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The Modernisation of Air Carrier Liability: Is the New Montreal Convention the Humble Successor to the Warsaw System?

Abstract

For seventy years, the Convention on the Unification of Certain Rules Relating to International Carriage by Air, more commonly known as the Warsaw Convention (1929) was the most important treaty regulating the relations of private international air law, which was replaced by a new international treaty, the Montreal Convention (1999). Of the international treaties of private law drafted under the guidance of the International Civil Aviation Organization (ICAO), the Montreal Convention is at present the most important treaty of private international air law. Its peculiarity is hidden in its legal institutions, which support the universal predominance of the Montreal Convention. The lawmaker introduced legal institutions familiar from the Warsaw Convention and utterly new ones, all of which targeted its ratification by as many countries as possible so that private international legal unification in the area of air law can be accomplished in the broadest possible scope. The author unfolds the definitive features of the Warsaw Convention and the phases of its modernisation. His goal consists partly in the introduction of the unquestionably manifold ways the Montreal Convention drew upon the Warsaw Convention and its amendments, but he also emphasises that as a new, renascent international source of law it guarantees rights and creates obligations in conformity with the challenges of our days.

Keywords: air carrier liability, limited liability, air ticket, modernization

I. Introduction

The principal objective of the rules of the private law of international civil aviation (treaties) is the realisation of the uniformity of law in the system of international relations, especially giving rise to rightful and equitable *(ex aequo et bono)* balance concerning the rights of the claimant.

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In the system of rules of liability for damages in international civil aviation, the rules of liability for damage caused to the *second party* (passengers or consignors) by air carriers are incorporated by the following sources of law:

– the universally recognised general legal principles of international law;
– multilateral international contracts [e.g., the Warsaw Convention (1929) and its amendments, the Montreal Convention (1999)];
– the decisions of international organisations;
– judicial decisions by the appliers of the law;
– agreements concluded between the state and the airline;
– agreements among the airlines; and
– so-called soft law provisions and agreements.

Besides international treaties, what have great significance upon the adjudication of damage caused to a second party include internationally recognised legal practice (cases constituting precedents), the resolutions of the International Air Transport Association (IATA)[1] and its agreements concluded with the member airlines and the professional requirements therein. Among legal sources, the universally recognised Warsaw Convention and the legal cases founded on its rules are prominent.

II. The Warsaw Convention (1929)

The first international commercial flight travelling between Paris and London took off with 12 paying passengers on board on 8 February 1919. The airplane, an F.60 Goliath was navigated by Henry Farman (1874–1958), a reputed aviator, pilot and airplane architect at that time. All of the passengers were soldiers, as non-military flying was still prohibited following the First World War.[2] After the transition to peacetime and the creation of civil airlines, the French government soon realised that regulation and the rules of liability for damages need to be formulated on an international level. Therefore, the French president, Raymond Poincaré (1860–1934) convened an

[1] The IATA was set up for the second time on 19 April 1945 during the International Air Transport Conference of international airlines held at Habana, Cuba (the former IATA had functioned between 1919–1945 with headquarters at The Hague). Initially, the IATA operated the uniform system of charges. In our days, the IATA deals with the standardisation of procedures and practices, the representation of member airlines and the comparison of tariffs and slot allocation. The headquarters of the organisation is in Montreal, whereas, the top management has its sessions in Geneva. Nowadays, more than 285 airlines representing 80% of the performers of global air traffic are members of the IATA. E. M. Giemulla and L. Weber (eds): *International and EU Aviation Law: Selected Issues,* (The Netherlands Alphen aan den Rijn, 2011); L. Weber, *International Organizations.* (Kluwer Law International, 2011) Chapter 3, 112–128.

[2] K. DeMace, Farman F.60 Goliath – The Plane of the Week, *Theflightblog.com,* https://aviationoiloutlet.com/blog/plane-week-farman-f-60-goliath-2/ (Last accessed: 31 July 2019).

International Conference on Private Air Law in 1925. At the conference held in Paris, the delegates of the invited countries set up the International Technical Committee of Experts in Air Law (CITEJA). At the outset, the objective of the Committee was the examination of the feasibility of the establishment of a uniform international regime of liability, whereas later it became the elaboration of the system and elements of an international treaty regulating liability for damages. The body at its first, then at its second session (1928) deliberated on the liability of air carriers, the system of jurisdiction and the issues of combined and successive carriage. At the third session of the CITEJA Committee, the draft of the treaty designed to be final was approved; therefore, the Committee made a recommendation for the convention of a new conference on international air law. On the basis of the recommendation, the second International Conference on Private Air Law was convened in Warsaw on 4–12 October 1929, at which 33 countries had delegates. The United States participated at the conference as an observer. The final recommendation put forward by the presidium was adopted by the parties as an international Convention on the Unification of Certain Rules Relating to International Carriage by Air, which later became familiar as the Warsaw Convention. The Convention was elaborated in French and it had a sole original copy; therefore, the Polish government, as the depository of the Convention, took steps so that the governments of the contracting parties received an authentic copy. The sole genuine version of the Warsaw Convention was lost during World War II, only the copies received by the representatives of the States that acceded to the Convention remained intact. Having been ratified by five acceding states, the Warsaw Convention took effect on 13 February 1933.

As air transport gained significance, it became increasingly problematic that the extent of compensation, mainly for personal injury, varied from state to state, and the legal grounds of liability had not been the same in different legal systems. Therefore, the Warsaw Convention focused on the uniform regulation of the liability of the air carrier for damages. For the compensation of pecuniary claims deriving from damage caused by the air carrier, the Convention gave rise to a system of rules of private law, which directly affected both natural and legal entities.[3] A prominent merit of the Warsaw Convention consisted in its endeavour to resolve the contradictions between the Continental and the Anglo-Saxon legal systems.

It was primarily the legal experts of countries following the Continental legal system who drafted the Convention but, by working in an open-minded manner, they offered scope for the Anglo-Saxon case law as well. As a consequence, for the interpretation of the main rules and concepts of the Warsaw Convention and its successor, the Montreal Convention, internationally recognised Anglo-Saxon legal cases

[3] J. E. Landry, Swift, Sure and Equitable Recovery. A Developing Concept in International Aviation Law, (1975) 47., *New York State Bar Journal,* 372–374.

as precedents and judicial practice have given guidance. The makers of the Warsaw Convention, drawing on the institutional system of maritime law, created one of the most significant international treaties of international law. The Warsaw Convention was ratified by 152 countries, thus, we can rightly state that the Convention achieved the goal set by its drafters since it:

– *unified* the specific statutes pertaining to international carriage by air;
– *limited* the liability of air carriers for damages; and
– *harmonised* the contents and the formal requirements of the documents of carriage.

The high number of acceding countries indicates that the Warsaw Convention has been the most widely recognised private international law treaty in the history of the regulation of aviation. The number of accessions will not increase, despite the fact that the Warsaw Convention is still in effect, since the Convention was completely replaced by the Montreal Convention, which in a way "superannuated" it. For countries which have acceded to the Montreal Convention, the Warsaw system of rules has been entirely invalidated. At the same time, in the case of countries which have not acceded to the Montreal Convention, but had ratified the Warsaw Convention and its amendments, the Warsaw regime remains guiding.

1. Limited liability

At the outset, in the Warsaw system, the lawmaker counter-balanced the rigorous liability of the air carrier for damages by limiting the amount of compensation to be paid in the event of accidents sustained by the passengers, thereby alleviating the situation of the air carrier. The limitation of the liability for damages as an institution had been adopted from maritime law. Its introduction was justified mainly by the financial protection of air carriers since, upon the occurrence of really grave accidents, they had become obliged to compensate for damage to such an extent that they could be entangled in financially difficult situations and in extreme cases in bankruptcy. One stakeholder group in the air transport industry, namely the airlines, had needed an adequate safeguard for their liability for damages, its protection by the regulator. Aviation is a capital-intensive, financially risky activity. Owing to the sharpening competition in the market, a great majority of the airlines had become financially vulnerable, and their profit-generating capacity in the passenger forwarding segment remained low.[4] Although the states have,

[4] The main activity of airlines is the carriage of passengers. In the passenger carriage segment, airlines make low margins due to fierce competition, the price of kerosene, tax burdens, and many other factors. In other areas, such as the consignment of cargo or charter activities, airlines realise far higher profits. In 2012 the IATA member airlines on average made profits of 2.56 USD per passenger on one-way flights. According to the report by IATA, between 2004 and 2011, airlines made profits of 4.1 per cent on average, which,

since then, tended to liberalise their domestic markets and withdraw from regulating the airlines, they are still interested in safeguarding, with the instruments of law, the stability of airlines, which has yielded measurable domestic economic benefits and served national interests in many respects. Such a regulatory instrument, creating an advantageous situation for the air carriers, was the comprehensive limitation of the liability of airlines for damages under an international treaty (the Warsaw Convention). The introduction of the limitation protected not only the air carriers but also facilitated the unification both of the assertion of the right to compensation and of the extent of payments, as well as the reduction of the number of frequently circumstantial and protracted lawsuits between the subjects of the legal relation of carriage.[5] The limitation of the liability for damages also diminished the high financial risk deriving from the activity of carriage by air. This way financing insurance became cheaper and the financial consequences of causing damage became more predictable. These manifested themselves in decreasing operating costs and the falling price of air services. As a consequence of the limitation, before the commencement of the journey, the passenger or the consignor of cargo was obliged to take out insurance for a considerably higher amount than the limited amount of compensation to be paid by the airline.

With good reason, the question arises whether the passenger or the consignor of the cargo was aware of the circumstance that, in the event of an accident, the air carrier did not compensate for the whole value of damage, but only for its fraction. Pursuant to the Warsaw Convention, the answer is unequivocally yes. Namely, on the basis of the provision of the Convention, the airline, before the commencement of the flight, was obliged to warn each passenger of this condition indicated in the air ticket proving the contractual relationship. The air ticket needs to contain an unambiguous warning that the carriage may be covered by the Warsaw Convention, which in most cases limits the liability of carriers for death or personal injury and in respect of the loss of or damage to baggage [Article 3(1)*c)*].

However, in practice, the majority of passengers did not read the contractual conditions of the air ticket but this essentially did not affect the limited liability of the air carrier. If the air carrier met its obligation to communicate the information lawfully, it could maintain its advantageous situation deriving from the limitation. If the passenger did not read the warning publicised in the air ticket, this fact did

in comparison with the profitability of other industries, is extremely low. In view of the fact that, in the inventory of a larger airline, the total value of its modern airplanes in itself is several billion dollars, compared with the huge operational risk, this profit is not really prominent. This enormous capital would yield much higher profits, in another investment. At the same time, between 2015 and 2019, the IATA member airlines achieved quite high profits, of above 8.4 per cent. B. Pearce, Profitability and the Air Transport Value Chain, (2013) (10) *IATA Economics Briefing,* 18.; (2019) *IATA Annual Review,* 44.

[5] H. Drion, *Limitation of Liabilities in International Air Law,* (Springer, Dordrecht, 1954) 36–41. https://doi.org/10.1007/978-94-017-6127-7

not have significance for the air carrier since, pursuant to the Roman legal maxim, ignorance of the law does not exempt anyone from bearing responsibility *(ignorantia iuris neminem excusat)*. Although the lawmaker strictly demanded the communication of the information, it ignored passengers with sight defects, the illiterate, or those who do not understand the conditions of the contract in a foreign language.

2. The relevance of documentation

The documents of carriage (the passenger ticket and the air waybill upon the consignment of cargo) have probative force. In the absence of evidence to the contrary, the passenger ticket, as main evidence, shall constitute *prima facie* evidence[6] of the conclusion and the conditions of the contract of carriage, consequently, of the route as agreed upon by the parties without any doubt whatsoever. The international character of the carriage may be established according to the exact route (the place of departure and the place of destination) accepted by the contracting parties [Article 1(2)], which is important, since the Warsaw Convention is applicable only and exclusively to cases of international carriage, not to domestic carriage.

The Warsaw Convention strictly demanded notification of the limited liability of the air carrier in the passenger ticket. The passenger needed to be aware of the fact of the limitation in time, so that they could take out supplementary insurance with more favourable conditions in order to gain greater protection. The absence, irregularity or loss of the passenger ticket in itself did not affect the existence or the validity of the contract of carriage [Article 3(2)], but it had an entirely detrimental legal consequence for the carrier. Namely, if, with the consent or awareness of the air carrier, the passenger embarked without a passenger ticket made out in advance, or, if the ticket did not include the general warning pertaining to the limitation of liability and an accident happened, the air carrier forfeited its right to determine the upper limit of the compensation and was liable for the damage caused *without limitation*. The air carrier could also lose the applicability of the limitation clause if, in the lawsuit, the passenger (or their relative in the case of their death) proved successfully that the aggrieved party could not avail themselves of the opportunity to purchase extra insurance because the air carrier had imparted the condition pertaining to the limitation illegibly or incomprehensibly.

[6] A Latin expression meaning on its first encounter or at first sight. It is based on first impression; accepted as correct until proved otherwise.

In the *John Lisi versus Alitalia,*[7] the plaintiff took recourse to the court with the claim that the airline paid total compensation for the damage instead of that of about 8,300 USD (it was the normative amount at that time) deriving from limited liability for the fatally injured passenger on board the airplane travelling from Rome (FCO) to New York (JFK), which crashed close to Shannon Airport. In the lawsuit, the plaintiff based his claim on the fact that the passenger ticket had been printed in point 4 print. Consequently, before the flight the passenger had been unable to read and construe the warning in the ticket appropriately, therefore, he had not been able to take prudent steps in order to supplement his insurance. The court sustained the action, and in its justification, it highlighted that by printing in Lilliputian letters the airline disguised the conditions of the flight, therefore, the air carrier had to compensate for the entire damage.

However, the *Lisi* case did not become a precedent to be followed by other judicial fora, it is rather an interesting example of the struggle for breaking through the limitation from the position of the plaintiff.

In *Chan Elisa versus Korean Air Lines,*[8] the plaintiff took recourse to the court with the claim that, in the case of the passenger who was killed in the tragedy of Flight 007 of Korean Air Lines (KE), the airline should compensate the entire damage instead of the limited amount specified in the Warsaw Convention, which was raised to 75,000 USD under the Montreal Agreement, applicable in the event of death. While making out the passenger ticket, the airline used letters of size 8 instead of modern characters of size 10 prescribed under the Montreal Agreement (1966) concluded among the airlines. Thus, the passenger could not read clearly and interpret the warning; consequently, they did not take due steps to purchase supplementary insurance. Nevertheless, the court ruled that by the use of letters of size 8, the airline did not forfeit its advantage deriving from limited liability guaranteed under the Warsaw Convention and therefore dismissed the plaintiff's action. Although the reference to the size of the letters was unsuccessful, the plaintiff (a relative of the passenger), not long after the ruling, broke through the limitation of liability for damages in another way. Subsequently to the end of the Cold War, an international team of experts examined the flight recorder (black box) of the crashed aircraft, which revealed that the pilots had been unambiguously responsible for the occurrence of the tragedy. Consequently, Korean Air Lines was deprived of the protection of limited liability for damages guaranteed by the Warsaw Convention, therefore, it had to pay damages in full to the heirs of the victims.

Thenceforward, the crucial factor in judicial practice consisted not in the size of the letters, but a much more practical aspect: the delayed receipt of the passenger ticket (for example, the passenger received their passenger ticket while embarking,[9]

[7] *John Lisi v. Alitalia,* US Court of Appeals Second Circuit, Nos. 91–95, Dock. 30543–30547, 1966. 510–514.
[8] *Chan Elisa v. Korean Air Lines,* Supreme Court Reporter, 490 U.S. 122, 104 L. Ed. 2d 113, 1989.
[9] *Warren v. Flying Tiger Line Inc.,* US Court of Appeals 9th Circuit, 352 F. 2d 494, 1965.

or they gained access to their ticket on board in their seat).[10] In these cases it was unequivocal that the passenger could not read the warning, or if they did, they could do so in the moment preceding departure, therefore, they did not have time to take steps in the interest of the further reinforcement of their protection.

The majority of passengers do not deal with the contractual conditions of the passenger ticket; their attention is obviously focused on the times of departure and arrival. If any of the passengers did read the warning attentively, generally, they did not decide to turn to an insurance company in order to supplement the low amount determined for the occurrence of an accident under the contractual conditions. Therefore, the lawmaker provided the opportunity for the passenger before the commencement of the flight to purchase insurance entitling them to an amount of compensation deemed sufficient and favourable, or to agree on a higher limit of liability with the air carrier under a special contract [Article 22(1)] and, in the case of checked-in baggage of high value, a special declaration of interest in delivery at destination for a supplementary sum [Article 22(2)*a)*].

The Warsaw Convention, although it protected the limited liability of the airlines by all means, in certain cases provided scope for the forfeiture of the limitation. In the system of the Warsaw Convention, liability became unlimited, if pursuant to the provisions of the Convention, the intentional conduct of the airline as damaging party was established. For this, the claimant needed to prove that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent or recklessly *(luxuria)* to cause damage and with knowledge that damage would probably result (Article 25).

In the lawsuit *Marjorie Zicherman versus Korean Air Lines,*[11] the plaintiff took recourse to the court with the claim that, in the case of a passenger who died in the tragedy of Flight 007 of Korean Air Lines (KE) the airline should compensate for the entire damage instead of the limited amount specified in the Warsaw Convention and raised to 75,000 USD in the Montreal Agreement (1966) applicable in the case of death. The plaintiff submitted the claim with reference to the fact that the pilots, while proceeding in their duty, caused the tragedy via wilful misconduct and negligence, which was proved. Consequently, the limitation of the liability for damages was broken. The court established the liability of the airline and emphasised in its justification that, on the basis of international maritime law, the heirs may claim further pecuniary compensation as a consequence of the loss of life above the high seas. The court obliged the airline to pay the plaintiff (the relatives) compensation of 70,000 USD for the loss of companionship, 161,000 USD for the grief to be borne during their lives, 16,000 USD for the omitted support and inheritance and

[10] *Mertens v. Flying Tiger Line Inc.,* US Court of Appeals 2nd Circuit, 341 F. 2d 851, 1965.
[11] *Marjorie Zicherman v. Korean Air Lines, Co. Ltd.,* Supreme Court reporter 510 U.S. 217, 133 L. Ed. 2d 590, 1996.

100,000 USD for the pain and suffering of the deceased during their fall. The Death on the High Seas Act (DOHSA) is integral to the domestic law of the United States and it is applicable solely if the jurisdiction of an American court has been appointed to adjudge the case. The main objective of the act adopted in 1920 by the Congress of the United States has been that, in accidents on the high seas and due to deaths therefrom, the heirs (child, wife, husband, parents or relatives) will receive compensation from the owner of the ship. The statute has also been applied to aviation accidents, but it pertains exclusively to commercial flights (neither to helicopters, state or military planes, nor to corporate or private airplanes). This rule has been applicable if the accident happened beyond 12 nautical miles off the coast of the United States.[12]

Since the air carriers paid unreasonably low compensation of a fixed amount for the loss of life, before the court, the relatives and heirs resorted to the only method of breaking through limited liability: pursuant to Article 25 of the Warsaw Convention, they endeavoured to prove the responsibility of the crew of the aircraft for the event. The array of solicitors saw evidence in all cases for the fact that the accident had ensued due to the wilful misconduct of the crew or the agent of the air carrier with malice aforethought, but mainly due to the deliberate negligence or recklessness *(luxuria)* of the commanding pilot proceeding in their scope of duties. They did so with consideration to demand the highest possible amount of compensation for their clients by the airlines. This is the origin of the saying that in aviation it is not the flight safety risk that is high, but the membership of the Bar Association.

III. Modernisation of the Warsaw Convention

With the advance of time, the Warsaw Convention became obsolete, although the lawmaker amended it several times via further treaties and supplementary protocols. The continual revision of the Warsaw system of rules ensued primarily because of the reconsideration of liability limitations. The member states did not always keep up with inflation, furthermore, the economic differences and divergences of the standard of living among the countries made the amounts of compensation disproportionate. The saying: "The American passenger is the most expensive passenger" well illustrated the evolved situation. The rulings passed by the courts of the United States one after the other secured the highest pecuniary and non-pecuniary compensation for the claimants, which encompassed all the elements of the damage, such as suffering, the loss of support and inheritance, the grief and pain of the relatives, the loss of paternal care, child-rearing, the absence of the loved person and the loss of an affectionate life. Since the quality of

[12] *Death on the High Seas Act* (DOHSA). *Code of Laws of the United States of America* 46 U.S.C. appx. (Articles 761–768).

life and the cost of living vary by country, this fact was considered by the courts upon the calculation of the amount of damages. For example, if a 45-year-old wage earner (in an administrative position) dying in an air accident leaves behind a wife and one child, their family would receive compensation of approx. 4.5 million USD in the United States. The amount of compensation under the same conditions in Canada would equal 1.7 million USD, in Great-Britain 1.2 million USD, in France 1.4 million USD, in Eastern Europe 450,000 USD, whereas in Asia it would be between 250,000 and 650,000 USD.[13]

Claimants therefore generally filed their claims in U.S. courts in the hope of the award of higher amounts of compensation due to the additional benefits deriving from the more effective protection of consumers. They did so even if the U.S. court did not have jurisdiction for the adjudication of the case, since the headquarters or the principal place of business of the air carrier was not registered in the territory of the U.S. or the place of destination (the last destination on the air ticket) was not in the U.S. In such cases the court rejected the action due to lack of jurisdiction, of competence.

In the case *Klos versus Polish Airline* (LOT),[14] the passenger purchased a return ticket for the route Warsaw (WAW) – New York (JFK) – Warsaw (WAW) in May 1987. The real objective of the flight was not sightseeing, because the passenger wished to start a new life in New York. The passenger bought the return passenger ticket sheerly with the intent to camouflage his plan. However, the Ilyushin Il–62M airplane on flight 5055 of the airline crashed shortly after take-off and all the persons on board lost their lives. The relatives (plaintiffs) referred the case to a U.S. court with reference to the fourth forum, since the ultimate end of the journey, the destination, was New York. Although in the case the first three fora secured the jurisdiction of a Polish court, the plaintiffs chose the American forum of jurisdiction. Nevertheless, the U.S. court established that it could not proceed in the case due to lack of jurisdiction, since the final destination of the journey was not New York, but Warsaw; therefore, it dismissed the action. Undoubtedly, the passenger ticket attests the real objective of the journey (the place of departure and the place of destination were both Warsaw, whereas the agreed stopping place was New York). The subjective goal of the passenger in the contractual relationship was not relevant, hence it was a non-considerable circumstance in the judgment of the case.

If the responsibility of the air carrier were proved, it was by all means liable to the upper limit of the amount of compensation determined under the Warsaw Convention. Although the limitation of the amount of compensation implied measurable advantage for the air carrier, the lawmaker nevertheless precluded the possibility that the air carrier in an extreme case could settle unilaterally at a lower value than the determined amount of liability, or, exempt itself from the obligation of compensation. All clauses with the

[13] A. J. Harakas, *Aviation Issues in the US,* (McGill University, Lecture, October 2014) 7.
[14] *Stefania Klos v. Polskie Linie Lotnicze,* No. 379, Docket 97–7073, US Court of Appeals, Second Circuit 1997.

objective of exonerating the air carrier or the determining a lower limit of liability than that prescribed under the Convention were null and void, but the nullity of any such clause did not entail the nullity of the other provisions of the contract.

The main objective of the amendments of the Warsaw Convention was to raise the limits of liability and the amount of compensation. The increases in themselves did not solve all problems but they supported the trend of the accession of as many countries as possible to the international treaties amending the Convention, and the accession of as many airlines as possible to the agreements on carriage by air. The most important objective further on remained the same: should the parties be entitled to compensation take action anywhere, the statutes to be applied in their cases and the judgments they are awarded need to be the same.

The modernisation of the Warsaw Convention ensued in several steps, of which the most important ones are the following:

– The Hague Protocol (1955);
– The Guadalajara Convention (1961);
– The Montreal Agreement (1966);
– The Guatemala City Protocol (1971);
– The Montreal Additional Protocols [No. 1, 2, 3, 4] (1975);
– The Japanese Initiative (1992);
– The IATA Intercarrier Agreements (1995–1996);
– The Regulation of the Council of the European Union (1997).

1. The Hague Protocol (1955)[15]

The objective of the recommendation elaborated by the ICAO Legal Committee (LC) was that, rather than drafting a new convention, the content of the Warsaw Convention should be validated with the necessary amendments. The members of the committee focused on counterbalancing the excessive protection of the air carriers and supporting the less protected passengers resorting to the service. On this basis, the contracting parties doubled the upper limit of the amount of compensation to be paid in the event of the death or injury of a passenger, so it increased from 8,300 USD to 16,600 USD (this amount did not include the cost of legal proceedings). While the majority of the states ratified the protocol, the government of the United States, with reference to the excessively low limit, refused to accede. (This is interesting because, as a consequence, in the United States, as party to the Warsaw Convention, the upper limit of 8,300 USD remained authoritative until 1966).

[15] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955.

2. The Guadalajara Convention (1961)[16]

In the Guadalajara Convention, the States Parties extended the liability rules to relations where the client, in this case the passenger, does not establish a contractual relationship with the air carrier actually discharging the carriage (the airlines conclude so-called "code-share" agreements with one another; that is, the flight on a route determined by them is operated jointly). With this step, besides the contracting carrier, the actually operating carrier was also included in the scope of regulation.

3. The Montreal Agreement (1966)[17]

The Montreal Agreement is not an interstate international treaty, but an agreement concluded among the airlines. The agreement raised the amount of compensation for death or bodily injury to 75,000 USD[18] in the case of flights departing from, arriving in or flying over the United States. The agreement was applicable in case of the death or bodily injury of a passenger, but it did not contain provisions concerning baggage and consigned cargo. The airlines which intended to operate in the United States needed to accede to the agreement in order to be granted permission to carry out commercial activity in the territory of the country. The United States could make the air carriers interested in cooperation and pressurise them commercially, since at that time 25 per cent of international passenger carriage in the world was implemented through the US, and, simultaneously, it had the largest number of domestic flights in the world.[19] The air carriers in the Montreal Agreement also assumed the obligation to print passenger tickets (with the warning on limited liability therein) in Modern typeface letters, sized 10 (Article 2).

[16] Convention Supplementary to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier. Signed at Guadalajara on 18 September 1961.

[17] Montreal Intercarrier Agreement. Agreement relating to Liability Limitations of the Warsaw Convention and The Hague Protocol. 31 Fed. Reg. 7302, Civil Aeronautics Board Order No. E–28680 approving CAB 18900, 13 May 1966.

[18] The amount of 75,000 USD contained all costs of the assertion of rights. If the claim was enforced before a court in a federal state in which the costs of legal proceedings were reimbursed separately, the upper limit of pecuniary liability was 58,000 USD, which did not include the costs of legal proceedings. The territorial and personal scopes of the Agreement were restricted to air carriers which operated carriage departing from, flying over or arriving in the territory of the United States. Montreal Intercarrier Agreement (CAB18900), 1966. I. (I).

[19] A. T. Wells and B. D. Chadbourne, *Introduction to Aviation Management,* (Krieger Publishing Company, Malabar, 1992) 83.

4. The Guatemala City Protocol (1971)[20]

As a principal objective, the states concerned made an attempt to review the Warsaw Convention, to raise the limits of liability and enhance the responsibility of the air carrier, but the Protocol never took effect. As it was ratified by merely 7 countries, it became a historical document.

5. The Montreal Additional Protocols [No. 1, 2, 3, 4] (1975)[21]

The states attending the Diplomatic Conference convened in Montreal set the objective of addressing the questions left open by the Guatemala City Protocol. The Warsaw Convention had determined the limits of liability in the currency of the French Gold Franc.[22] After the Vietnam War, the United States and other countries devaluated their currency as a consequence. Therefore, the determination of some new stable measurement was necessary. The Special Drawing Rights (SDR)[23] was determined by the International Monetary Fund (IMF), an independent organisation belonging to the UN "family" and the transfer thereto was accepted by the parties. During the proceedings, the conversion of these amounts to the national currency was carried out by the court upon passing the judgment on the basis of the value of SDR prevalent in the given currency. Furthermore, the States Parties modernised and simplified the rules concerning the documentation of carriage, which resulted in serious changes, since the parties could accept lawfully the air waybill made out electronically. In addition, air cargo could depart even if its complete documentation had not been prepared. The

[20] ICAO Doc 8932 Guatemala City Protocol.

[21] In Montreal the Additional Protocols Nos. 1–3. and a Protocol No. 4. were signed, which are jointly designated as the "Montreal Protocols." The Additional Protocol No. 3. did not take effect. The Additional Montreal Protocols Nos. 1., 2., 3. and 4.; ICAO Doc 9148 Montreal Protocol No. 4. to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955. Montreal, 25 September 1975.

[22] The sums mentioned in Francs shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgement. Warsaw Convention, Article (22)5.

[23] The amounts manifest in SDR pertain to a unit determined by the International Monetary Fund. The determination of the SDR is effected so that the major international currencies used in international transactions are united in a currency basket. The SDR (the currency code of which according to the ISO–4217 standard is XDR) derives its value from a basket of five currencies: the Euro, the Japanese yen, the American Dollar, the British Pound Sterling and the Chinese renminbi (yuan). The weight of the given currency manifest in SDR is determined by the weight the given national currency carries in international transactions. *IMF Review of the Method of Valuation of the SDR. Executive Summary,* July 2015. 1–2.

lawmaker added to the limited liability of the air carrier for damage caused to the cargo that the upper limit of the liability for damage could not be surpassed, with the exception if a higher value had been stipulated in advance.

6. The Japanese Initiative (1992)[24]

The initiative encompassed ten Japanese airlines, which incorporated a special provision into their conditions of carriage. For its legal grounds, they drew on the Warsaw Convention, which facilitated that the airlines and the passengers could agree on a higher limit of liability under a special contract [Article (22)1]. According to the conception of the Japanese airlines, in the event of an accident sustained by the passenger, the air carrier acceded to the initiative would be liable in a two-layered system:

– under the amount of 100,000 SDR, the air carrier cannot preclude or limit its liability, therefore, it shall be entirely liable for the damage;
– in the event of damage exceeding 100,000 SDR, the air carrier shall be liable for the amount of proven damage, if the air carrier cannot exonerate itself.

Via the initiative, the Japanese airlines made history, because their recommendation consisting of three paragraphs and barely half a page established the unlimited liability of the air carrier with respect to accidents sustained by the passenger. Although an upper limit was applied, its significance was that the air carrier could exonerate itself from liability only above that amount. It is incredible: what the states had not been able to agree on for 40 years, some airlines could resolve after seven years' negotiations. (Note: this two-layered system will appear later in the Montreal Convention.)

One of the largest catastrophes of the history of civil aviation underlay the commitment of the Japanese, which demonstrated in reality that the low level of the limits of liability for damage could not be tenable any longer. On 12 August 1985, the vertical stabilizer detached explosively due to a maintenance-repair fault from a Boeing 747–400 Jumbo Jet airplane 12 minutes after take-off on the Tokyo–Osaka 123 domestic flight operated by Japan Airlines (JL). The unnavigable plane crashed in the mountains. Of those on board, 520 lost their lives, while 2 persons survived the accident. Since the flight was domestic, the Warsaw Convention was inapplicable. Therefore, the payment of compensation was determined pursuant to the rules of national law. However, these amounts considerably exceeded the Warsaw limits, so it became unambiguous that, had this been an international flight, the relatives of the victims would have received much less compensation.

[24] Japan Airlines' Conditions of Carriage; "The Japanese Initiative", (1995) 11 (2) *Lloyd's Aviation Law*.

7. The IATA Intercarrier Agreements (1995–1996)[25]

In June 1995, Washington D.C. accommodated the IATA international conference, where two agreements were drawn up (IIA/MIA) by the member airlines. The majority of air carriers adopted the two-layered Japanese Initiative (1992) guaranteeing higher liability limits and agreed that the Warsaw system inevitably needed a complete review besides the preservation of its basis. The review of the Warsaw system was necessitated by the rigorous liability rules and low limits, which were unfair towards the claimants.

8. The Regulation of the Council of the European Union (1997)

Although the law of the European Union does not constitute international law (therefore it is not part of the international treaties reforming the Warsaw system), we need to make mention thereof here, since the institutions of the European Union were among the pioneers in the modernisation process of the system of liability for damages governing air carriers. The European Union also deemed the value limits of the liability of air carriers to be low, so it urged the prescription of uniform liability rules within the Community. The legitimacy of regulation within the Union was justified, mainly because the Warsaw Convention contained rules exclusively concerning international air carriage, while in the internal market of the EU the lawmaker abolished the distinction between domestic and intra-EU carriage as of 1 April 1997 as part of the Third Package.[26] Consequently, in the inland market of the community, liability rules based on the same provisions were necessary. A further intent of the lawmakers of the European Union was to reinforce the protection of passengers involved in air accidents; therefore, an unlimited liability system in the event of the death or bodily injury of passengers was introduced.

As a result of law-making, the European Parliament and the Council of Europe adopted the Council Regulation No. 2027/97 on air carrier liability in the event of accidents,[27] which was amended under Regulation (EC) No. 889/2002 of the European Parliament and of the Council five years later.[28] This was necessary since, on 5 April 2001,

[25] The Intercarrier Agreement on Passenger Liability (IIA) and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) adopted at the 51st General Assembly of IATA organised in Kuala Lumpur in October 1995.

[26] Third Package (HL L 240.): Council Regulation (EEC) No. 2407/92 on licensing of air carriers; Council Regulation (EEC) No. 2408/92 on access for Community air carriers to intra-Community air routes; Council Regulation (EC) No. 2409/92 on fares and rates for air services.

[27] Council Regulation (EC) No. 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (9 October 1997), HL L 285., 17 October 1997. 1.

[28] Council Regulation (EC) No. 889/2002 of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents HL L 140., 30 May 2002. 2.

the Council of the Europe had made a decision on the approval of the accession of the European Union to the Montreal Convention and on the harmonisation of its rules with the regulations of the EU.[29] According to the justification of the Council, the Community and its member states have parallel competence concerning the issues encompassed by the Montreal Convention; therefore, for the purpose of its uniform and comprehensive application, the simultaneous ratification of the Montreal Convention by the EU and its member states was necessary.

Council Regulation (EC) No. 2027/97/EC is to be applied in the event of the death or bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board an aircraft or in the course of any of the operations of embarking or disembarking (Article 1). Following the models of the Japanese Initiative and the IATA Air Carrier Agreements, the European Union, at the level of the member states, introduced the unlimited liability of Community air carriers for damages in the event of the death or bodily injury of passengers. The Community air carrier,[30] in the event of damages up to the sum of the equivalent of 128,821 SDR (about 155,000 EUR) may not challenge the claim for compensation, or exclude or limit its liability [Article 3(2)]. Up to this amount, the air carrier shall provide compensation in all cases. Above the amount of 128,821 SDR, the air carrier shall be liable for the damage caused, but may resort to defence against the claim (may be exonerated wholly or partly from its liability) if it can prove that the damage derived from the negligence of the injured or deceased passenger or the passenger contributed to the occurrence of the damage [Article 3(3)]. The burden of proof shall be borne by the Community air carrier; as a consequence, the passenger is granted a greater opportunity to enforce their claim for damages more successfully.

The "Warsaw system" outgrew itself. Due to increased traffic and the changed commercial circumstances, it no longer served the purpose for which it had been established. The modernisation of the Warsaw Convention had constantly been on the agenda and, as a consequence of the amendments and the accessions thereto in various numbers, it had become a rather complex and heterogeneous system of rules. It was not by chance that the international community coordinated by the organisation of the ICAO, as a result of the work and deliberation of 33 years, reached the ultimate and all-encompassing destination of the process: the Montreal Convention.[31]

[29] Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air.

[30] The *community carrier* is an airline with air traffic rights in the member states of the European Union, which is in the substantial ownership (50%+1) of EU states and/or the citizens of the member states and is under effective control. Sipos A., *A nemzetközi polgári repülés joga,* (ELTE Eötvös Kiadó, Budapest, 2018) 132.

[31] M. Milde, From Warsaw 1929 to Montreal 1999, *IASL/McGill Symposium* (UAE, Dubai, 13–14 December 2003).; *ICAO Special Meeting on Limits for Passenger under the Warsaw Convention and The Hague Protocol,* (Montreal, 1–15 February 1966).

IV. The Montreal Convention (1999)[32]

The Montreal Convention summarises the results of 70 years' law-making and retains certain provisions from the original text and the subsequent amendments of the Warsaw Convention, while it meets the most recent demands of regulation. The Montreal Convention is not a "successor" of the Warsaw regime, it follows, it is a new international treaty, which was designed to create complete uniformity in private law liability relations between the air carriers and their passengers, as well as between the air carriers and consignors. The establishment of such uniformity requires as many accessions by the states as possible. The Montreal Convention "predominates" over the outdated Warsaw system, replaces the Warsaw Convention and its amendments in all respects and prevails over any other rules which apply to international carriage by air (Article 55).

Nevertheless, the Warsaw Convention is still in effect; it was ratified by 152 states. At the same time, the Montreal Convention has been ratified by 135 states and a regional economic integration organisation, the European Union itself.[33] Therefore, there are still states, although in a diminishing number, where the Warsaw Convention and its amendments are still valid. This fact further complicates the adjudication of cases on the basis of the Warsaw system. The situation is aggravated by the fact that states have ratified different amendments of the Warsaw Convention, thus, it is very likely that the passengers on the same airplane are subject to different rules and different jurisdictions. In the case of one passenger the Montreal Convention is applicable, in the case of the other one the Warsaw Convention and its amendments apply, while the third passenger's situation is governed by national law, therefore, in the event of an accident, their claims for damages will be adjudged on the basis of different rules of liability. The strange situation may also emerge that, if the airline suffers a catastrophe, less compensation is due for the relatives of the deceased passenger than for a slightly injured person surviving the accident. The reason is that the heir of the deceased passenger is entitled to compensation on the basis of the Warsaw Convention and its amendments (its version amended by The Hague Protocol and the Montreal Agreement) and may in the first step claim compensation of at most 75,000 USD, whereas the passenger subject to the Montreal Convention may claim compensation with respect to the degree of the

[32] ICAO Doc 9740; Convention for the Unification of Certain Rules for the International Carriage by Air. Montreal, 28 May 1999.

[33] The European Community as a regional economic integration organisation deposited the ratifying document with the Secretary General of the ICAO on 29 April 2004, as a consequence of which the Convention took effect for the EU afterwards on the 60th day, on 28 June 2004.; Council Decision 2001/539/ (EC) of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention 1999). Official Journal L 194, 18/07/2001 38–38.

injury, of 128,821 SDR[34] (about 183,500 USD). If the injury is lighter, the demand of the claimant shall be fulfilled under this amount. If the injury is more severe, i.e., it exceeds the equivalent of 128,821 SDR and the air carrier cannot exonerate itself above this sum, it shall indemnify the complete proven damage to the passenger.

The different practice of the application of law under the Continental and the Anglo-Saxon (case law) legal regimes founded on each other permissively by the Warsaw regime gave rise to a special situation. The voluminous case-law practice under the Warsaw system became a knowledge base in the course of time, which the lawmaker saved for posterity with a unique legal technical solution: several legal institutions and concepts of the Warsaw Convention (limited liability, the accident, the exclusiveness of the Convention, the four jurisdictional forums, the limitation of lawsuits, the definitions of international carriage) were transplanted into the new Montreal Convention in some places with minor modifications, which did not affect their substance. Consequently, the legal cases in this scope will have further significance in the application of law; they provide guidance and shape the law. Therefore, the proceeding courts of the States acceded to the Montreal Convention may refer to and rely on former legal cases and legal practice constituting precedence on the basis of the Warsaw Convention and its additional protocols.

The Montreal Convention focuses closely on four major areas:

– the format of the documents of carriage and its display (Articles 3–11);
– the liability regime (objective liability) (Articles 17–18);
– the limitations of liability (unlimited liability for accident) (Articles 21–22); and
– jurisdictional forums [five forums (4+1)] (Article 33, Article 46).

The lawmaker opened a new chapter in the history of the liability of the air carrier for damages, since, in the event of an accident (bodily injury or death) sustained by the passenger, it obliged the air carrier to assume unlimited liability for damages, it simplified the documentation of carriage, facilitated the electronic issuance of the air ticket and the air waybill and, by the introduction of the fifth forum of jurisdiction, it extended the scope of optional proceeding courts for the plaintiffs; furthermore, it obliged the air carrier, if the national law so required, to make advance payments following an accident sustained by the passenger. The requirement of the purchase of

[34] The amount of 100,000 SDR per passenger determined in 1999 and all other amounts in Articles 21–23 of the Convention, for the purpose of the offset of the inflation, have been raised by the States Parties pursuant to the rule of Article 24 of the Montreal Convention. The upper limit in the case of passengers became 113,100 SDR in 2009, then 128,821 SDR in 2019. The limit, revised at five-year intervals did not change in 2014, then, in 2019 it was amended again and the raised amounts have been applied since 28 December 2019. *Revised Limits of Liability Under the Montreal Convention of 1999,* https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx (Last accessed: 31 July 2019).

adequate insurance by the air carrier is also a new element in the Montreal Convention, just like the provision that the air carrier may enter a counterclaim against the claimant third party.

This way, the lawmaker resolved the sustained differences and the consequently deriving conflicts between the old and the new system by the establishment of an entirely new international treaty, i.e., the Montreal Convention (not by the amendment of the Warsaw Convention, although drawing upon it), which replaced all the former conventions, protocols and agreements in the relations among the contracting States. The comprehensive unification of law is unequivocally only a matter of time, and the Montreal Convention will predominate as being observed by the decisive majority of the international community.

V. Conclusion

Instead of a fragmented and complex "Warsaw system" consisting of six international treaties, the Montreal Convention offers the alternative of a uniform, homogenous system of rules. This reinforces the intention of the states and regional economic integration organisations to accede. Although there are still states which are parties solely to the Warsaw Convention (or not parties to both of them), it can be established that, as reflected by the ratifications to the new Montreal Convention hitherto, the lawmaker has successfully laid the foundation for the unification of the system of the liability of the air carrier for damages. International legal harmonisation can be realised only via the actual prevalence of the rules and procedures set forth under the nouveau Montreal Convention, since there are still numerous collisions deriving from diverse national regulations and conflicts arising during the adjudication of private legal disputes.