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**A CURE FROM ROME FOR MONTREAL'S ILLNESS:
ARTICLE 5 OF THE ROME I REGULATION AND FILLING
THE VOID IN THE 1999 MONTREAL CONVENTION'S
REGULATION OF CARRIER'S LIABILITY
FOR PERSONAL INJURY**

YEHYA BADR*

ABSTRACT

An examination of the 1999 Montreal Convention shows that the drafters did not intend to lay down a comprehensive treaty that would organize a carrier's liability for personal injury to passengers. They opted to achieve a certain level of uniformity through enacting a set of rules that tackled several key issues such as the grounds for a carrier's liability, the available defenses, and the limits on the recoverable damages. Consequently, some unaddressed issues created a void in the Montreal Convention and were then left without a clear remedy. In this article, a distinction is made between two types of voids: first, the definitional void describes the lack of definition for several key terms used in the Montreal Convention, such as "accident" and "carrier." Second, the regulatory void describes the lack of rules to address issues such as determining the effect of a passenger's contributory negligence as a defense for liability and the right of action. This article demonstrates that national courts have resorted either to the forum's law or the forum's choice-of-law rules to fill the void in the Montreal Convention. As a result, international uniformity of results cannot be achieved nor is there any predictability. This article recommends the adoption of Article 5 of the Rome I Regulation as a solution to this problem. Doing so would give both parties the freedom to choose a

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law, form a predetermined list, and fill the above mentioned voids, while providing alternative choice-of-law rules if the parties decided not to choose a law to govern their contract for air carriage.

I. INTRODUCTION

THE DRAFTERS OF THE MONTREAL CONVENTION decided to focus their attention on uniting some aspects of the Air Carrier's liability under the contract of international air carriage without including a mechanism to ensure the uniform and consistent interpretation and application of the Convention's text.¹ This situation has created two types of voids: the first type is the "definitional void" because the drafters left several key concepts such as *carrier* and *accident* undefined.² As the author will demonstrate in this article, the courts in various jurisdictions need to develop their own definitions of those key terms to enable them to apply the Montreal Convention, or else the same term is given different meanings rendering uniform application of the Convention impossible. The second type of void is the "regulatory void," which describes the lack of substantive rules addressing issues such as the effect of a passenger's contributory negligence as a defense for liability and a carrier's duty of care under the contract of carriage. Thus, courts have resorted to either using their own laws or their choice-of-law rules. As the author will demonstrate, neither solution is capable of producing uniform results. Finally, the author will suggest using Article 5 of the Rome I Regulation as a choice-of-law rule to fill the void in the Montreal Convention in a uniform and predictable manner because it allows carriers and passengers to choose a law from a limited set of options to govern their contracts while providing alternatives if such choice was absent. Therefore, this article will be divided into two parts. Part Two will explore both types of voids. Part Three will explore the use of both forum law and forum choice-of-law rules as a cure for the void, ending in the final suggestion of the use of Article 5 of the Rome I Regulation to fill the void.

¹ Marc McDonald, *The Montreal Convention and the Preemption of Air Passenger Harm Claims*, 44 IRISH JURIST (N.S.) 203, 231 (2010).

² Tracy Bussel, *Airline Injuries: When Is Liability Imposed*, 2002 INT'L TRAVEL L.J. 87, 88-89 (2002).

II. EXPLORING THE VOID

In this part, the article will explore both types of voids within the Montreal Convention, starting with the definitional void followed by the regulatory void. The distinction between the two types of voids is important because the definitional void affects the Montreal Convention's scope of application. According to Article 17 Section 1, "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."³ Therefore, if multiple definitions are used for what constitutes an "accident" as a condition precedent for applying the Montreal Convention, then the Convention's scope of application will not be uniform and will vary from one jurisdiction to another.

On the other hand, the regulatory void touches upon the exclusivity of the Montreal Convention rules that govern a carrier's liability. Whenever a court does not find a rule to address an issue, such as the effects of a passenger's contributory negligence within the Montreal Convention, it will resort to either its own national law or its own choice-of-law rules. This means that the Montreal Convention will not enjoy the exclusivity status required to attain the Convention's purpose of unifying the rules governing the air carrier's liability.

A. DEFINITIONAL VOID

As stated earlier, the carrier's liability for a passenger injury or death is determined by Article 17.⁴ However, due to the lack of definitions provided by the text of the Montreal Convention, national courts defined this liability according to their own national concepts or by using choice-of-law terminology. These techniques are used in the 1929 Warsaw Convention as well.⁵ This led to a lack of uniformity in holdings because the same concept may have various meanings. This is especially problematic with the terms *carrier* and *accident*.

³ Convention for the Unification of Certain Rules for International Carriage by Air, art. 17 sec. 1, May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

⁴ *Id.*

⁵ Law No. 131 of 1948 (Civil Code), *al-Jaridah al-Rasmīyah*, 29 July 1948, § 10 (Egypt) [hereinafter the Egyptian Civil Code]; Albert A. Ehrenzweig, *Specific Principles of Private Transnational Law*, 121 RECUEIL DES COURS 235 (1968); HENRI BATIFOL & PAUL LAGARDE, *TRAITÉ DE DROIT INT'L PRIVÉ* 478 (8th ed.1993).

1. *Carrier*

Although the Montreal Convention is all about regulating air transport, it does not even define “carrier,”⁶ unlike EU regulation No. 889/2002, which defines an air carrier as “air transport undertaking with a valid operating license.”⁷ Thus, each state is free to develop its own definition of the word carrier without consideration for uniformity of results and holdings. For instance, the Singaporean courts have ruled that, under the Warsaw Convention (which also does not contain a definition), the term *carrier* does not include any party undertaking the carriage of goods besides the actual or contractual carrier.⁸ Therefore, freight forwarders who conclude contracts of aerial carriage, either as a principal or as an agent, are not carriers according to the Singaporean definition of the word carrier used in the Warsaw Convention.⁹ On the other hand, a Japanese court ruled that the word carrier under the Warsaw Convention meant exclusively a contracting party unless the circumstances of the case indicate that both the actual and contracting carrier are engaged in performing a single operation.¹⁰

In France, the courts use a more elaborated approach to define the concept of carrier which requires the examination of the nature of the operations carried out under the contract. There, a carrier is a party engaged solely in an activity qualified as “transport,” which is the physical displacement of a person or thing.¹¹ On the other hand, a party whose activity is qualified as a “voyage,” which is a mixture of transportation and activities, or as *forfait touristique*, which adds accommodation to the mix, will not be considered a carrier. As a result, the law of the jurisdiction where the activity took place, and not the Montreal Convention, will be applicable to the merits of the case.¹²

Similarly, the lack of a definition of a carrier’s “agents” or “servants” also causes each court to use its own definitions. In

⁶ Bernhard A. Koch, *Other Strict Liabilities*, TORT L. OF THE EUR. COMM. 135, 1135 (Helmut Koziol & Reiner Schulze eds. 2008).

⁷ 2002 O.J. (L140) 2, 3.

⁸ Leng Sun Chan, *Claims Arising from Air Carriage*, 12 SING. ACAD. L.J. 331, 335 (2000).

⁹ *Id.*

¹⁰ Tokyo Chiho Saibansho [Tokyo Dist. Ct.] October 13, 1999, (wa) no. 11629, 5 UNIFORM LAW REVIEW [UNIF. L. REV.] 354, 366, 368 (Japan).

¹¹ Olivier Cachard, *Le Transport International Aérien de Passenger*, 373 RECUEIL DES COURS 23 (2015).

¹² *Id.*

the United States, there are two different tests for determining whether a person qualifies as an agent or a contractor. The first is the furtherance test, which classifies a person as an agent or contractor based on how far removed that person's activity is from the execution of the contract of carriage.¹³ Thus, a company contracted to clean airplanes was found to be an agent of the carrier under the Warsaw Convention.¹⁴ The test is also applied to determine agents under the Montreal Convention. Thus, a terminal operator is an agent for the air carrier because its operations are a vital part of executing the contract of transportation.¹⁵ The second test, also developed when interpreting the Warsaw Convention, is the required services test, whereby a person is an agent or servant if his services were required by the airline according to the forum's law.¹⁶ For example, if a law requires that the airlines be responsible for conducting security inspections, then the airlines will be liable for the actions of those who conduct that activity, even if those who made the actual inspection are merely the employees of a contractor. On the other hand, if the law requires the security inspection to be conducted by law enforcement agencies or some other third party, then the airline will not be liable for actions of its employees.

Under Egyptian law, the distinction between servants and agents as ancillaries depends on their functions during the performance of the contract of carriage. On one hand, an agent is a person who concludes legal transactions in the name of and on behalf of his principal in accordance with the terms of the contract of agency and the former's instructions.¹⁷ Therefore, the principal carrier is liable only for the agent's actions that are associated with executing his duties as an agent, concluding contracts on his behalf. A carrier will not be liable for the agent's action if it lies beyond the agent's duties or are in breach of the

¹³ *Julius Young Jewelry Mfg. Co. v. Delta Air Lines*, 414 N.Y.S. 2d 528, 528 (N.Y. App. Div. 1979).

¹⁴ *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*, 13 F. Supp. 2d 508, 513–15 (S.D.N.Y. 1998).

¹⁵ *Vumbaca v. Terminal One Group Ass'n. L.P.*, 859 F. Supp. 2d 343, 364 (E.D.N.Y. 2012).

¹⁶ *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 776 F. Supp. 710, 714 (E.D.N.Y. 1991); *Kabbani v. Int'l Total Servs.*, 805 F. Supp. 1033, 1039–40 (D.D.C. 1992).

¹⁷ Civil Code, art. 699 (Egypt) (“Agency is a contract whereby an agent binds himself to perform a juridical act on behalf of a principal.”).

principal's instructions.¹⁸ On the other hand, the servant is a subordinate employee of the carrier. Subordination means that the carrier supervises the servant's performance of his duties, determines those duties, and the hours of work.¹⁹ Therefore, the airplane's crew and the carrier's ground-handling personnel are servants. The carrier is not liable for the servant's actions unless the conduct took place while the servant was performing his duties.²⁰

2. Accident

It is important to remember that the purpose of the Montreal Convention, as with the Warsaw Convention, is to define carrier liability for the bodily injury of the passenger on a basis that is different from the *res ipsa loquitur* concept.²¹ The carrier's liability does not arise by the mere occurrence of the passenger's death or injury. The carrier is liable only when the death or physical bodily injury is the direct result of an accident that occurred while the passengers were onboard the airplane and during the time between embarkation and disembarkation. Fortunately, most jurisdictions agree that the phrase "bodily injury" in Article 17 of the Montreal Convention is a continuation of "injury" in Article 17 of the Warsaw Convention. Therefore, a passenger's right to recovery is limited to physical injuries.²² This means that injuries resulting from a passenger's medical condition, such as cardiac arrest²³ or other individual physiological events,²⁴ do not qualify as a "bodily injury" and a carrier thus

¹⁸ Civil Code, art. 703 (Egypt) ("The Agent is bound to perform the agency without exceeding the limits fixed therein.").

¹⁹ Civil Code, art. 671 (Egypt) ("A contract of employment is one whereby one of the contracting parties undertakes to work in the service and under the supervision of the other contracting party in consideration of a remuneration which such other party undertakes to pay.").

²⁰ Civil Code, art. 174 (Egypt) ("A Master is liable for the damage caused by an unlawful act of his servant when the act was performed by the servant in the course, or as a result, of his employment.").

²¹ Malgorzata Polkowska, *Some Observations on Civil Air Carrier Liability in International Air Carriage – "Accident", "Damage" and Jurisdiction*, 15 UNIF. L. REV. 109, 111 (2010); compare with John Fenston, *Res Ipsa Loquitur in Aviation*, 1 MCGILL L.J. 209, 229–210 (1953).

²² *E. Airlines, Inc., v. Floyd*, 499 U.S. 530, 552 (1991).

²³ Jennifer A. George, *Sudden Cardiac Arrest and Airline Liability*, 1999 INT'L TRAVEL L.J. 178, 185 (1999).

²⁴ Muḥammad Mūsā Muḥmad, *Fākrt Al-khṭā Fy Itifaqyt "Farsfya" wa Ms'lyt Al-nāql Al-Jwi Fy Al-naql Al-Jwi* 214 (1986).

cannot be held liable for those occurrences.²⁵ However, the Montreal and Warsaw Conventions do not define accident as an injury-producing event. There was an attempt to limit the definition of accident in a draft of the Warsaw Convention. The draft limited the term “accident” to incidents related to pilot error, equipment malfunction, or natural disaster. However, this definition was abandoned in the final version²⁶ and no effort was made to introduce one in 1999 when the Montreal Convention was passed.

Most jurisdictions agree that the word “accident” in both Conventions refers to the cause of the death or injury as distinct from the death or injury itself.²⁷ In other words, courts should focus their attention on the event that caused the passenger’s death or injury to see if that event qualifies as an accident. This is crucial because it serves as a condition precedent for holding the carrier liable for damages to the passenger. Under the Warsaw Convention, the U.S. Supreme Court in *Air France v. Saks* defined accident as an “unexpected or unusual event or happening that is external to the passenger.”²⁸ This means that certain incidents, such as loss of hearing, do not constitute an accident, despite being an unpleasant event, since they are not uncommon occurrences during air travel.²⁹ Important examples of accidents include plane hijackings and terrorist attacks.³⁰ As a result, all federal courts across the United States apply *Saks*’s definition of “accident” to the Montreal Convention.³¹

In the United Kingdom, the House of Lords refused to recognize as an accident a passenger’s injury from deep vein thrombosis caused by sitting onboard an airplane seat for an extended period.³² The High Court of Australia, similarly, decided that the word “accident” evokes the elements of mishap or misadventure, however produced, and is wide enough to include any kind

²⁵ *Air France v. Mme X.*, Cour D’ Appel De Toulouse, 275 *Revue Française de Droit Aerial et Spatial* 327, 329 (2015).

²⁶ Bussel, *supra* note 2, at 89.

²⁷ *Povey v. Qantas Airways* (2005) 223 CLR 189, 204 (Austl.).

²⁸ *Air France v. Saks*, 470 U.S. 392, 405 (1985).

²⁹ *Id.* at 406.

³⁰ *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (1972); Roberta L. Wilensky, *Flying the Unfriendly Skies: The Liability of Airlines under the Warsaw Convention for Injuries Due to Terrorism*, 8 *Nw. J. INT’L L. & BUS.* 249, 271 (1987).

³¹ *Arellano v. Am. Airlines, Inc.*, 69 F. Supp. 3d 1345, 1348 (S.D. Fla. 2014); *Siddiq v. Saudi Arabian Airlines Corp.*, No. 6:11-cv-69-Orl-19GJK, 2013 WL 2152566, at *5 (M.D. Fla. Jan. 9, 2013).

³² *In re Deep Vein Thrombosis Group Litigation*, [2006] 1 A.C. 495, 527.

of misfortunate or undesirable circumstances or condition or combination thereof and ultimately also found that deep vein thrombosis did not qualify as an accident under the Warsaw Convention.³³ In France, courts define accident under the Montreal Convention as a material incident that was provoked inclusively by an external event which is unexpected, sudden, and inflicted involuntarily upon the victim.³⁴ Thus, incidents like loss of hearing or dizziness, which are usual or expected incidents of air travel, do not qualify as an accident under the Montreal Convention.³⁵ Even falling on the tarmac before boarding an airplane is not considered an accident.³⁶

However, a careful examination of the above definitions reveals that each do not provide any informative criterion to determine when a given event is considered an accident. The use of terms like “unusual,” “unexpected,” and “sudden” does not define the unusualness, unexpectedness, or suddenness of an incident in order to be qualified as an accident under either the Warsaw Convention or the Montreal Convention.³⁷ In fact, the U.S. Supreme Court in *Saks* expressly stated that its own definition of accident “should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.”³⁸ Therefore, courts still have a large latitude for when a given event constitutes an “accident” and can base judgment on the circumstances of the case, even when the injury might not be flight related. For example, in *Olympic Airways v. Husain*,³⁹ the respondent’s husband presented to an airline check-in agent a physician’s letter that explained how he had a medical history of recurrent anaphylactic reactions and should be seated in a non-smoking area of the plane.⁴⁰ During his flight from Athens to San Francisco, he found himself seated three rows away from the smoking section of the flight, which prompted him to ask the flight attendant if he could be seated away from the smoking

³³ *Povey v. Qantas Airways* (2005) 223 CLR 189, 205 (Austl.).

³⁴ *Air France c/ Mme X.*, Cour D’Appel De Toulouse (2015) 275 *Revue Française De Droit Aérien et Spatial* 327, 329 (2015).

³⁵ *Id.*

³⁶ *La Société Aigle c/ Lex Époux Y*, Arrêt no 11 du 15 January 2014 (11-27.962) Cour De Cassation-Première Chambre Civile.

³⁷ Alexa West, *Defining “Accidents” in the Air: Why Tort Law Principles are Essential to Interpret the Montreal Convention’s “Accident” Requirement*, 85 *FORDHAM L. REV.* 1465, 1479 (2016).

³⁸ *Air France v. Saks*, 470 U.S. 392, 405 (1985).

³⁹ 540 U.S. 644 (2004).

⁴⁰ *Id.* at 647.

section, but his request was not answered.⁴¹ He suffered from an anaphylactic reaction from inhaling secondhand smoking and died onboard.⁴²

The carrier argued that the death was not an accident under Warsaw Convention for two reasons: First, the carrier asserted that the passenger's death was due to an internal reaction (asthma), not an external event.⁴³ Second, the carrier asserted that the flight attendant's refusal to change the passenger's seat further away from the smoking section was an *inaction*, whereas Article 17 of the Warsaw Convention requires an accident to be the result of an *action* that causes the injury.⁴⁴ However, the U.S. Supreme Court said that "the injury producing event," the accident, is not a "precise factual event" but is often a group of "multiple interrelated factual events that combine to cause any given injury."⁴⁵ In other words, an accident is not a single fact but a grouping of several events that together cause the injury, which was in this case: (1) the passenger's medical history; (2) the passenger's close to the smoking section; (3) the exposure to the secondhand smoke; and (4) the flight attendant's refusal to reseat the passenger away from the smoking section in violation of the airliner's policy and instructions.⁴⁶ Furthermore, the U.S. Supreme Court held that the flight attendant's inaction, her refusal to assist the passenger, was in fact an unusual event or happening that constitutes an "accident" under the Warsaw Convention.⁴⁷ In this case, at least in the United States, the concept of an accident no longer reflects an event but a description of a set of circumstances surrounding the passenger when the injury occurred.

This broad, fact-sensitive approach to defining "accident" ultimately allows courts to hold a carrier liable for events that are not even specific to the operation of air transport, such as the acts of co-passengers. In *Wallace v. Korean Air*, a South Korean passenger sexually molested his co-passenger-plaintiff who fell asleep during a flight from the United States to South Korea.⁴⁸

⁴¹ *Id.*

⁴² *Id.* at 648.

⁴³ *Id.* at 652.

⁴⁴ *Id.*

⁴⁵ *Olympic Airways v. Husain*, 540 U.S. 644, 653 (2004).

⁴⁶ *Id.*

⁴⁷ *Id.* at 654–55.

⁴⁸ *Wallace v. Korean Air*, 214 F.3d 293, 295 (2d Cir. 2000).

The United States Second Circuit decided that the carrier was ultimately liable for this injury because

[t]he characteristics of air travel increased [her] vulnerability to [the] assault . . . she was cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark. It was then that the attack occurred.⁴⁹

The court pointed to the assailant's ability to unbutton the plaintiff's belt, unzip her shorts, and squeeze his hands into her shorts, all without being checked by any of the flight crew, as important factors in characterizing the sexual assault as an "accident" under the Warsaw Convention.⁵⁰ In short, the definition of what constitutes an accident under both the Warsaw Convention and the Montreal Convention will depend on a court's evaluation of the circumstances surrounding the passenger's death or injury instead of a predetermined criterion, which creates uncertainty and renders the predictability of the case outcome near impossible.

Another thorny issue caused by the definitional void is the issue of what constitutes "embarking" and "disembarking," since a carrier's liability for a passenger's death or bodily injury commences with embarking and ceases upon disembarking. This article will focus on two approaches. The first approach, adopted by the French courts, focuses on the time when the contract of air transport starts to run rather than on defining embarking and disembarking.⁵¹ In other words, the French approach holds a carrier liable for a passenger's bodily injury as long as the injury occurred during the execution of the contract of transport and was associated with the risks of air transport.⁵² For example, upon interpreting the Warsaw Convention, a French court ruled that a carrier, Air France in this case, was liable for the injury of a passenger who was pushed by the carrier's airport bus while proceeding from the air terminal toward his aircraft.⁵³ There, the contract had commenced because the passenger was on his way to board the agreed-upon airplane and was then injured by the airline. On the other hand, the French courts ruled that

⁴⁹ *Id.* at 299.

⁵⁰ *Id.* at 300.

⁵¹ Polkowska, *supra* note 21, at 112.

⁵² Hassan Kyrak, Ms'lyt Al-nāql Al-Jwi fy Itifaqyt "Farsfya" wa BrutwkwL Lahly Al-Müdl Lha 28 (1959).

⁵³ Polkowska, *supra* note 21, at 112.

hijacking and terrorist attacks do not constitute accidents under the Warsaw Convention because they are not related to the risks of air carriage.⁵⁴

A different approach is used by U.S. courts, which was laid out in *Day v. Trans World Airlines, Inc.*⁵⁵ The court developed a tripartite test whereby the determination of embarking and disembarking is made according to “the passengers’ activity . . . to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate”⁵⁶ The court held that a terrorist attack that took place inside the terminal constituted an accident that occurred during embarkment.⁵⁷ The same conclusion was reached in *Evangelinos v. Trans World Airlines, Inc.* where a group of passengers were shot by terrorists while standing in a queue at the transit hall prior to boarding the airplane at Athens International Airport.⁵⁸ Courts across the United States use the *Day* tripartite test to determine what constitutes embarking and disembarking under the Montreal Convention.⁵⁹

Nonetheless, the *Day* tripartite test does not produce predictable results because it is based on a circumstantial approach, much like the test that U.S. courts use to define “accidents.” In *Martinez Hernandez v. Air France*, the court held that a terrorist attack on passengers in a baggage claim was not an accident for three main reasons. First, the passengers had already emerged from the aircraft and presented their passports to the customs authorities. Second, the passengers were about half a mile away from the airplane that they deplaned. Third, the passengers’ movements were no longer restricted or monitored by the airline personnel.⁶⁰ In a different case, preventing a passenger from boarding an airplane *was* held to constitute an accident

⁵⁴ Mamdouh Ali Alhoudaili, *Air Carrier Liability – Unfinished Unification of Private International Air Law* 80 (May, 2005) (Unpublished LL.M thesis, McGill University) (on file with ProQuest Dissertation & Thesis Global Database).

⁵⁵ 528 F.2d 31 (2d Cir. 1975).

⁵⁶ *Id.* at 33.

⁵⁷ *Id.*

⁵⁸ *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 156 (1977).

⁵⁹ See *Kruger v. Virgin Atl. Airways, Ltd.*, 976 F. Supp. 2d 290, 303 (E.D.N.Y. 2013), *aff’d*, 578 F. App’x 51 (2d Cir. 2014); *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1173 (11th Cir. 2014); *Adelson v. Am. Airlines, Inc.*, No. C 17-00548 WHA, 2017 WL 2265459, at *5 (N.D. Cal. May 24, 2017); *Sanches-Naek v. TAP Portugal, Inc.*, 260 F. Supp. 3d 185, 194 (D. Conn. 2017); *David v. United Airlines, Inc.*, No. 2:15-cv-02262-ODW (PJWx), 2016 WL 1573423, at *5 (C.D. Cal. Apr. 18, 2016).

⁶⁰ *Martinez Hernandez v. Air France*, 545 F.2d 279, 282–85 (1st Cir. 1976).

while embarking under the Montreal Convention because boarding an airplane is an activity related to air travel.⁶¹ In another reported case, the court decided that an injury sustained by a passenger while moving from one concourse to another to catch a connecting flight, at his own pace and speed, did *not* qualify as an accident under the Warsaw Convention.⁶² Finally, in Hong Kong, a district court adopted the *Day* tripartite test and found that the fall of an unaccompanied minor while standing in a queue at the immigration checkpoint qualified as an accident under the Warsaw Convention.⁶³ So, if a terrorist attack or natural catastrophe destroyed an entire airport, there will be exactly two groups of passengers: The first group is covered by the Montreal Convention because they were at the airport either standing in a queue at the airline's check in counter or at the immigration checkpoint. The second group is not covered by the Montreal Convention because they are claiming their luggage or waiting for their connecting flight in the airport's lounge.

As a result, using a forum's own substantive law to define key terms like "accident" under the both the Warsaw Convention and the Montreal Convention creates unpredictable and inconsistent results that vary from one court to another and one country to another. Each court will apply its own notions to supplement the definitional void in the Convention. In fact, as seen, the definitional void enables some courts to define the word "accident" in such a generous and expansive manner that passengers in those jurisdictions could receive damages for terrorist attacks while passengers in other countries may not. Thus, a plaintiff's ability to recover damages from the carrier under the Montreal Convention may depend on the court's definition of what constitutes an accident rather than the actual nature of their injuries.

B. THE REGULATORY VOID

The regulatory void refers to the lack of sufficient detailed rules within the text of the Montreal Convention, which ultimately prevents it from being the exclusive source of rules regulating a carrier's liability under the contract of air carriage. The

⁶¹ *Okeke v. Nw. Airlines, Inc.*, No. 1:07CV538, 2010 WL 780167, at *5 (M.D.N.C. Feb. 26, 2010).

⁶² *Rabinowitz v. Scandinavian Airlines*, 741 F. Supp. 441, 446 (S.D.N.Y. 1990).

⁶³ *Ong v. Malaysian Airlines Sys. Bhd.*, [2007] 3 H.K.L.R.D. 255, 260 (H.K.).

article here will examine the Montreal Convention's actual scheme for establishing the carrier's liability for the death and injury of the passenger. According to Article 21(1) of the Montreal Convention, "[f]or damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability."⁶⁴ This article represents a shift from a presumed fault-based liability (which prevailed under the Warsaw Convention) to strict liability.⁶⁵ Thus, an injured passenger, or his estate in the case of death, is required to prove only the existence of an injury or death to hold the carrier liable—there is no need to prove negligence or any other sort of fault.⁶⁶ In other words, a carrier's duty under the contract of air transport is now a duty of success rather than a duty of best efforts.⁶⁷

The second tier of liability under the Montreal Convention is for damages exceeding 100,000 Special Drawing Units (SDR). Unlike the first tier of liability, the basis of the second tier is the presumed fault of the carrier. In other words, the second tier of liability relies on the rebuttable presumption that the carrier's actions, or the actions of its agents or servants, are the cause of the injury or death. As a result, the carrier can absolve itself from liability through several defenses. First, a carrier can use a "no negligence defense," or that the injury was not caused by its actions or the actions of its servants or agents. Second, a carrier can show that the action of a third party was the sole cause of the injury. Third, the carrier can use the "contributory negligence" defense under Article 20 of the Montreal Convention.⁶⁸

Nonetheless, the liability scheme under the Montreal Convention suffers from a regulatory void because it does not provide the world with a comprehensive set of rules, specifically a set of uniform choice-of-law rules to address all the various aspects of air transport. For example, just like the Warsaw Convention, it does not contain a substantive rule or a choice-of-law rule that addresses how a court should calculate passenger damages due or who exactly could have standing to sue in the first place.⁶⁹ Furthermore, the contributory negligence defense, which was

⁶⁴ Montreal Convention, *supra* note 3, art. 21 sec. 1.

⁶⁵ Cachard, *supra* note 11, at 135.

⁶⁶ Kyrah, *supra* note 52, at 14.

⁶⁷ Muḥmad Farid Al-'ryynī, *Al-Qanūn Al-Jwī*, 348 (2009).

⁶⁸ Montreal Convention, *supra* note 3, art. 20.

⁶⁹ Ludovico M. Bentivoglio, *Conflict Problems in Air Law*, 119 *RECUEIL DES COURS* 128 (1966); Troy A. Weigand, *The Modernization of the Warsaw Convention and the*

left to the forum's law to regulate under the Warsaw Convention,⁷⁰ is left without indication of what constitutes contributory negligence and without a choice-of-law rule under the Montreal Convention.⁷¹ Therefore, a court finds itself before two solutions to supplement the lackluster rules contained in the Montreal Convention, as it did under the Warsaw Convention: either apply its own law⁷² or use its own choice-of-law rules to direct itself to the national law that will be used to fill the gaps, as seen later on.

This state of affairs has an adverse effect on the exclusiveness of the Montreal Convention's rules within the national legal systems. It is true that there are jurisdictions, including Canada,⁷³ Australia,⁷⁴ and Hong Kong,⁷⁵ that mandate their courts to apply the Montreal Convention's rules without reference to any other rules. In those jurisdictions, a passenger's claim against a carrier must fulfill the requirements under the Montreal Convention and is limited to the remedies set out in such. Failure to do so will mean that the lawsuit against the carrier will be dismissed. Thus, a passenger would have no remedy under the law of that forum if the Montreal Convention does not recognize the claim.⁷⁶ Nonetheless, that ignores the fact that there is a void within the Montreal Convention, which means that its rules alone cannot provide a complete framework for the passenger's claim against the carrier.

New Liability Scheme for Claims Arising Out of International Flight, 84 MASS L. REV. 175, 179 (2008).

⁷⁰ Convention for the Unification of Certain Rules Relating to International Carriage art. 21, Oct. 12, 1929, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]. "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." *Id.*

⁷¹ Jennifer McKay, *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, 34 CASE W. RES. J. INT'L L. 73, 93 (2002).

⁷² Laurent Chassot, L'article 29 De La Convention Du Montréal, Clef de Voûte de la Responsabilité du Transporteur Aérien International 19 (August 2009) (Unpublished LL.M thesis, McGill University) (on file with ProQuest Dissertation & Thesis Global Database).

⁷³ *Thibodeau v. Air Canada* [2014] S.C.R. 340, 343.

⁷⁴ *Kern v Qantas Airways Ltd* [2015] NSWSC 1565 (Austl.); *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 203 (Austl.).

⁷⁵ *Olding v. Singapore Airlines Ltd.*, [2003] 2 H.K.L.R.D. 476, 479; *Ericsson Ltd. v. KLM Royal Dutch Airlines*, [2006] 1 H.K.L.R.D. 584, 593 (H.K.).

⁷⁶ Andreas Kadletz, *American Court's New Drive Towards Uniformity in International Air Transport Law: A Survey of Recent U.S. and Canadian Jurisprudence and the Political Background*, 49 GERMAN J. AIR & SPACE L. 201, 203 (2000).

Several forums that tend to treat the Warsaw Convention as a nonexclusive source of rules on carrier liability already acknowledge this fact. For example, the Singaporean courts have applied the Warsaw Convention alongside Singaporean law, since the Warsaw Convention trumps its common law causes of action but does not trump the equitable defenses that are related to the principles of equity, “which are a fundamental part of the law of Singapore.”⁷⁷ Thus, the Convention repeals the common law remedies but does not bar courts from having to resort to equitable remedies. Egypt adopts a similar approach. According to Article 3 of the Egyptian Civil Aviation Law, the Montreal Convention trumps Egyptian law in any topic that the Montreal Convention addresses.⁷⁸ Similarly, the Egyptian Cassation Court has ruled that Egyptian law would govern legal issues not covered by the Warsaw Convention.⁷⁹

A prime example of how the regulatory void undermines both the Warsaw Convention and the Montreal Convention’s exclusiveness can be found in the United States. The courts there are struggling to convince themselves that both Conventions could completely preempt the law of the forum on legal issues not addressed by either Convention.⁸⁰ To illustrate, the U.S. Supreme Court in *Zicherman v. Korean Airlines* ruled that a mother and sister of a deceased passenger could seek damages for the loss of the deceased’s society and companionship, looking to a federal law—the Death on the High Seas Act—which was not recognized under the Warsaw Convention.⁸¹ Under an exclusive approach, the Court should have dismissed the case because loss of a deceased’s society and companionship is not compensable under the Warsaw Convention. However, the Court accepted the claim for damages because “[t]he Warsaw convention permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum’s choice-of-law

⁷⁷ Chan, *supra* note 8, at 334.

⁷⁸ Law No. 28 of 1981 (Civil Aviation Law of Arab Republic of Egypt), *al-Jarīdah al-Rasmīyah*, vol. 17, 23 April 1981, art. 3 (Egypt). “The provisions of the international and regional Civil Aviation treaties and conventions which State is a party thereto, as well as the provisions of this law, shall be applied, without prejudice to the provisions of such treaties and conventions.” *Id.*

⁷⁹ Maḥkamat al-Naqḍ [Court of Cassation], no. 908/49 (Egypt).

⁸⁰ *Benjamin v. Am. Airlines, Inc.*, 32 F. Supp. 3d 1309, 1316 (S.D. Ga. 2014); *Sompo Japan Ins. Inc., v. Nippon Cargo Airlines Co.*, 522 F.3d 776, 785 (7th Cir. 2008); *Rogers v. Am. Airlines, Inc.*, 192 F. Supp. 2d 661, 667 (N.D. Tex. 2001).

⁸¹ *Zicherman v. Korean Airlines*, 516 U.S. 217, 231 (1996).

rules.”⁸² The Court found that the Warsaw Convention did not ban recovery for loss of a deceased’s society and companionship and decided that the issue should be addressed by the Death on the High Sea Act, which was the applicable body of law in default to the Warsaw Convention’s rules, and allowed the petitioners to claim damages for loss of society.⁸³ Fortunately, the U.S Supreme Court had an opportunity to rectify this holding in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, in which the Court held that “the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention.”⁸⁴ However, the U.S Supreme Court did not go further to ensure the exclusivity of the Warsaw Convention and adopted the “‘reverse-Erie’ doctrine” to ban the plaintiff from using state law in his claims under the Warsaw Convention, and by the same analogy under the Montreal Convention, as it did under Maritime law.⁸⁵

In fact, the U.S Supreme Court’s hesitation allowed the lower federal courts to try to avoid granting the Montreal Convention provisions the status of complete preemption by claiming that Article 29 does not require such a result. As one lower court stated:

[w]hile one can theorize as to the intent informing the retooled Article 29 (formerly Article 24), the plain meaning of the resulting text militates against finding complete preemption. The provision’s language ‘whether under this Convention or in contract or in tort or otherwise’ expressly contemplates the application of the Convention’s limits to all types of cases within its scope—whether directly brought under the Convention or under state/local tort or contract law.⁸⁶

This argument does have its own merits, for the language used in drafting Article 29 does not clearly prevent the plaintiff from resorting to local law in his claim.⁸⁷ However, this skepticism stems from the fact that those courts realize that the regulatory

⁸² *Id.*

⁸³ *Id.* at 231–32.

⁸⁴ *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999).

⁸⁵ Luis F. Ras, *Warsaw’s Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. AIR L. & COM. 587, 612 (1994).

⁸⁶ *DeJoseph v. Cont’l Airlines, Inc.*, 18 F. Supp. 3d 595, 603 (D. N.J. 2014).

⁸⁷ Chassot, *supra* note 72, at 41; compare with Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, as Amended by the Protocol Done at The Hague art. IX, Sept. 28, 1955, art. IX, 10 I.L.M. 613.

void within the Montreal Convention prevents the latter from being a comprehensive regulation of the carrier's liability and that resorting to the forum's law or the forum's choice-of-law is inevitable as discussed earlier.

III. THE SEARCH FOR A CURE FOR THE VOID

As demonstrated, there are two solutions left for filling the regulatory void. The first solution is to apply the law of the forum directly as a supplement to the Montreal Convention's rule.⁸⁸ The second solution is to use the forum's choice-of-law rules to furnish the rules to fill the regulatory void within the Montreal Convention.⁸⁹ In the latter case though, some jurisdictions use their torts choice-of-law rule while others use their contracts choice-of-law rule. This article will now explore both solutions.

A. THE LAW OF THE FORUM

Applying the law of the forum does not serve the purpose of establishing uniform rules because the outcome will vary depending on where the lawsuit is filed, which creates the risk of forum shopping. Consider the measurement of damages. Since the Montreal Convention's liability scheme is divided into two tiers depending on the monetary value of the damages sought, and since the Montreal Convention did not specify a rule for assessing the monetary value of the damages, it is left for each court to decide. Courts in the United Kingdom and Canada calculate a passenger's damages in the same manner as damages

Article 24 of the Convention shall be deleted and replaced by the following: ". . . 1. In the carriage of cargo, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. 2. In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."

Id.

⁸⁸ Cachard, *supra* note 11, at 145.

⁸⁹ *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 228–29 (1996); Ntorina Antoni, *Conflict of Tort Laws in International Air Accidents: Evolution of Lex Fori and Lex Loci Delicti in the E.U. and U.S.*, 2 AVIATION & SPACE J. 2, 4 (2015).

resulting from a breach of contract.⁹⁰ However, when Canadian courts assess damages, they do not include funeral costs (if applicable) and they subtract the value of the passenger's life insurance from the final sum of damages awarded to the passenger's heirs (once again, if applicable).⁹¹ In Hong Kong, a court will not take into consideration the purely economic loss resulting from the injury.⁹² This is in contrast to Egyptian courts, and most other civil law jurisdictions, which will take into consideration such economic loss as a part of the *lucrum cessans* that the passenger is entitled to receive from the carrier.⁹³ Consequently, the amount of damages received by passengers who suffer from any bodily injury while flying will depend on which forum hears their dispute. This is a result that does not by any means coincide with the Convention's aim of achieving uniformity.

Another example is the contributory negligence defense under Article 20 of the Montreal Convention. Each forum has its own definition of what constitutes contributory negligence and the effect it has on the tortfeasor's liability. Under French and Egyptian law, the plaintiff's contributory negligence does not relieve a defendant from liability unless the plaintiff's actions were inexcusable and were the exclusive cause of injury.⁹⁴ Whereas under English common law, a plaintiff's contributory negligence reduces the amount of damages recoverable from a defendant in proportion to its share in the injury.⁹⁵ Some jurisdictions have multiple rules on the issue because of their federal structure, such as Australia⁹⁶ and the United States.⁹⁷ This

⁹⁰ Grein v. Imperial Airways, Ltd., [1937] 1 K.B. 50, 69; Vassallo v. Trans Can. Airlines, 1963 Carswell Ont. 177 (1963).

⁹¹ Micheal D. Lipton & Vance Cooper, *International Air Travel: An Air Carrier's Liability for Personal Injury*, 5 ADVOC. Q. 403, 407 (1985).

⁹² Olding v. Singapore Airlines Ltd., [2003] 2 H.K.L.R.D. 476, 488.

⁹³ John Y. Gotanda, *Damages in Private International Law*, 326 RECUEIL DES COURS 106 (2007).

⁹⁴ Danny Watson, *Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability*, 2 MANCHESTER REV. L. CRIME & ETHICS 1, 6 (2013); Maḥkamat al-Naḥd [Court of Cassation], no. 36/26 (Egypt); Maḥkamat al-Naḥd [Court of Cassation], no. 92/63 (Egypt); Maḥkamat al-Naḥd [Court of Cassation], no. 5202/62 (Egypt).

⁹⁵ Nettleship v. Wetson [1971] RTR 425, 426.

⁹⁶ Vernon Nase & Nick Hunphrey, *Three Steps Forward, Two Steps Back: Reflections on Air Carriers' Liability and Australia's Accession to Montreal 99*, 55 GERMAN AIR & SPACE L.J. 364, 372 (2006).

⁹⁷ Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 550 (1996).

means that the Montreal Convention has failed once again to produce uniform results. The same problem exists when it comes to determining the heirs of the deceased passenger. In Canada, heirs will be determined according to a mandatory rule contained in the Carriage by Air Act without resorting to a choice-of-law rule.⁹⁸ In Egypt, the heirs will be determined according to the Islamic *Shariah* as embodied in the Egyptian law if the deceased was an Egyptian.⁹⁹

In addition, applying the law of the forum as a supplement to the Montreal Convention's rules might give the opportunity for courts to impose their own discretionary interpretations of the Convention, and thus alter the manner in which it is applied. For example, the French Cour de Cassation held that a carrier cannot be held liable under the second tier of liability if the cause of the accident was unknown,¹⁰⁰ like in the Air France flight 447 crash. There, an Air France plane crashed into the Atlantic Ocean while en route from Rio de Janeiro to Paris on May 31, 2009, and all passengers on board were killed.¹⁰¹ The passengers' heirs sought from the Toulouse Court of Appeal, unsuccessfully, damages exceeding 100,000 SDR under the Montreal Convention's second tier of liability.¹⁰² The heirs challenged the appellate court's decision on the grounds that they were entitled to receive the damages unless the carrier could prove an exonerating defense of either lack of negligence, the presence of contributory negligence, or the existence of a third party culprit.¹⁰³ The carrier responded, and prevailed, that the cause of the accident was under investigation and had not yet been made known, and therefore, it should not be held liable for damages exceeding 100,000 SDR¹⁰⁴ because the second tier

⁹⁸ Carriage by Air Act, R.S.C. 1985, c. C-26, Sched. II, s.1. "The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of the death of the passenger. In this paragraph, 'member of the passenger's family' means the passenger's spouse or a person who was cohabiting with the passenger in a conjugal relationship for a period of at least one year immediately before the death of the passenger, a parent, step-parent, grandparent, brother, sister, child, adopted child, stepchild, grandchild, or any person for whom the passenger stood in the place of a parent." *Id.*

⁹⁹ Law no. 77 of 1943 (Egyptian Inheritance Code), *al-Jaridah al-Rasmiyah*, 12 August 1943 (Egypt).

¹⁰⁰ Cour de cassation, 1^{ère} civ., Apr. 2. Bull Civ.1, No. 60.

¹⁰¹ M. X. et Autres v. Air France & AirBus, 11 Feb. 2015 Cour de Cassation (1^{er} Chambre Civile), 273 *Revue Francaise De Droit Aerien et Spital* 87.

¹⁰² *Id.*

¹⁰³ *Id.* at 88.

¹⁰⁴ *Id.* at 90.

of liability is based on presumed fault that does not operate when the cause of the accident is unknown.¹⁰⁵ Therefore, the French courts will refuse to hold a carrier liable under the Montreal Convention's second tier of liability if the cause of the accident remains unknown. For another example, consider flight MH-370, which vanished during its flight from Kuala Lumpur to Beijing.¹⁰⁶

The same problem has also occurred under the Warsaw Convention. In Singapore and Hong Kong, courts held that the term "carrier" under Articles 17, 18, and 19 does not include agents and servants who could be held liable under the traditional common law rules, provided that the courts do not award damages exceeding the limits under Article 22.¹⁰⁷ Thus, those courts allowed the servant and agents to be sued on other legal grounds not related to the Warsaw Convention, defeating the purpose of including them within the text of such Convention.

B. FORUM'S CHOICE-OF-LAW RULES

Using the forum's choice-of-law rules to furnish the court with rules to supplement the Montreal Convention is a better alternative than using the forum's substantive law. However, this is not a perfect solution—civil law jurisdictions will use its choice-of-law rule for contracts in order to deal with the regulatory void, while the common law jurisdictions will use its choice-of-law rule for torts.¹⁰⁸ This should not surprise anyone because the Montreal Convention, like the Warsaw Convention, is applicable to any action against a carrier, whether brought under contract law or tort law.¹⁰⁹ It remains to be seen which choice-of-law rules are

¹⁰⁵ *Id.* at 91.

¹⁰⁶ Lucy Marks, *MH370: Search for Missing Flight Narrows to Specific Area Along the 'Seventh Arc,'* ABC NEWS (July 5, 2017, 9:50 AM), <http://www.abc.net.au/news/2017-07-05/mh370-search-further-narrowed-to-fraction-of-seventh-arc/8678532> [<https://perma.cc/YJA9-LBJ2>].

¹⁰⁷ Chan, *supra* note 8, at 341; *Ericsson Ltd. v. KLM Royal Dutch Airlines*, [2006] 1 H.K.L.R.D. 584, 599.

¹⁰⁸ Micheal Bogdan, *Aircraft Accidents in the Conflict of Law*, 208 RECUEIL DES COURS 142 (1988); Cachard, *supra* note 11, at 151; Singapore Annual Review 44 (Jack TEO Cheng Chuah ed., 2004).

¹⁰⁹ Montreal Convention, *supra* note 3, art. 29.

Basis of claims. In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respec-

capable of achieving predictability, legal certainty, and uniformity of results.

1. Tort Choice-of-Law Rules

A survey of the common law forums will show there are several choice-of-law rules for torts. First, there is the ancient English common law double-actionability choice-of-law rule, which dictates that a foreign tort must be actionable under both the forum's law and *lex loci delicti commissi*. This rule is used by several common law jurisdictions in Africa.¹¹⁰ Second, there is the *lex loci delicti* choice-of-law rule, which is adopted by several other common law jurisdictions (including several states in the United States)¹¹¹ because it is predictable, easy to use, and creates a sense of legal certainty.¹¹² However, this choice-of-law rule has come under severe scrutiny by American scholars and courts because the place where the aerial accident occurred is often described as "fortuitous."¹¹³ As a result, courts in the United States tend to substitute the *lex loci delicti* choice-of-law rule with a variety of modern choice-of-law doctrines. Some American courts use choice-of-law doctrines such as the government interest analysis¹¹⁴ and the comparative impairment doctrine developed by the California Supreme Court.¹¹⁵ These are appealing because these are the choice-of-law rules prevailing in the state where the court sits (since those courts believe that the claim in question is not a federal question and the U.S. Supreme Court did not mandate full preemption).¹¹⁶ On the other hand, some

tive rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Id.

¹¹⁰ RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN COMMON WEALTH AFRICA 151 (2013); *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

¹¹¹ James A. R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1009 (1994).

¹¹² Antoni, *supra* note 89, at 6.

¹¹³ Joseph D. Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299, 300 (1969).

¹¹⁴ *Hurtado v. Superior Court*, 11 Cal. 3d 574, 582 (1974); *Marcano Diaz v. Easter Airlines, Inc.*, 698 F. Supp. 18, 21 (1988); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 14 (1964); *Pescatore v. Pan Am. World Airlines, Inc.*, 97 F.3d 1, 13 (2d Cir. 1996).

¹¹⁵ *Ciprari v. Servicos Aereos Cruzeiro do sul*, 245 F. Supp. 819, 824 (1965).

¹¹⁶ This occurs because each state has the right to regulate the choice-of-law issues as it pleases. The U.S. Supreme Court said,

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which

courts have used the Second Restatement as the federal common law choice-of-law rule because those courts believe that filling the gaps under the Warsaw Convention, as well as the Montreal Convention, is a federal question that should not be governed by state choice-of-law rules, since they are preempted by the Warsaw Convention's rules.¹¹⁷

The problem with the modern choice-of-law doctrines is that they allow the courts to justify almost any result they want,¹¹⁸ which usually means that the court applies the forum's law. For example, in *Brickner v. Gooden*,¹¹⁹ an airplane registered in Oklahoma crashed while en route from Oklahoma to Mexico. The crash took place within Mexico, yet the court decided to apply the law of Oklahoma, which was the forum's law, because Oklahoma had a greater interest in applying its law than Mexico.¹²⁰ The Court found that the point of departure was Oklahoma, the plane was registered in Oklahoma, and most of the victims were residents of Oklahoma.¹²¹

Even if the forum decided not to apply its own substantive law to the facts of the case, the results under modern choice-of-law doctrines remain unpredictable. In *Pescatore v. Pan Am. World Airways, Inc.*,¹²² an airplane passenger, an Ohio resident, was killed in Lockerbie, Scotland. The carrier was from New York.¹²³ The court applied New York's choice-of-law rules, the *Neumeier* choice-of-law rule,¹²⁴ to find that Scottish law would not apply to the case because the place of the accident was fortuitous and Scotland's interests in the case was limited.¹²⁵ The court then

leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws . . . to determine whether a given matter is to be governed by the law of the forum or some other law.

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941). This is an application of the Erie Doctrine. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 75-76 (1938).

¹¹⁷ *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1004 (9th Cir. 1987); *Hernandez v. Aeronave de Mexico, S.A.*, 583 F. Supp. 331, 333 (Cir. D. Cal. 1984).

¹¹⁸ Willis L. M. Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303, 1304 (1982).

¹¹⁹ 525 P.2d 632 (1974).

¹²⁰ *Id.* at 638.

¹²¹ *Id.*

¹²² 97 F.3d 1 (2d Cir. 1996).

¹²³ *Id.* at 13.

¹²⁴ *Neumeier v. Kuehner*, 31 N.Y. 2d 121, 128 (1972).

¹²⁵ *Pescatore*, 97 F.3d at 13.

decided that Ohio had a greater interest than New York because Ohio had an interest in providing compensation for its residents, whereas the passenger had no contacts with New York and New York's interest in protecting corporations that operate within its borders would not be affected because the Warsaw Convention did not allow punitive damages.¹²⁶ Had the plaintiff been a foreigner and the carrier a New York resident, would the court have applied New York law? Or would it instead apply the foreigner's law of domicile? Fortunately, the above choice-of-law doctrines developed in the United States have not gained foothold elsewhere.

2. *Contracts Choice-of-Law Rule*

In most civil law jurisdictions, the passenger's action for damages under the contract of air carriage is brought under contract law.¹²⁷ This means that the universally accepted "party autonomy" choice-of-law rule can be used to provide the legal guidance to help fill both the definitional and regulatory voids within the Montreal Convention.¹²⁸ Thus, the parties can determine beforehand the rules that will govern their contracts, achieving legal certainty and predictability, which cannot be achieved under tort choice-of-law rules. However, there is one main obstacle against this proposed solution, which is the adhesive character of the standardized forms used in air transport.¹²⁹ As in most consumer contracts, the carrier has a stronger bargaining position than that of the passenger, and so, this approach would allow the carrier to choose a law favorable for his interests as the law governing the contract of air transport.¹³⁰ It is even expected that carrier bargaining position will grow in strength with the consolidation of the air carriers within a limited number of alliances.

¹²⁶ *Id.* at 14.

¹²⁷ Bogdan, *supra* note 108, at 142.

¹²⁸ Egyptian Civil Code, art. 19. "Contractual Obligations are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law." *Id.*; OP-PONG, *supra* note 110, at 135; 2008 O.J. (L 177) Art. 5; Restatement (Second) of Conflict of Laws § 187 (1971).

¹²⁹ Bentivoglio, *supra* note 69, at 135.

¹³⁰ Micheal Milde, *Conflicts of Laws in the Law of the Air*, 11 MCGILL L.J. 220, 244 (1965).

Fortunately, there is a balanced and suitable choice-of-law rule available:¹³¹ Article 5, Section 2 of the Rome I Regulation.¹³² According to this article, the passenger and the carrier can choose the law of one of the following places to govern their contract: (1) the place where the passenger's habitual residence exists; (2) the place where the carrier's habitual residence exists; (3) the place where the carrier's place of central administration is located; or (4) the place of departure or destination. It is important to note the parties' freedom of choice is limited to choosing the law of a single country that has a substantial connection with the contract, which will allow the carrier to avoid the difficulties of applying multiple laws to govern its liability from a single incident. Once the parties choose a certain law, then all claims brought against the carrier will be governed by that law and that law only, with the exception of the Montreal Convention. Here, the carrier cannot abuse its strong bargaining power against the passenger to exert a favorable law because the choices are predetermined, and Article 5 does not allow it to unmoor the contract from state rules, i.e., *contract sans lois*.¹³³

The balanced approach continues even when the parties fail to choose a law to govern the contract of carriage. According to Article 5, the court must apply the law of the place where the passenger's habitual residence exists if the point of departure or destination is located in that country, or else, it must apply the law of the place where the carrier has its habitual residence. This means there is no absolute preference for the law of the passenger's habitual residence unless it has a significant contact with the trip. This is in line with what several U.S. courts under the modern choice-of-law doctrines have done, which is apply the law of the passenger's place of residence.¹³⁴ Otherwise, the focus will be on the carrier's habitual residence, which is better for the carrier's interests given that fact that, in reality, passengers usually do not share a common place of habitual resi-

¹³¹ M.C. Nita, *Regulation (EC) No. 593/2008 (Rome I) Special Rules to Determine Applicable Law to International Carriage Contracts*, 2015 CONF. INT'L DR. 261, 267 (2015).

¹³² O.J. (L 177) Art. 5.

¹³³ For more analysis of contract sans lois concept, see Frédérique Saboruin, *Le Contrat sans Loi en Droit International Privé Canadien*, 19 REV. QUÉBÉCOISE DE DROIT INT'L 35, 64 (2006).

¹³⁴ *Pearson v. Ne. Airlines, Inc.*, 309 F.2d 553, 556 (2d Cir. 1962); *Griffith v. United Airlines Inc.*, 416 Pa. 1, 24–25 (1964); Allan I. Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. & COM. 624, 627 (1967).

dence.¹³⁵ In fact, Article 5 of the Rome I Regulation is quite similar to the choice-of-law rules proposed by several American choice-of-law scholars.¹³⁶ This makes it a suitable solution for adoption in the United States, even if those courts decided to treat choice-of-law issues related to air disasters as torts rather than contractual breaches.

Nonetheless, there are still some challenges that might hinder the use of the party autonomy choice-of-law rule to fill the voids in the Montreal Convention. A court might resort to the public policy defense if it finds the applicable law unacceptable from its own point of view,¹³⁷ or it may even simply apply its own law if the parties fail to establish the contents of the chosen foreign law because the court is not legally bound to take judicial notice of foreign rules.¹³⁸ On the other hand, this is a better approach than allowing plaintiffs to dictate the use of the law of the forum to fill the void in the Montreal Convention through selection of the forum from among those listed in Article 33.¹³⁹

¹³⁵ Bentivoglio, *supra* note 69, at 138; Bogdan, *supra* 108, at 139; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 582 (1967).

¹³⁶ Reese, *supra* note 118, at 1317; Friedrich K. Juenger, *Mass Disasters & the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 122 (1989).

¹³⁷ F. Mosconi, *Exceptions To The Operation Of Choice Of Law Rules*, 217 RECUEIL DES COURS 80 (1989); Andreas Bucher, *L'Ordre Public et Le But Social Des Lois En Droit International Privé*, 239 RECUEIL DES COURS 25 (1993).

¹³⁸ Maḥkamat al-Naqd [Court of Cassation], no. 149/57 (Egypt); Maḥkamat al-Naqd [Court of Cassation], no. 408/21 (Egypt); Maḥkamat al-Naqd [Court of Cassation], no. 51/36, session of 14 April 1970 (Egypt); Maḥkamat al-Naqd [Court of Cassation], no. 8/35 (Egypt). For other jurisdictions, see TREATMENT OF FOREIGN LAW - DYNAMIC TOWARDS CONVERGENCE (Yuko Nishitani ed., 2017).

¹³⁹ Montreal Convention, *supra* note 3, art. 33.

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

Id.

IV. CONCLUSION

This article has demonstrated that the Montreal Convention has two types of voids: the definitional void and the regulatory void. As a result, courts have found themselves forced to fill the voids by either using the law of the forum or by resorting to the forum's choice-of-law rules. Using the laws of these many individual forums means creating countless (and different) national versions of the Montreal Convention. On the other hand, using the forum's choice-of-law rules means that holdings will depend on the forum being a member of the civil law or the common law system, which have different choice-of-law rules. Neither solution will produce uniform results, and both will definitely lead to too much variation in the rules used in supplementing the Montreal Convention. This article suggests adopting Article 5 of the Rome I Regulation as a choice-of-law rule that will help fill the voids. This suggested route could easily be adopted by both common law and civil law jurisdictions, allowing a much greater degree of uniformity and predictability of results when each nation's courts apply the Montreal Convention.