaintiffs on the record being the only persons who can be recognized as plaintiffs.[54]

Whilst the right of subrogation is subject to some limitations at common law, e.g. it is only exercisable once the insured has been fully indemnified,[55] these are either not of relevance to third-party liability policies of the type we are concerned with or can be mitigated by an express provision in the insurance contract. Rather than relying on the common law of subrogation to grant it claims control, the insurer can make use of the policy to grant it expressly by contract.[56]

The doctrine of subrogation provides the insurer with an invaluable right of claims control which is subject to few limitations at common law. The first such limitation can be resolved by means of making the right of subrogation contractual by inclusion of a clause in the insurance contract. The second, i.e. that the doctrine does not arise in the case of non-indemnity insurance, is certainly of great relevance to life insurance but is largely inapplicable in the context of aviation insurance which is almost entirely of the indemnity type. The third limitation undoubtedly applies in the case of aviation insurance but its impact is dependent on the nature and extent of the liability relations between the insured and third parties, e.g. the contractual indemnities agreed between the various commercial aviation entities. The next step, is to look closer at the role played by subrogation in the field of aviation litigation.

8.4.2 Aviation Litigation and Subrogation

In conversation with aviation litigators it becomes abundantly clear that it is the insurer who is, so

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[50] *Mason v Sainsbury* (n 45) 64.
[51] See *Castellain v Preston* (1883) 11 QBD 380, 388 (CA).
[52] *MacGillivray* (n 47) [24.071]; SR Derham *Subrogation in Insurance Law* (Law Book Co 1985) 45–48.
[53] *Arnould* (n 47) 1487. See *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333, 339 (HL).
[54] [1881] 7 QBD 553, 558 (CA).
[55] Margo (n 1) [23.63]. See *Page v Scottish Insurance Corp Ltd* (1929) 33 Ll L Rep 134, 137 (CA); *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249, 254–255 (KB).
[56] Derham (n 52) 144. See *Morris v Ford Motor Co* [1973] QB 792, 812 (CA).

to speak, “calling all the shots”. This is a state of affairs that is enthusiastically acknowledged by plaintiff lawyers, for whom it almost goes without saying. Whereas, on the defence side lawyers are eager to downplay the role of the insurer; they know not to bite the hand that feeds them. Depending on the parties involved, the air carrier may have some influence over how the litigation is pursued, not by matter of law or contract but down to commercial considerations. A large airline is a valuable customer to an aviation insurer and the market is highly competitive so the desire to keep the insured happy will influence the power-play. The insurer will generally stress this aspect of the arrangement and emphasize the importance of not only satisfying the insured but of protecting its interests. Clearly, each situation is unique and the relative bargaining strength of the parties will influence the *de facto* control of proceedings. For instance, a very large international air carrier opposed to the course of action pursued by its insurer (e.g. to concede liability in litigation) may be able to exert sufficient influence over its insurer to alter the course of litigation. The insurer’s interest is in minimizing its exposure and reaching a settlement with the manufacturer whereas the airline is primarily concerned with the negative impact that conceding liability would have for its business. It is therefore impossible to generalize but one thing is clear, it is the insurer who controls the purse strings and it is the insurer who is in the driver’s seat when it comes to making decisions.[57]

AVN 1C contains a claims control clause which provides: ‘The Insurers shall be entitled (if they so elect) at any time and for so long as they desire to take absolute control of all negotiations and proceedings and in the name of the Insured to settle, defend or pursue any claim.’[58] AVN 1D contains provisions to similar effect.[59] AVN 1C and AVN 1D also provide for subrogation based on a payment being made under the policy which could be construed as sufficient to grant the insurer a contractual right to subrogation (including claims control) irrespective of the full indemnification of the insured’s loss.

Even in the case that the insured retains the right of claims control—a rarity in aviation insurance—the insured nonetheless owes a duty of good faith to the insurer in respect of claims against third-parties. In many cases this will have been codified as a contractual obligation within the policy.[60] As a result, even if the insurer cannot control the proceedings, its potential to seek damages against the insured for any prejudice caused by the insured’s own handling of the claim against the third-party gives to the insurer indirect control. It is a safe working assumption that the insurer of a commercial air carrier will have claims control and this sub-section shall continue on that basis.

There are two aspects to claims control, firstly, it grants the insurer control of proceedings brought against the insured, and secondly, it also gives to the insurer the power to bring third-party actions in the name of the insured. However, a word of caution must be mentioned here with respect to joint insurance in light of the decision of a majority of UK Supreme Court in *Gard Marine & Energy Ltd v China National Chartering Company Ltd (The Ocean Victory).*[61] The

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[57] See T Baker ‘Insurance in Sociolegal Research’ (2010) 6 *Annual Rev L & Soc Sci* 433, 436.
[58] See Section IV(C)(1) AVN 1C.
[59] See Defence and Settlement Payments Applicable to Sections 2 and 3 AVN 1D.
[60] *MacGillivray* (n 47) [24.049]. For example, in AVN 1C, Section IV(3)(B)(d) provides that the insured shall ‘not act in any way to the detriment or prejudice of the interest of the Insurers.’
[61] [2017] UKSC 35.

majority determined that subrogation will not operate for the insurer for an action between the co-insureds. As joint insurance is not commonplace in the aviation insurance market this is unlikely to prove problematic and insurers can be expected to act to counter it.

8.4.2.1 Claims Control

In most jurisdictions, although the insurer has claims control, the litigation in question will be taken in the name of the claimant against the insured, e.g. the carrier. The insurer's name will not appear anywhere on the court docket. Therefore, although the insurer may not be the *de jure* liable party, he is the real defendant in interest since the litigation is being primarily conducted in accordance with its instructions and in pursuance of its benefit. The reality is that a passenger bringing an action against a carrier under WCS or MC99 is not taking on the party with whom it concluded the contract of carriage or the carrier who actually performed the flight in question, instead he is facing off against a party with whom he has neither contracted, nor one that was ever within his contemplation. In some jurisdictions, e.g. New York, a direct action against an insurer is possible and an insurer may be obligated to take any subrogated actions in its own name.[62] However, this is exceptional. In the vast majority of jurisdictions around the world, the insurer can pull the strings from behind the curtain without fear of revealing itself; which is especially beneficial where a jury is involved.

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

8.4.2.2 Right to Bring Third-Party Actions

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

[62] See e.g., *Royal Insurance v Amerford Air Cargo* 654 F Supp 679 (SDNY 1987).

compensating the victim is ultimately borne by the responsible party.[63] In this sense, it can promote corrective justice. In a similar vein, it is argued that subrogation lowers the costs of premiums since it reduces the final sum paid by the insurer as indemnification. However, scepticism has been expressed by some courts as to whether or not the insurer actually includes subrogation recoveries into the calculation of premiums or whether it treats them as a windfall.[64] In any case, these arguments are, on other grounds, less persuasive in the context of the aviation insurance market for reasons detailed below.

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

The value of a subrogated claim against a third-party will depend on a number of factors. Firstly, in many cases, the same insurer will be involved on both sides, being the insurance carrier for at least part of the risk of both the carrier and the manufacturer. Second, there will more than likely be a pre-existing contractual relationship between the insured and third-party so any contractual provisions which affect the insured's right of action against the third-party will be binding on the insurer. For instance, if the insured carrier has given to the third-party manufacturer contractual indemnities of the type discussed earlier in this chapter, then the right of subrogation will most likely be worthless. In addition, the parties may have agreed a waiver of subrogation clause which the insured will be obliged to make provision for in its insurance policy. In the case of leasing agreements, the lessor will always require that the lessee carrier take out and maintain insurance and that the lessor shall be named as an additional insured.[65] This will prevent the carrier's insurer from bringing a subrogated claim against the lessor. As the grantor of contractual indemnities, waivers, etc., the carrier is thus placed in the position of having the risk contractually allocated to it, a risk it then shifts to the insurer who will be unable to rely on subrogation to shift it elsewhere.

However, the insurer of the recipient of these contractual indemnities and related mechanisms will have the option to utilize subrogation to shift the loss off of its shoulders and onto those of the carrier. But, since the carrier is itself insured, the reality of subrogation in an aviation market where insurance is so ubiquitous is that the loss is merely shifted from one insurer to another. The net impact of which is not only that it necessitates the duplication of insurance but it also results in immense cost. Subrogation is a wasteful and extremely costly process which only adds to the overall cost of litigation.[66] In turn, this results in higher insurance premiums which are ultimately paid for by the consumer for international carriage by air. In this scenario, the justifications of subrogation—as promoting corrective justice by ensuring that the responsible party pays and that it also reduces the premiums charged—are of doubtful value since it is the insurer of the

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[63] P Cane *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013) 377.

[64] Derham quotes a dictum of Swann J from *De Cespedes v Prudence Mutual Casualty Co of Chicago* 193 So 2d 224, 227-8 (1966) in which he stated: '"[Subrogation] has frequently become a source of windfall to insurers in that the anticipated recoveries under subrogation rights are generally not reflected in the computation of premium rates."' Derham (n 52) 153.

[65] See AVN 67 Airline Finance/Lease Contract Endorsement.

[66] See Cane (n 63) 378.

responsible party who pays and who will therefore figure the cost into the future premiums charged.

The fact that the insurer can do all this in the insured's name is of enormous value to an insurer who is desperate to keep its name out of the litigation. Its anonymity is chiefly motivated by the fear that 'the knowledge of the existence of liability insurance is likely to affect the jury both in the allocation of responsibility and in the assessment of damages.'[67] Naturally, where the dispute is to be decided by a judge this motivation is less pressing as the judge will be well aware of who is who. As Sir Richard Aikens (Lord Justice of Appeal) noted in the preface to Merkin & Steele's *Insurance and the Law of Obligations*, [t]he fact that the claimant was actually a subrogated insurer and the defence was being maintained by the defendant's liability insurer have traditionally been treated as the unacknowledged elephants in the court room.'[68] Even still, the insurer is keen to maintain a low profile and subrogation facilitates this by obfuscating its presence as the true party in interest. The reality is that the nominal claimant or defendant has long since been indemnified by its insurer and plays only a supporting (if any) role in the proceedings.

8.4.3 Concluding Remarks

The prevalence of insurance coverage for international carriage of passengers by air is a boon for the travelling public. It all but ensures that the resources necessary to satisfy claims will be available in the event of an accident. In addition, insurance also means that in most cases the passenger's right to compensation will not be defeated by the financial dire straits of fly-by-night operators such as West Caribbean Airways. The stark reality is that by way of subrogation—regardless of what the docket says—it is the insurer who is calling the shots in the vast majority of aviation litigation of passenger claims. The result of which is that there is a hidden cost of insurance for the claimant passenger, one that is not always readily apparent but which is nevertheless pernicious.

By holding claims control, it is the insurer's interest in choice of forum which becomes paramount. The carrier is effectively removed from the equation in all but name. This undoubtedly changes the dynamics involved in aviation litigation. Most notably, the question of the liability of the carrier is seldom the concern, except perhaps where the carrier has sufficient commercial power to sway the insurer. Instead, it is simply a matter of the quantum of damages that will have to be paid in settlement of the claim. Whether it settles a claim in the US or almost anywhere else is the key factor driving the insurer to challenge the claimant passenger's choice of forum. "Anywhere but here" is the mantra of the aviation insurer when it comes to being sued in a US court. FNC is thus manna from heaven for the insurer and it is zealously employed, not as a device for ensuring fairness and convenience in forum selection, but as a means of mitigating the cost of the insurer's duty to indemnify its insured.

Subrogation further empowers the insurer in this battle over forum because its ability to bring third-party actions can be exploited to secure a jurisdictional advantage. Whilst claimants can add

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[67] Cane (n 98) 378. See also JT Ray Jr 'The Loan Receipt and Insurers' Subrogation - How to Become the Real Party in Interest Without Really Lying' (1975) 50 *Tul L Rev* 115, 119–120.

[68] R Merkin and J Steele *Insurance and the Law of Obligations* (OUP 2013) Preface.

alternative defendants to proceedings to do likewise, they are not, unlike the defendants, able to count on the cooperation of those parties. In some cases, the claimant might be able to play the defendants off against each other, but, in most cases, it will be the defendants teaming-up against the claimant.

There are of course cases in which subrogation is employed toward a genuine goal of shifting the loss from the insurer (who has indemnified its insured) to the actual party at fault. This is especially important in the case of a regime such as MC99 which provides for no-fault liability of the carrier. Where this strategy succeeds, then it is arguable that it keeps the costs of premiums down and by extension the passenger pays a lower fare but there is a social cost involved to the claimant whose road to receiving compensation is made so much longer and more arduous. In addition, the reality of aviation litigation is that the loss is not shifted to the party at fault but to its insurer. Thus, instead of reducing the overall loss to be spread across the market, the loss is just shifted—at great expense—from one loss-spreading insurer to another with the cost of doing so added on top. Who ultimately pays for this? The travelling public! Is it all worth it?

Conclusion to Part Four

The goal of Part Four of this work was to prove that MC99, as the successor to WCS, is built upon an anachronistic understanding of itself as a discrete system for the resolution of passenger claims arising out of international carriage by air. This involved showing how that system is premised upon a two-party paradigm of claimant passenger versus defendant carrier that no longer accords with the reality of international aviation litigation. The legal environment that existed in 1929, i.e. at the time of the Warsaw Convention's drafting, has evolved enormously due to various socio-political factors.

We have focused on the emergence of alternative remedies for claimant passengers. This means that MC99 is really just a part of a larger aviation accident passenger compensation system. One major impact of this new reality is that through these alternative remedies against alternative defendants (i.e. other than the carrier) claimants' choice of forum has been expanded. Claimants will take advantage of this when choosing in which forum to pursue an action for compensation, even if that means foregoing an action under MC99 and, thereby, risking the undermining of that Convention's goals.

Another effect of the changing legal environment is that international aviation litigation has become multi-party in nature. Partly as a result of the emergence of alternative remedies, courts and/or legislators have made provision for third-party actions for contribution and indemnification on the basis of common liability between the defendants and the injured party, i.e. the claimant passenger. Aside from also creating risks of undermining or circumventing the provisions and goals of MC99, third-party actions have created an avenue for third-party influence in what was previously a two-party relationship between the claimant passenger and defendant carrier. This third-party influence is felt most strongly on the defence side as it is exploited by the defendants to secure a jurisdictional advantage against the claimant passenger. In making their choice of forum, the claimant passenger must contend, not only with the competing interests of the carrier but also those of third parties.

The final piece of the bigger picture to be revealed is the role played by risk management devices, specifically contractual indemnities and aviation insurance. In addition to the liability relations that arise by force of law between defendant stakeholders to international aviation litigation, as evidenced by third-party actions for contribution/indemnification, there are also underlying contractual relations whereby these parties allocate the risk of their liability to passengers. We have found that this risk is generally shifted to the carrier who, in turn, shifts that risk to the insurer who then spreads it across the aviation insurance market. The near-universal presence of insurance cover and the paramount role played by insurers is perhaps the most potent instrument for third-party influence. Through claims control and subrogation, it is the insurer's interests which become controlling. The reality of contractual indemnities and insurance underlines the multi-party nature of international aviation litigation, augments our appreciation of third-party influence and fills out our conception of the bigger picture by showing how risk is actually allocated.

With the bigger picture now exposed, how should we address the challenges facing MC99 with respect to choice of forum?

PART FIVE

CONCLUSION

Chapter 9: The Way Forward is Back

The catalyst for this work was the doctrinal conundrum posed by the *West Caribbean Airways* litigation. Should a claimant's choice of forum under MC99 be absolute and inviolable, or, should it be subject to the discretion of the chosen forum to decline to exercise that jurisdiction? The US court aligned itself with the latter position by granting FNC dismissal but the French Cour de Cassation reached the opposite conclusion by declaring that a court could not invoke a doctrine such as FNC to disturb the claimant's choice. It was in the hope of resolving this standoff over FNC and MC99 that this work first conceived.

Having familiarized ourselves in Chapter 2 with the doctrine of FNC in its various doctrinal manifestations, we considered the perspective of the civilian legal system on declining jurisdiction in Chapter 3. Thus forearmed, Chapter 4 began with analysis of the jurisdictional regime of the Warsaw Convention and the place of FNC therein. Although the practice had been to apply the doctrine, the courts in the UK and US eventually reached the conclusion its application was inconsistent with a convention agreed in 1929 by predominantly civilian drafters. It was with some surprise that we came to the opposite conclusion with respect to MC99. Whilst sharing the same text, MC99's new drafting history resolved any doubt as to the availability of FNC.

If we had been able to conclude otherwise, i.e. that the doctrine of FNC was not available under MC99 then our journey may have been much easier. Claimant passengers could rely on their choice of forum being absolute and the impetus that exists for wasteful litigation over jurisdiction would be removed and greater legal certainty provided. In consequence, there would be a resulting diminution in the volume of MC99 litigation. This was not, however, where we found ourselves. But, if all this would be so, then would not the obvious reform be to amend MC99 to expressly make the claimant's right to choose their forum absolute, thereby precluding the application of a discretion to decline jurisdiction? Sadly, no. By targeting a solution solely at FNC and MC99, one would be adopting a two-dimensional solution to a three-dimensional problem. The truth is that FNC is merely a symptom of a more fundamental ailment within the bigger picture of international aviation litigation, one centred on the wider issue of choice of forum and which goes beyond MC99. We must not confuse the attempted cure with the underlying illness.

Simply put, FNC is a doctrinal mechanism for resolving a dispute between litigants regarding choice of forum driven by the parties' conflicting interests over where to litigate. In our analysis of these interests in the context of WCS and MC99, a bigger picture emerged in which those regimes for passenger compensation were revealed as being just one part of a larger aviation accident passenger compensation system. The stakeholders to this multi-party system were identified and its organization and means of operation revealed in Chapters 6, 7 and 8. This permitted us to reach a vital conclusion, that MC99 (as successor to WCS) is based on an anachronistic understanding of international aviation litigation as two-party in nature. Such an understanding was justifiable in 1929 but not in 1999 and even less so in 2019. With the emergence of alternative

remedies, the realization of rights to contribution and indemnification, and the ubiquity of insurance and other risk management devices, the reality of modern aviation litigation of passenger claims is that it is predicated on a multi-party system of liability relations. The two-party paradigm of the claimant passenger versus defendant carrier has been exploded. In its place stands a far more complex multi-party system in which third-party interests play a dominant role.

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

When it comes to choice of forum, the balance of interests is thus tipped firmly against the claimant passenger and this has prejudicial consequences on the extent and level of compensation they can hope to receive. Yet, was it not a stated goal of MC99 to provide a new deal which assured claimant passengers of swifter and more equitable compensation in the event of an accident? In so doing, it professed to readdress the balance of interests and make concessions to the claimant passenger who had hitherto been underserved by WCS. However, by failing to appreciate the existence of the bigger picture revealed in this work, the balance of interests upon which the jurisdictional regime of MC99 was established was woefully incomplete. Consequently, the results derived therefrom are necessarily defective and unsound. Furthermore, by leaving the claimant's choice of forum open to challenge, MC99 incentivizes and generates unnecessary litigation over jurisdiction which not only lengthens the process of securing compensation in the event of an accident but also adds to its cost (which is then borne by the industry and the fare-paying public).

With the US being the current centre for international aviation litigation, FNC serves an important function in controlling forum shopping and keeping the cost of settlements and damages awards down. This amounts to a counter-argument for maintaining the availability of FNC within MC99. However, it is based on the supposition that there is a need to control forum shopping in the context of MC99, a supposition that must be challenged. FNC makes sense within a common law system where the jurisdiction of courts is extremely broad and which freely entertains the claims of foreigners. Civil law systems manage without an equivalent to FNC precisely because the jurisdiction of their courts is more constrained and carefully prescribed. The jurisdictional regime of MC99—based as it is on the Warsaw Convention—has a civilian sensibility. It provides a limited number of pre-determined forums in which a claimant can sue. These are forums that have been selected because they are deemed *prima facie* appropriate to the parties. In the vast majority of cases, the practical reality is that a claimant passenger will most likely only have a choice between two or three forums in which to pursue an action for damages against the carrier. It is wholly inappropriate and downright disingenuous to accuse a claimant passenger of forum shopping when they have selected a forum from among a very limited choice presented to them.

As we saw in Chapter 5, the concerns expressed by States at the Montreal Conference regarding forum shopping under MC99 were only voiced with respect to the fifth jurisdiction and they dissipated once the necessary connecting factors between the carrier and the fifth jurisdiction were established. Furthermore, time has proven that the fifth jurisdiction did not—irrespective of FNC—open the floodgates to US litigation of foreign claims. Indeed, practitioners acknowledge that invocation of the fifth jurisdiction is slight and its economic impact has been extremely modest. Therefore, in the context of MC99, forum shopping poses little danger.

In light of all these considerations it must be concluded that FNC has no place within the jurisdictional regime of MC99. The claimant's choice of forum under MC99 should be absolute and inviolable. However, as concluded above, FNC is just a symptom of the wider problem of choice of forum in international aviation litigation. Therefore, merely excluding FNC from MC99 will not be sufficient. Due to the evolution of the legal landscape since the time of the Warsaw Convention's drafting, the claimant now has a multitude of litigation options. In 1929, the only real option for the claimant passenger was to sue the carrier because third parties were generally beyond reach. As such, the Warsaw Convention was the only show in town. This is no longer the case, MC99 is just one of several options.

This new reality of international aviation litigation is a factor that MC99 has failed to adequately respond to. In practical terms, the legal landscape in 1929 meant the Warsaw Convention ring-fenced passenger claims falling within its scope and it could operate as a discrete passenger compensation system, insulated from third parties. This is no longer true. The existence of alternative remedies and the reality of third-party actions and contractual indemnities means that exposure of the carrier and the industry in general to liability for passenger claims arising from international carriage by air is not kept contained within MC99. This undermines MC99 in a number of ways.

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

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

Merely removing the possibility of FNC from MC99 litigation will not resolve these issues. The optimal solution is that MC99 should be amended, not only to exclude the application of FNC, but

also to explicitly provide that it provides the exclusive remedy for passenger claims falling within its substantive scope—not just against the carrier, but against any of a list of specified third parties (e.g. the airframe manufacturer, a component manufacturer, an aircraft lessor, an airport authority). The claimant passenger's MC99 action against the carrier would pre-empt claims against these specified third parties. In effect, all passenger claims should be channelled through MC99 and alternative remedies proscribed. A savings clause should be provided to ensure that the carrier's right of recourse against third parties is not prejudiced. When it comes to the sharing or shifting of liability between the carrier and the specified third parties, this should be left—as it is at present—to the contractual mechanisms agreed *inter se*.

This proposed amendment to the regime would resolve the immediate problem of the availability of FNC. It would greatly reduce the volume of litigation of passenger claims as well as assure claimants of faster and more equitable compensation in the event of an accident. The risk of circumvention would be effectively eliminated by the non-availability of alternative remedies. In addition to providing greater certainty and predictability to all stakeholders, these immediate consequences would reduce the cost of aviation litigation to the industry.

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

Such a proposal is not new to international law. A similar proposal was proposed by Cheng[1] and considered by the ILA at its Conference in 1980.[2] A draft convention was produced which was debated at the 1982 ILA Conference but never came to fruition.[3] This proposal was for an integrated system of aviation liability under which liability for personal injury or death was to be based on the principle of absolute, unlimited and secured liability.[4] Crucially, liability was to be channelled through the carrier. However, as noted by the authors of *Shawcross & Beaumont*, the 'weakest link' in the argument was that it proposed to include liability for damage to third parties on the surface.[5] An additional weakness to the regime was that the proposed channelling was *de facto* rather than *de jure*.[6] It did not propose to legally exclude alternative remedies against third parties (e.g. manufacturers) but expected that assured and unlimited recovery against a carrier would be a sufficient incentive to achieve that in effect, if not in law. As observed in this thesis,

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[1] See B Cheng 'Fifty Years of the Warsaw Convention: Where Do We Go from Here?' (1979) 28 *ZLW* 373, 379–380.

[2] International Law Association 'Air Law' (1980) 59 *Int'l L Ass'n Rep Conf* 471, 479–482.

[3] ibid 553–593.

[4] ibid 583.

[5] D McClean (ed) *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019) div VII [184].

[6] See International Law Association (n 2) 583. An alternative draft had been proposed by Mankiewicz which would have made channelling obligatory but it was not preferred. ibid.

the availability of an alternative remedy, even where seemingly less attractive, will be exploited by claimants where it offers the preferred choice of forum. The advantage of the channelling proposal made in this thesis is that it does not extend to liability to third parties[7] and it does provide for *de jure* exclusivity of the liability of the carrier.

There has been successful implementation of similar proposals in international law. Indeed, Cheng's proposal was inspired by conventions on civil liability for nuclear damage agreed through the International Atomic Energy Agency.[8] In addition, the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969),[9] makes the ship-owner strictly liable for oil pollution damage. As amended by in 1992 Protocol,[10] it defines a range of persons against whom no remedy, either under the Convention or otherwise, can be taken. In addition to servants or agents of the ship-owner, the pilot, charterer, operator, any person taking preventative measures, etc., are now insulated from liability.[11] Thus, CLC 1992 provides a quasi-exclusive remedy against the ship-owner. In other words, it channels liability through the ship-owner. At present, CLC 1992 has been ratified by 138 States (accounting for 97.75% of world tonnage) and it thus represents a compelling analogy which could be applied *mutatis mutandis* to international carriage by air.

Channelling claims through the carrier also makes sense in the context of the near-universal requirement for carrier insurance that now exists. Insurance that is relatively inexpensive, offers very wide coverage and the capacity of which is well in excess of that required to satisfy claims in the vast majority of aviation accidents. The carrier's own financial capacity to meet the cost of settlement will not be at issue. Limiting claimants to an MC99 action against the carrier (i.e. excluding alternative remedies) will not deprive them of their right to full damages since recovery is guaranteed by insurance. There would be no need to pursue alternative remedies where the MC99 remedy is capable of satisfying claims in full. There are, of course, exclusions and limits to insurance coverage and there will thus remain cases in which the carrier will bear the financial burden of meeting claims without the aid of insurance. In such case, the claimant passenger's remedy is dependent on the solvency of the carrier. Where a carrier proves incapable of satisfying the full cost of compensating the claimant then the absence of an alternative remedy would be prejudicial. This is an issue that would benefit from future research, the conclusions from which may require adjustment to the proposals put forward by this work.

A related issue would pertain to the existing grounds on which the carrier can be exonerated from tier-two (i.e. unlimited) liability under MC99. As it stands, the carrier is not liable where it can prove: (a) 'such damage was not due to the negligence or other wrongful act or omission of the

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[7] It is appropriate to exclude liability to third parties on the ground as this is the subject to new regime consisting of two conventions agreed through ICAO in 2009, i.e. Convention on Compensation for Damage Caused by Aircraft to Third Parties (opened for signature 02 May 2009, not yet in force) DCCD Doc No 42 (General Risks Convention); Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (opened for signature 02 May 2009, not yet in force) ICAO Doc 9920 (Unlawful Interference Convention). For detail, see *Shawcross & Beaumont* (n 5) div V [587] et seq.

[8] See Cheng (n 1) 379.

[9] International Convention on Civil Liability for Oil Pollution Damage (opened for signature 29 Nov 1966, entered into force 19 June 1975) 973 UNTS 3 (CLC 1969).

[10] Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, 1969 (opened for signature 27 Nov 1992, entered into force 20 May 1996) 1956 UNTS 255 (CLC Protocol 1992).

[11] International Convention on Civil Liability for Oil Pollution Damage (opened for signature 29 Nov 1966, entered into force 19 June 1975) 973 UNTS 3, as amended by Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage, 1969 (opened for signature 27 Nov 1992, entered into force 20 May 1996) 1956 UNTS 255 (CLC 1992) Article III(4).

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.'[12] It is submitted that such grounds for exoneration should be removed. However, in their place, the carrier should be entitled to exonerate itself from tier-two unlimited liability where it can prove the damage arose solely due to the negligence or other wrongful act or omission of a third party other than the specified third parties.

A further issue for future examination is how this proposal would interact with the controversial matter of the exclusivity of MC99. In this context, the exclusivity in question pertains to the scope of MC99 and of the available remedies found therein. As decided by Supreme Court of the UK (then the House of Lords) in *Sidhu v British Airways plc*[13] and the Supreme Court of the US in *Tseng v El Al Israel Airlines Ltd*,[14] where a claimant's action against the carrier falls within the substantive scope of the Warsaw Convention (or MC99)[15] but no liability is provided for under the provisions of the relevant convention, then no action lies against the carrier (either under the conventions or *le droit commun*). For example, a passenger injury that occurs during qualifying international carriage by air but is not the result of an "accident" and/or is not "bodily injury" would not be recoverable. This proposition is largely accepted but is not without challenge.[16] As it stands, the consensus of jurisprudence would deny the claimant a remedy against the carrier but they would be entitled to pursue a third party (e.g. the manufacturer) under *le droit commun*. The question to be asked in the context of this research is whether the immunity granted to third parties by channelling claims through carriers should be maintained in the case where there is no liability of the carrier. In other words, should the exclusivity enjoyed by carriers under the conventions be extended to the nominated third parties? Resolution of this issue is dependent on the solution to the question of the exclusivity of the Convention, which, as noted above, is still contested. If the current consensus prevails, then the issue of third parties would arise and a policy would need to be adopted with respect to third parties. However, if non-exclusivity were to win out, then the issue would not arise, since both carriers and third parties could be sued under *le droit commun*. In either event, the proposal made in this thesis would be applicable, the only distinguishing issue would the extent of its application. Establishing a policy position on this would be a valuable area for future research.

An advantage of the proposal put forward in this thesis is that it would replicate the arrangements already established by the industry itself. Through contractual indemnities, the principal stakeholders to international carriage by air allocate risk to the carrier, who in turn shifts

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[12] Convention for the Unification of Certain Rules for International Carriage by Air 2242 UNTS 309 (signed 28 May 1999, entered into force 04 November 2003) (MC99) Article 22(2).

[13] [1997] AC 430 (HL).

[14] 525 US 155 (1999).

[15] *Sidhu* and *Tseng* were decided in relation to the Warsaw Convention. However, they have been followed in MC99 cases. See e.g., *Stott v Thomas Cook Tour Operators* [2014] AC 1347 (SC); *Doe v Etihad Airways PJSC* 870 F 3d 406 (6th Cir 2017).

[16] Several jurisdictions have followed the *Sidhu/Tseng* position on exclusivity, see e.g., *Thibodeau v Air Canada* [2014] SCC 67 (Canada); *Hennessy v Aer Lingus* [2012] IEHC 124 (Ireland); [2005] ZAWCHC 5 (South Africa). Commentators are supportive of exclusivity, see e.g., D McClean (ed) *Shawcross & Beaumont: Air Law* (Issue 166, LexisNexis 2019) div VII [406]; GN Tompkins Jr *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* (Wolters Kluwer 2010) 99–100. For non-exclusivity, the authors of *Shawcross & Beaumont* cite a French decision (i.e. *Duffy v Brit Air* (Le Havre, 12 June 1986), (1987) 40 RFDA 446 affd Rouen CA (26 April 1988)) and a German decision (i.e. Oberlandesgericht Frankfurt (1 U 34/88) (20 April 1989), (1989) 38 ZLW 381). McClean div VII [411].

that risk onto the aviation insurance market. The cost to the insurer in assuming that risk is then spread across that market through the payment of premiums by carriers. It is submitted that this is the most efficient and appropriate mechanism as it focuses the cost on the party best placed to spread it across the widest possible consumer base for international carriage by air, i.e. the passengers. This results in a regime where it is the two contracting parties to international carriage by air who are *prima facie* bearing the costs of a risk which has been rationally and responsibly insured against.

The way forward is back. Back to a regime where the claimant's choice of forum was absolute and inviolable. Back to the two-party paradigm upon which the Warsaw Convention was created and under which the claimant passenger was effectively limited to a remedy against the carrier. If this is done then choice of forum will be regulated in a manner which takes account of the bigger picture, which is fair to all parties and which also promotes the policy objectives of MC99 and those of the industry generally.