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**THE WEST CARIBBEAN CONUNDRUM:  
THE UNITED STATES VERSUS FRANCE ON THE  
AVAILABILITY OF *FORUM NON CONVENIENS* UNDER  
THE MONTREAL CONVENTION OF 1999**

DAVID CLUXTON\*

I. INTRODUCTION

ON AUGUST 16, 2005, West Caribbean Airways Flight 708 (WCW-708) took off from Tocumen International Airport in Panama set for Aimé Césaire International Airport in Fort-de-France, the capital city of the French overseas region of Martinique.<sup>1</sup> A little over an hour later, it crashed near Machiques, Venezuela, killing everyone on board.<sup>2</sup> In addition to the 8 Colombian crew members, WCW-708 was carrying 152 passengers, mostly civil servants from Martinique and their families who had been vacationing in Panama.<sup>3</sup> The charter flight was operated by a Colombian airline, West Caribbean Airways (WCW), which was established in 1998 and ceased operations following the crash.<sup>4</sup>

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<sup>1</sup> See Frances Fiorino, *West Caribbean Crash Probe*, AVIATION WK. & SPACE TECH., Aug. 22–29, 2005, at 50, 50.

<sup>2</sup> *Grim Find at Venezuela Crash Site*, BBC NEWS (Aug. 17, 2005), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4158126.stm> [<https://perma.cc/5M8J-T85T>].

<sup>3</sup> *Id.*

<sup>4</sup> See *West Caribbean Airways Fleet Details and History*, PLANESPOTTERS.NET, <https://www.planespotters.net/airline/West-Caribbean-Airways> [<https://perma.cc/DA64-5D6Y>] (last updated Jan. 4, 2020).

The report of the Venezuelan accident investigation authority concluded that the aircraft had been airworthy at the time.<sup>5</sup> It passed a complete inspection by Colombian authorities the same week as the accident and was also subjected to two recent inspections by French authorities in Martinique.<sup>6</sup> WCW-708 was the airline's second fatal accident of 2005.<sup>7</sup> The earlier crash had occurred on March 26, 2005, in Colombia and resulted in the deaths of six passengers and two crew.<sup>8</sup> Three months prior, the airline was fined by the Civil Aviation Authority of Colombia for fourteen violations of airline regulations, including failures to provide required pilot training.<sup>9</sup> The financial situation of the airline was dire, and the report concluded that this contributed to the accident by generating an atmosphere of uncertainty and stress for its employees.<sup>10</sup> The pilots had not been paid in several months, and the report even noted that the captain was moonlighting during his off hours by running a bar.<sup>11</sup> These and various other psycho-emotional factors were identified as contributing negatively to the pilots' performance.<sup>12</sup>

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<sup>5</sup> The summary account provided herein is taken (in the absence of other citation) from an unofficial French translation of the original report issued in Spanish. See generally BUREAU D'ENQUÊTES ET D'ANALYSES, RAPPORT FINAL: WEST CARIBBEAN AIRWAYS DC-9-82 (MD-82) IMMATICULE HK4374X, MACHIQUES, VENEZUELA, 16 AOÛT 2005 (2005) (Fr.), <https://www.bea.aero/fileadmin/documents/docspa/2005/hk-x050816/pdf/hk-x050816.pdf> [https://perma.cc/3U9Q-9U65] [hereinafter RAPPORT FINAL: WEST CARIBBEAN AIRWAYS]. For the original report in Spanish, see MINISTERIO DEL PODER POPULAR PARA TRANSPORTE Y COMUNICACIONES, INFORME FINAL: WEST CARIBBEAN AIRWAYS DC-9-82 (MD-82) MATRÍCULA HK4374X, MACHIQUES, VENEZUELA, 16 DE AGOSTO DE 2005 (2005) (Venez.), <http://www.mppt.gob.ve/download/121864/> [https://perma.cc/V9JM-3L4D]. See also JUNTA INVESTIGADORA DE ACCIDENTES DE AVIACIÓN CIVIL, ENGLISH TRANSLATION OF MAIN TEXT OF VENEZUELAN ACCIDENT REPORT, JIAAC-9-058-2005, SKYBRARY, <https://www.skybrary.aero/bookshelf/books/1930.pdf> [https://perma.cc/ZA84-4JE7] (last visited Mar. 31, 2020) (English translation of the original report).

<sup>6</sup> *Grim Find at Venezuela Crash Site*, *supra* note 2.

<sup>7</sup> See Fiorino, *supra* note 1, at 50.

<sup>8</sup> *Id.*

<sup>9</sup> Brian Ellsworth & Juan Forero, *160 Die in Crash of Airliner in Venezuela*, N.Y. TIMES (Aug. 17, 2005), <http://www.nytimes.com/2005/08/17/world/americas/160-die-in-crash-of-airliner-in-venezuela.html> [https://perma.cc/2ZX9-9AU9]. One month prior to the WCW-708 accident, Colombian authorities temporarily grounded the airline because of noncompliance with an airworthiness directive. Tom Hennigan, *Holiday Jet Crashes After Engines Fail, Killing 160*, TIMES (Aug. 17, 2005), <https://www.thetimes.co.uk/article/holiday-jet-crashes-after-engines-fail-killing-160-n9fthn6p0fm> [https://perma.cc/PWZ7-GNAB].

<sup>10</sup> RAPPORT FINAL: WEST CARIBBEAN AIRWAYS, *supra* note 5, at 94.

<sup>11</sup> *Id.* at 109.

<sup>12</sup> *Id.*

Given that WCW-708 was a flight between Panama and Martinique, operated by a Colombian airline, which crashed in Venezuela, with mostly French and Colombian nationals on board,<sup>13</sup> where might one expect ensuing litigation to be pursued? Colombia? Venezuela? Martinique? The U.S. District Court for the Southern District of Florida?

#### A. THE WEST CARIBBEAN CONUNDRUM

Under the Montreal Convention of 1999 (MC99), the applicable instrument governing the liability of the carrier for passenger death or injury arising during most international carriage by air, there exists a presumption of fault on the carrier in the event of an accident.<sup>14</sup> The burden of proof rests not on the plaintiff to prove fault but on the carrier to prove the absence of fault.<sup>15</sup> Where a carrier can make out this defense, it is entitled to limit the maximum extent of its liability.<sup>16</sup> Otherwise, as in WCW-708, the carrier faces unlimited liability. On the facts of WCW-708's crash, the negligence of the carrier was incontestable, and thus the question of liability was not truly at issue. In a case like this, indeed in most aviation litigation—especially under MC99—the real crux of the matter is the question of damages. Plaintiff lawyers consider themselves duty bound to secure for their clients the largest award possible. Since the ultimate quantum recoverable is often dictated by the forum in which one sues, it is not surprising that choice of forum is the key factor in international aviation litigation. The quantum recoverable varies substantially from one forum to another. For instance, one jurisdiction might allow for the determination of damages by a jury rather than a judge. In addition, the recoverable heads of damage may be broader in one forum than in the other. These, and a variety of other factors, routinely differ amongst the available forums and may have a major bearing on the ultimate liability and recovery.

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<sup>13</sup> Of the 152 passengers aboard, all were residents of Martinique or France, with the exception of one who was of Italian nationality. *See, e.g.*, Defendants Jacques Cimetier, Newvac Corp. Inc., & Go 2 Galaxy, Inc.'s Refiled Motion to Dismiss on Grounds of *Forum Non Conveniens* at 2 & n.3, *In re West Caribbean Airways*, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (No. 06-22748-CIV) [hereinafter Defendants Refiled Motion to Dismiss].

<sup>14</sup> *See* Convention for the Unification of Certain Rules for International Carriage by Air art. 17, May 28, 1999, T.I.A.S. No. 13,083, 2242 U.N.T.S. 309 [hereinafter MC99].

<sup>15</sup> *See id.* art. 20.

<sup>16</sup> *See id.* art. 22(1).

Under MC99, plaintiffs do not have complete freedom of choice but are constrained to bringing their complaint before the courts of one of a limited number of specified forums.<sup>17</sup> Under Article 33 of MC99,<sup>18</sup> there are five grounds provided for jurisdiction that, on application to a given case, will generally yield a choice between the courts of two or three different States.<sup>19</sup> In the case of WCW-708, the choice of forums available to the majority of the plaintiffs would have been between Colombia, Martinique (i.e., France), and the United States. The only reason the United States was available as a possible forum was because a U.S. corporation by the name of Newvac was deemed to be the “contracting carrier” for the purposes of MC99 (as distinct from the actual carrier, i.e., West Caribbean Airways).<sup>20</sup>

While the plaintiffs had overcome the initial hurdle of establishing jurisdiction in the United States under MC99, the defendants had an ace up their sleeve in the form of the common law doctrine of *forum non conveniens* (FNC). Under this doctrine, on the request of the defendant and at the discretion of the court, a court may decline to exercise jurisdiction over a dispute, not for lack of competence but because an alternative forum is considered to be the more appropriate one for resolving the dispute. Although a feature of the legal systems of many common law States, the doctrine is virtually absent from civilian legal systems, which generally view it with contempt.

The defendants’ motion for FNC dismissal emphasized the preponderance of connecting factors between the case and Martinique while noting the relative poverty of the links to the United States.<sup>21</sup> In addition, the defendants were willing to make the following concessions if dismissal was granted: they would submit to the jurisdiction of the Martinique courts, concede liability, waive any statute of limitations, and not invoke any

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<sup>17</sup> See *id.* art. 33(1).

<sup>18</sup> See *id.* The jurisdictional regime of MC99 will be detailed and analyzed in Parts II and III *infra*.

<sup>19</sup> As this Article concerns *international* aviation litigation in *national* courts, the following convention will be adopted with respect to the term “state.” Where referring to a nation-state, that is, the legal entity recognized as a State by public international law, then the term “State” (i.e., with a capital “S”) shall be used. The term “state” (i.e., with a lowercase “s”) shall be used to refer to political subdivisions of a State.

<sup>20</sup> For details of Newvac’s involvement, see *In re West Caribbean Airways*, 619 F. Supp. 2d 1299, 1302–08 (S.D. Fla. 2007).

<sup>21</sup> Defendants Refiled Motion to Dismiss, *supra* note 13, at 3–4.

defense under Article 21(2) of MC99.<sup>22</sup> The plaintiffs sought to resist dismissal, arguing *inter alia* that Article 33 of MC99 gives the plaintiff an unqualified right to choose in which of the available forums to bring an action.<sup>23</sup> They relied heavily on the decision of the Court of Appeals for the Ninth Circuit in *Hosaka v. United Airlines, Inc.*<sup>24</sup>

The *Hosaka* court held that under the Warsaw Convention of 1929,<sup>25</sup> the predecessor to MC99, a court has mandatory jurisdiction over a dispute properly brought before it and is precluded from declining jurisdiction on grounds of FNC.<sup>26</sup> However, in *In re West Caribbean Airways*, Judge Ungaro determined that the *Hosaka* decision was of “limited precedential value” because, in that case, the Ninth Circuit had specifically stated that it was not expressing an opinion on the availability of FNC under MC99, an entirely new treaty with its own drafting history.<sup>27</sup> For these reasons, although the text of Article 33 of MC99 is very similar to that of Article 28 of the Warsaw Convention, Judge Ungaro decided that the court was faced with resolving the availability of FNC under MC99, “apparently as a matter of first impression.”<sup>28</sup> The court concluded (for reasons analyzed below in part III.C.1.) that FNC is available under MC99 and consistent with its purpose and drafting history.<sup>29</sup>

With the question of the availability of FNC under MC99 resolved, the court next applied the doctrine to the case at hand. Given the facts involved, Judge Ungaro’s decision to grant the motion to dismiss did not come as a surprise.<sup>30</sup> In 2009, the Eleventh Circuit affirmed the decision, and a petition for a writ of certiorari was denied by the U.S. Supreme Court in 2010.<sup>31</sup> Surprisingly, the story did not end there. There was to be a twist in

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<sup>22</sup> *Id.* at 2–3.

<sup>23</sup> See *In re West Caribbean Airways*, 619 F. Supp. 2d at 1308.

<sup>24</sup> *Id.*

<sup>25</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

<sup>26</sup> *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1004 (9th Cir. 2002). See *infra* part II.C for further analysis.

<sup>27</sup> *In re West Caribbean Airways*, 619 F. Supp. 2d at 1309.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1328.

<sup>30</sup> See Order Granting Defendants’ Motion to Dismiss on Grounds of *Forum Non Conveniens* at 15, *In re West Caribbean Airways*, 619 F. Supp. 2d 1299 (No. 06–22748–CIV).

<sup>31</sup> *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1061–62 (11th Cir. 2009), *cert. denied sub nom. Bapte v. West Caribbean Airways*, 560 U.S. 952 (2010).

the tale that would see the plaintiffs back before Judge Ungaro in 2012, seeking to have the 2007 FNC dismissal vacated.

Immediately after the 2007 FNC order, the plaintiffs commenced proceedings in Martinique against Newvac. Unexpectedly, the Newvac action was not commenced with a view to resolve their claims for damages. Instead, the plaintiffs petitioned the Tribunal de Grande Instance (TGI) in Fort-de-France, Martinique, to *declare itself without jurisdiction* to hear such a claim.<sup>32</sup> The plaintiffs maintained that they had not chosen Martinique as their forum and only appeared before it because they were forced to do so on account of the FNC dismissal from the U.S. district court.<sup>33</sup> It was their view, per Article 33(1) of MC99, that jurisdiction could only vest in a court by an act of the plaintiff's choice, and regardless of Article 33(4), this choice of forum cannot be nullified and substituted by a rule of internal procedural law such as FNC.<sup>34</sup> In other words, the choice of the U.S. district court effectively preempted and precluded the TGI in Martinique from hearing the dispute. The TGI rejected the plaintiffs' petition, a decision upheld by the Fort-de-France Cour d'Appel.<sup>35</sup> As a last throw of the dice, the plaintiffs appealed to the Cour de Cassation in Paris, France.

On December 7, 2011, the Cour de Cassation found in favor of the plaintiffs and quashed the decision of the cour d'appel.<sup>36</sup> The Cour de Cassation concluded that it is the exclusive right of the plaintiff to choose a forum from those available under MC99 and that an internal rule of procedure such as FNC cannot be

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<sup>32</sup> See Declaration of Maylis Casati-Ollier, Avocat in Support of Defendant, Newvac Corporation's Response in Opposition to Bapte Plaintiffs' Rule 60(b)(6) Motion to Vacate at 5, *In re West Caribbean Airways*, 619 F. Supp. 2d 1299 (No. 06-22748-CIV) [hereinafter Declaration of Casati-Ollier].

<sup>33</sup> *Id.* at 5-6.

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.* at 9-10. It held:

[G]iven that among the fora competent under the Montreal Convention is the court of the place of destination of carriage, namely that of Fort-de-France, the court can only record that the [TGI], the competency of which could not be disputed under cover of lack of jurisdictional power, is then the sole court with jurisdiction of the dispute between the plaintiffs and the air carriers.

Cour d'appel [CA] [regional court of appeal] Fort-de-France-Martinique, June 25, 2010, 10/239 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. F, at 9.

<sup>36</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. H, at 5.

invoked to disturb that choice.<sup>37</sup> For the Cour de Cassation, this interpretation was necessary to meet MC99's objectives of predictability, certainty, and uniformity.<sup>38</sup> Consequently, jurisdiction of the chosen forum is mandatory under MC99. Once the chosen forum is seized of the case, the courts of any other State identified by Article 33 lose their jurisdiction over the dispute.

Seemingly vindicated by the Cour de Cassation, the plaintiffs returned to Florida seeking to have the FNC order vacated.<sup>39</sup> Judge Ungaro took an unsurprisingly dim view of what she described as “the latest offensive in Plaintiffs’ four-year campaign to subvert the *forum non conveniens* dismissal.”<sup>40</sup> Unfazed, her opinion voiced disagreement with the conclusion reached by the Cour de Cassation, noting that a U.S. court was not bound by the analysis of the French Court and need not blindly abide by it.<sup>41</sup> With a warning of possible sanctions should the plaintiffs launch yet another assault on the FNC order,<sup>42</sup> Judge Ungaro denied the motion to vacate, stating:

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

. . . [T]o un-do the *forum non conveniens* dismissal would sanction Plaintiffs’ disrespect for the lawful order of this United

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<sup>37</sup> Declaration of Casati-Ollier, *supra* note 32, at 4. For further consideration on the Court’s ruling, see *infra* part III.3.

<sup>38</sup> Cour de cassation, 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. H, at 4.

<sup>39</sup> See Order on Motion to Vacate at \*1, *In re West Caribbean Airways*, No. 06–22748–CIV (S.D. Fla. May 16, 2012), 2012 WL 1884684. Plaintiffs argued that there existed no available alternative forum in Martinique, or indeed anywhere, and because the existence of an available alternative forum is an essential requirement of FNC dismissal, the order had to be vacated. *Id.* at \*6.

<sup>40</sup> *Id.* at \*1.

<sup>41</sup> *Id.* at \*7. The court explained that “[c]omity ordinarily requires United States courts to defer to foreign courts on the interpretation of their own jurisdictional statutes,” but since the case in point involved denial of jurisdiction under an international treaty, comity no longer required such deference. *Id.* (citing *Osario v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1325–26 (S.D. Fla. 2009)).

<sup>42</sup> *Id.* at \*12 n.15 (warning that “[i]f the *Bapte* Plaintiffs launch yet another (fifth) assault on the FNC Order, the Court will consider sanctions.”).



States court and encourage other litigants to engage in similar conduct.<sup>43</sup>

In its 2011 annual report, the Cour de Cassation made the following statement in respect to its decision in the case: “[b]y adopting [its] position, the Supreme Court of France brings into the international legal order the ‘dialogue of judges’ required by the absence of an international jurisdiction capable of securing a uniform interpretation of said Convention (between all State Parties).”<sup>44</sup> The French Court’s statement is open to interpretation. It could be taken as an example of French judicial chauvinism, a thinly veiled cliché aimed at implying that, unlike U.S. courts, the French courts understand the value of judicial cooperation. On the other hand, rather than just shield itself behind an unequivocal statement as to the veracity of its decision, the Court may have earnestly been leaving the door open for further dialogue. To date, the U.S. courts have not picked up the baton and responded to this invitation to parley. Instead, they have continued to apply the doctrine of FNC to dismiss cases under MC99.<sup>45</sup>

In *Delgado v. Delta Air Lines, Inc.*, the same Florida district court in which Judge Ungaro sits accepted that the Cour de Cassation’s decision had caused some doubt to arise regarding MC99 and FNC.<sup>46</sup> More recently, in *Eldeeb v. Delta Air Lines, Inc.*,

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<sup>43</sup> *Id.* at \*12.

<sup>44</sup> Sandra Adeline, *The Forum Non Conveniens Doctrine Put to the Test of Uniform Private International Law in Relation to Air Carriers’ Liability: Lack of Harmony Between US and French Decisional Outcomes*, 18 UNIFORM L. REV. 313, 327 (2013).

<sup>45</sup> See *infra* part III.C.2.

<sup>46</sup> In *Delgado*, the plaintiff sued in Florida for the wrongful death of the decedent passenger in an accident at Charles de Gaulle Airport in Paris. See generally *Delgado v. Delta Air Lines, Inc.*, 43 F. Supp. 3d 1261 (S.D. Fla. 2013). The defendant airline sought FNC dismissal, which was resisted by the plaintiff on the grounds, *inter alia*, that subsequent to the Cour de Cassation’s decision, a French court would refuse to hear the case. *Id.* at 1265 (“By refusing to exercise jurisdiction on the grounds that the plaintiffs initially selected the United States to litigate their claims, the Cour de Cassation stands in direct conflict with the Eleventh Circuit Court of Appeals. This Court is bound by the decisions of the Eleventh Circuit Court of Appeals and will find the doctrine of *forum non conveniens* to be applicable; however, in light of the Cour de Cassation’s position, this Court expresses doubt as to the availability of an alternative forum in France after a *forum non conveniens* dismissal.”). In *Delgado*, the court did not have to enter into an examination of these questions because it determined that FNC dismissal was not warranted on the basis of the private and public interest analyses. See *id.* at 1266–68. Strictly speaking, the doubt was expressed with regard to the availability of France as an alternative forum. *Id.* at 1268. This is not irreconcilable with the availability of FNC under MC99. It merely means that, in this instance, the doc-

plaintiffs sought to resist FNC dismissal on the grounds that the Cour de Cassation's decision meant that France was not available as an alternative forum;<sup>47</sup> it is an essential requirement of FNC dismissal that there should be an available alternative forum.<sup>48</sup> The Minnesota district court was unconvinced by this argument, stating that “[t]he Cour de Cassation’s opinion, as translated, declares ‘the *present* lack of availability of the French venue’ based on complex facts and procedural circumstances not presented here.”<sup>49</sup> The district court’s analysis is weak; it plays semantics by emphasizing the Cour de Cassation’s use of the word “present,” and more significantly, it is mistaken to think that the Cour de Cassation’s decision was specific to the circumstances of the case. As we shall see, the Cour de Cassation took a very principled position in rejecting FNC within the context of MC99; the particular circumstances of the case were not determinative. *Eldeeb* was dismissed on appeal to the Eighth Circuit.<sup>50</sup>

## B. OVERVIEW

The catalyst for this research was the compelling doctrinal conundrum posed by the controversy surrounding the *In re West Caribbean Airways* case. It is clearly a worrying and undesirable state of affairs that a matter so essential as jurisdiction, under an international treaty aimed at achieving uniformity of law, is the subject of such radically opposed interpretations by two of its most influential State parties. Nonetheless, the matter remains in a juridical limbo while the deadlock persists. The goal of this Article is to try and break the deadlock by determining what place, if any, FNC has within the jurisdictional regime of MC99.

In the field of MC99 passenger-claims litigation, both the plaintiff lawyers and defendant lawyers devote much time and effort to jurisdictional strategizing. Because the United States is currently the focal point for such litigation, a core pillar of that

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trine would be applied, but that—without an available alternative forum—dismissal would not be granted. However, it does raise questions about the legitimacy of the French Court’s action and its consistency with MC99.

<sup>47</sup> *Eldeeb v. Delta Air Lines, Inc.*, No. 18-1128, 2018 WL 6435739, at \*2 (D. Minn. Dec. 7, 2018).

<sup>48</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“[FNC] presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.”).

<sup>49</sup> *Eldeeb*, 2018 WL 6435739, at \*2.

<sup>50</sup> *Eldeeb*, 2018 WL 6435739, *appeal dismissed per stipulation*, No. 19-1069 (8th Cir. June 6, 2019).

strategy is FNC (whether as a question of securing dismissal or resisting it). The determination of the jurisdictional question of forum is, in many cases, the most important because it is often outcome determinative. For this reason, both sides will employ tactics that range from the ingenious to the utterly disingenuous—often both—all in order to secure a jurisdictional advantage that can ultimately be translated into a pecuniary gain. The resulting litigation on the matter of jurisdiction is both time-consuming and expensive.

That FNC motions are outcome determinative means that the parties essentially agree on, or at least do not sufficiently dispute, other matters, most notably the question of liability. The irony is obvious. What this also demonstrates is that, by and large, MC99 has been successful in lessening the amount of litigation on the essential matter of liability. Much less litigation over the question of liability is seen under MC99 than under its predecessor, the Warsaw Convention System (WCS).<sup>51</sup> The

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<sup>51</sup> The term Warsaw Convention System (WCS) refers to the Warsaw Convention and to the general body of instruments built around it. As such it consists of: Warsaw Convention, *supra* note 25; 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, Sept. 28, 1955, 478 U.N.T.S. 371 (Hague Protocol); Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31 (Guadalajara Convention); Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, *opened for signature* Mar. 8, 1971, 10 I.L.M. 613, ICAO Doc. 8932 (Guatemala City Protocol or GCP); Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 25, 1975, 2097 U.N.T.S. 23 (MAP1); Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, Sept. 25, 1975, 2097 U.N.T.S. 63 (MAP2); Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955 and at Guatemala City on 8 March, 1971, *opened for signature* Sept. 25, 1975, ICAO Doc. 9147 (MAP3); 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, *opened for signature* Sept. 25, 1975, 2145 U.N.T.S. 31 (MAP4). The intercarrier agreements include the Montreal Intercarrier Agreement of 1966 and the IATA Intercarrier Agreements (1992–1995); the text of these agreements and others are available in INT’L AIR TRANSPORT ASSOC. [IATA], *ESSENTIAL DOCUMENTS ON INTERNATIONAL AIR CARRIER LIABILITY* (3d ed. 2012).

changes made to the liability regime have undoubtedly benefited the plaintiff passenger and greatly reduced the amount of litigation. This of course is not to say that MC99 is not without its problems. For instance, non-recovery for pure mental injury remains a bugbear for many a plaintiff lawyer. However, it is the preponderance of litigation over the question of jurisdiction, particularly the recurring incidence of FNC motions, that sets the alarm bells ringing and strongly suggests that all is not well with MC99. If only this jurisdictional predicament could be overcome, then MC99 would surely become an even greater success.

Overcoming the stalemate reached in the *In re West Caribbean Airways* case entails understanding the place of FNC within the jurisdictional scheme of MC99. At its simplest, FNC is ultimately just a doctrinal mechanism for resolving a dispute between the litigants regarding choice of forum. It presupposes the existence of concurrent jurisdiction. Where only a single forum is available, then FNC has no part to play. However, once there is a choice between available forums, then the space is created for conflict between the interests of the litigants. Where the interests of the defendant are better served by trial in a foreign forum, then the doctrine provides an avenue by which the defendant can petition the court to show preference for its choice of forum. FNC thus provides the stage upon which the drama arising from the conflicting interests of plaintiff and defendant over choice of forum can be played out.

MC99 was preceded by almost ninety years' worth of jurisprudence built up surrounding WCS, so it is apt to first address what role FNC played under that system and to what extent its availability was challenged. Such detailed consideration of WCS is also justified for the purpose of establishing and appreciating the policy objectives involved. This is the goal of Part II of this Article. It provides some essential background to the Warsaw Convention by pointing out some key details regarding the historical context of its drafting in 1929 and by considering its general purpose. Close attention is then paid to the Warsaw Convention's jurisdictional scheme (e.g., the four bases of jurisdiction provided therein) and its specific purpose. The resolution by the courts on the question of the availability of FNC within the context of WCS will then be thoroughly explored and analyzed, permitting us to reach a firm conclusion. The approach adopted in Part II will establish a foundation upon which to conduct a similar analysis of MC99 in Part III.

Again, background to the drafting of MC99 will be presented and its purposes identified. It will also be essential to elucidate how the Warsaw Convention retains relevance to MC99 and how they interrelate. Although built upon the same jurisdictional scheme as the Warsaw Convention, MC99 saw the introduction of a new jurisdictional base, the so-called fifth jurisdiction. Aside from completing the jurisdictional picture, attention to the fifth jurisdiction is vital because the possibility of its introduction gave rise to much controversy and debate at the Montreal Conference in which the doctrine of FNC played a massive role. Attention is also merited because the fifth jurisdiction controversy at the Montreal Conference predominantly played out between the United States and France, which once again found themselves on opposing sides—mirroring the core conflict at issue in *In re West Caribbean Airways*. Part III will then conclude by returning to *In re West Caribbean Airways* and conducting an intensive analysis of the court's reasoning, as well as the response of the French Cour de Cassation and other relevant authorities. Conclusions on the availability of FNC within MC99 will then be reached in Part IV and the way forward contemplated.

## II. WARSAW CONVENTION AND *FORUM NON CONVENIENS*

### A. BACKGROUND TO AND PURPOSE OF THE WARSAW CONVENTION

From early on, the international community was awake to the issues of nonuniformity in aviation. Between 1922 and 1924, against a backdrop of diverse national legislative efforts to regulate the area, resolutions were passed by at least three international organizations calling for the formulation of a uniform code for the regulation of private air law.<sup>52</sup> The consensus was clear—uniformity of certain rules relating to international carriage by air was a necessity, specifically those governing the legal

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<sup>52</sup> Latchford reported that “[t]he Advisory and Technical Committee on Communications and Transit of the League of Nations in 1922, the International Chamber of Commerce in 1923, and the International Aeronautic Federation in 1924 adopted resolutions recommending to the various governments that they formulate a uniform system of private air law.” Stephen Latchford, *The Growth of Private International Air Law*, 13 GEO. WASH. L. REV. 276, 276 (1945); see also John Jay Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. & COM. 27, 27 (1932); Alexander N. Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345, 346 (1933).

relationship between the carrier and shipper or passenger. On August 17, 1923, France issued a diplomatic letter in which it expressed its wish to convene an international conference with a view to concluding a convention on the liability of the air carrier.<sup>53</sup> The patchwork of divergent national laws necessitated the conclusion of a treaty in order to avoid the conflict of laws that would otherwise be inherent in the uncoordinated regulation by individual countries of an international activity. The immediate concern was to achieve a necessary measure of certainty for the parties regarding the liability of the carrier by air.<sup>54</sup>

The intention was to convene the conference in late 1923, but it was not until October 1925 that it eventually took place.<sup>55</sup> This conference was the First International Conference on Private Air Law, and it considered a draft (the *Avant Projet*) on the liability of the air carrier in international transportation.<sup>56</sup> The *Avant Projet* was prepared by France, modeled on its own national legislation, i.e., the Air Navigation Law of 1924.<sup>57</sup> The Conference also led to the establishment of the Comité International Technique d'Experts Juridiques Aériens (CITEJA).<sup>58</sup> One of the CITEJA's first tasks was to continue the work of the Conference by further studying the draft and the general question of the liability of the carrier.<sup>59</sup> This work was carried out by the Second Commission, which was composed of delegates from several States, nearly all hailing from civil law legal systems.<sup>60</sup> How-

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<sup>53</sup> See DANIEL GOEDHUIS, NATIONAL AIR LEGISLATIONS AND THE WARSAW CONVENTION 4 (1937); *Id.*, *supra* note 52, at 27–28.

<sup>54</sup> For the introductory report attached to the *Avant Projet*, see CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN 12–13 (Imprimerie Nationale 1926).

<sup>55</sup> See, e.g., *Id.*, *supra* note 52, at 30.

<sup>56</sup> See *id.*

<sup>57</sup> Loi du 31 mai 1924 relative à la navigation aérienne [Law of May 31, 1924 regarding Air Navigation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 3, 1924, p. 5046. For an English translation of the relevant articles (Articles 41, 42, 43, and 48), see GOEDHUIS, *supra* note 53, at 52. For history and commentary on the Act, see generally Lincoln H. Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 AIR L. REV. 25 (1936); Georges Ripert, *Responsabilité du Transporteur Aérien* [Liability of the Air Carrier], 7 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AÉRIENNE [INTERNATIONAL LEGAL REVIEW OF AIR LOCOMOTION] 353 (1923) (Fr.).

<sup>58</sup> Stephen Latchford, *The Warsaw Convention and the C.I.T.E.J.A.*, 6 J. AIR L. & COM. 79, 84 (1935). The CITEJA's role was to study relevant areas of private air law with a view to producing instruments for codification. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Cha lists the membership of the Second Commission as follows: Richter (Germany); de Vos (Belgium); Dennis (U.K.); Moralès (Dominican Republic); de Las Penas (Spain); Ripert (France); Figueroa (Guatemala); Cogliolo (Italy);

ever, one common law State, the United Kingdom (U.K.), was represented on the Commission.<sup>61</sup> The Second Commission conducted its work and produced a number of revisions before submitting its final draft to the Second International Conference on Private Air Law, held in Warsaw in 1929, from which would ultimately emerge the Warsaw Convention.<sup>62</sup> A highly significant point to note is that the United States did not officially participate in the First or Second International Conferences on Private Air Law, but it did send observers.<sup>63</sup>

### 1. *Uniformity of Certain Rules*

Uniformity is the most fundamental purpose one can define for the Warsaw Convention.<sup>64</sup> However, uniformity was not pursued for its own ends but in order to provide a requisite level of certainty and predictability to the interested parties in carriage by air—namely the carrier, the passenger, and the shipper. There was thus a limited scope to the goal of uniformity. It was not the stated goal of the Convention to unify “all” rules relating to carriage by air but only “certain rules.”<sup>65</sup> It is clear that these “certain rules” concerned travel documentation and liability of the air carrier. This is borne out by its preamble, which recognizes “the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier.”<sup>66</sup> The latter was regarded as being of primary importance.<sup>67</sup>

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Gorski (Poland); Ibarra (Uruguay); and Akamine (Japan, although Cha lists his position as “reserved”). Cha, *supra* note 57, at 32 & n.22.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 32–33.

<sup>63</sup> Latchford, *The Warsaw Convention and the C.I.T.E.J.A.*, *supra* note 58, at 87. For a history of U.S. involvement in the CITEJA, see *Id.* *supra* note 52, at 40–44.

<sup>64</sup> LAWRENCE B. GOLDBIRCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 5 (2d ed. 2000) (citing *Domangue v. Eastern Air Lines Inc.*, 722 F.2d 256 (5th Cir. 1984); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977)).

<sup>65</sup> Warsaw Convention, *supra* note 25.

<sup>66</sup> *Id.* pmb.

<sup>67</sup> MICHAEL MILDE, *ESSENTIAL AIR AND SPACE LAW: INTERNATIONAL AIR LAW AND ICAO 283* (2d ed. 2012) (“Liability represents the core subject of the unification of law by the Warsaw Convention . . .”). For comments by Giannini, the Italian Delegate at the Warsaw Conference, see *SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCTOBER 4–12, 1929, WARSAW: MINUTES*, at 205 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter *WARSAW MINUTES*] (stating of Chapter III of the Warsaw Convention, i.e., Articles 17– 30 on the

By addressing only “certain rules,” the delegates intended to limit the scope solely to matters strictly necessary for a convention on private air law. The minutes manifest a sensitivity on the part of the drafters toward keeping the scope of the Convention’s uniformity tightly focused on issues of air law and a desire to leave well alone questions of procedure and general matters of private international law. For instance, at one point, there was discussion about a provision aimed at excluding foreign plaintiffs from having to post a security bond when bringing a claim abroad.<sup>68</sup> The Italian Delegate (Mr. Giannini) stated: “We have decided that we would put in our Convention only matters strictly necessary for a convention on private aeronautical law. For what reason should we make a particular rule here for the security bond?”<sup>69</sup> Sir Alfred Dennis (the U.K. Delegate) was completely opposed to the provision because it conflicted with U.K. procedural law, and he remarked that “[w]e have always followed in this Convention the principle that questions of procedure would be left to national courts . . . .”<sup>70</sup> Giannini implored the Conference “to limit itself to a convention of private aeronautical law.”<sup>71</sup> The proposal was defeated (by a vote of 21–3), not because it was irrelevant, far from it, but because it was not solely a matter of private air law but one of general order.<sup>72</sup> In addition, it was an area dealt with by the Hague Conference on Private International Law, and it was thought it would likely be impossible for the delegates in Warsaw to achieve unanimity on the matter.<sup>73</sup> It was, in other words, not a matter strictly necessary for a convention on private aeronautical law. The same concerns were expressed in a discussion of a different proposal aimed at including wording on the recognition of foreign judgments.<sup>74</sup>

Two points can be made at this point that must be kept in mind moving forward. First, it is undoubtedly true that one of the primary goals of the Warsaw Convention is uniformity of cer-

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liability of the carrier: “As our colleagues certainly recall, these are perhaps the most important articles of the Convention.”).

<sup>68</sup> *Id.* at 172–73.

<sup>69</sup> *Id.* at 173.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 174.

<sup>72</sup> *See id.* at 173–75.

<sup>73</sup> *Id.* at 173–74.

<sup>74</sup> *Id.* at 116–25. During the discussion, the Brazilian Delegate stated, “we came to this conference for questions concerning air carriage in itself, we must avoid the other questions . . . .” *Id.* at 122.



tain rules, but the scope of the Convention's object of unification was limited to rules of general order within the field of private air law. We must be wary of overemphasizing the extent to which uniformity was demanded by the drafters, and also careful to avoid the supposition that absolute uniformity was being pursued.

The second point is that the delegates were firmly of the view that the unification of rules of procedure did not fall within their remit; it was a matter best pursued either by bilateral negotiation or by the appropriate international body on private international law. However, we must qualify this point because the drafters did address some questions of procedure in the Convention.<sup>75</sup> In fact, some of these procedural matters were specifically in the area of jurisdiction—with which we are specifically concerned in this Article. Why were the delegates prepared to deal with some questions of procedure but not others? If the delegates perceived the execution of judgments and security bonds as being matters of procedure outside the scope of their work, would they have taken the same view of a procedural rule for declining jurisdiction such as FNC?

## 2. *Balancing Interests*

From its earliest incarnation, the Warsaw Convention sought to unify rules relating to the liability of the carrier because it was deemed necessary to assure passengers and consignors of their rights and the steps required to enforce them and to enable carriers to protect themselves through foreknowledge of the extent of their liability. In order to achieve this, the drafters prohibited exemption clauses<sup>76</sup> and provided for a monetary limitation of liability.<sup>77</sup> The Convention's monetary limitation of liability proved to be its most controversial provision, but we must not allow its notoriety to skew our understanding of the purpose of the Convention generally.

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<sup>75</sup> *Id.* This was pointed out by the Luxembourg delegation (Arendt). He stated: We are told that we are here to solve questions relating to carriage and not procedure. But what do we do in this Convention if not to solve certain questions of procedure when it is necessary to solve them in accordance with the question of carriage? We have solved them; we have several articles which are of pure procedure. Then why, why not extend procedure to other cases?

*Id.*

<sup>76</sup> Warsaw Convention, *supra* note 25, arts. 23, 25.

<sup>77</sup> *Id.* art. 22.

It is often said that the Warsaw Convention is a pro-carrier instrument and that the main rationale for the monetary limitation of liability was to protect the nascent aviation industry from catastrophic losses, the burden of which it was not yet in the position to shoulder.<sup>78</sup> Unfortunately, this only tells part of the story and may give rise to the misconception that the Convention protects the carrier at the expense of the passenger. It is necessary to unpack the interests involved to better appreciate how the balance was struck. The monetary limitation of liability was necessary because the drafters chose to prohibit exemption clauses, yet they needed to fix limits of liability in order to provide certainty and predictability to all parties and to facilitate the practice of insurance.<sup>79</sup> Too much has been made of the limitation of liability with the result that the assumed purpose of the Convention (i.e., protecting the carrier) has come to eclipse the real principal purpose (i.e., uniformity). The exploration of the actual rationale for the limitation of liability underlines the principal goal of the Convention as achieving certainty and predictability through uniform rules of liability. The limitation of liability was, in the first place, introduced to quantify the risk in order to facilitate the parties to take action to protect themselves.

While the prohibition of exemption clauses was clearly in the interests of passengers, the introduction of fixed limits—specifically low limits—was not. Indeed, on first impression, low limits seem tailored solely toward the interests of carriers. However,

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<sup>78</sup> This view is commonly held. For example, Milde stated: “The most likely reason for the introduction of the limits of liability was the protection of the infant industry that could not sustain its development without such protection . . . .” MILDE, *supra* note 67, at 284. Likewise, Videla Escalada stated:

The main [reason favoring limitation] is the protection of the carrier. . . .

. . . .

In fact, a quantitative limitation of the carrier’s liability has a common welfare purpose: the encouragement of aviation, which is an extraordinary contribution of our time to the progress of mankind and, more specifically, of air carriage, a means of communication whose benefits, with respect to the human race, it is redundant to underline.

FEDERICO N. VIDELA ESCALADA, *AERONAUTICAL LAW* 565 (1979) (footnote omitted); *see also* ALEKSANDER TOBOLEWSKI, *MONETARY LIMITATIONS OF LIABILITY IN AIR LAW* 110 (1986) (“[T]he most important rationale for the limitation of liability . . . is the protection of the aviation industry.”).

<sup>79</sup> *See* CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, *supra* note 54, at 56; *see also* GOEDHUIS, *supra* note 53, at 256.

the fixing of low limits of liability indicate the service of another interest. Low limits of liability were set for an economic reason that was counterbalanced—to a lesser degree—by a moral consideration. The economic justification is that the stakeholders in air transport had an interest in seeing the cost kept down and that this could be achieved by allocating a lower proportion of risk to the carrier. The imposition of unlimited liability or of a high limitation would increase the insurance premiums of the carriers (assuming coverage could be found), which would trickle down to the passenger and shipper in the form of higher fares and rates.<sup>80</sup> It was also in the general public's interest to have a low limit of liability, not just for the carrier. The public interest in seeing this new means of transportation develop and mature demanded it be given the room to grow without the threat of massive liability claims, which could wipe out carriers and deter the capital investment the industry so desperately needed. The opposing moral consideration was the minimum level of protection to be afforded to victims (specifically those without insurance).

By setting relatively low limits of liability, it is clear that the delegates were also seeking to aid the development of air transport. This was not, as is so often assumed, done solely for the benefit of the carrier but primarily in the interests of the general public. Therefore, when one talks of the balance of interests in the context of the Warsaw Convention, it is not a simple opposition of carrier versus passenger; it is actually a balance between, on the one side, the carrier and the general public and, on the other side, the plaintiff seeking compensation. At that time, the public interest was aligned more closely with the interests of the carrier, and thus the resulting regime had a *de facto* pro-carrier slant, but it was not directly intended as such. The drafters were aware of this and made concessions to potential plaintiffs in an effort to reach an equitable balance (e.g., prohibition of exclusion clauses, reversed burden of proof, etc.).<sup>81</sup> However, the fact is that the scales were undoubtedly tipped in favor of the carrier over the general public, with the plaintiff drawing the shortest straw.

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<sup>80</sup> See *infra* note 261 and accompanying text.

<sup>81</sup> See Warsaw Convention, *supra* note 25, arts. 19–21 (establishing that the carrier has the burden of proof).

### 3. Conclusions

The purpose of the Warsaw Convention was to establish a uniform legal regime consisting of certain rules relating to travel documentation and the liability of the air carrier that would give sufficient certainty and predictability to assure passengers of their rights and to empower the carrier to protect itself through foreknowledge of the extent of its liability. The regime ultimately sought to achieve this principal objective whilst also pursuing a complementary goal of promoting the public interest in the development of international air transport, striking an equitable balance between various interests.<sup>82</sup> In conclusion, the author proposes that the purpose of the Warsaw Convention is twofold, consisting of a cardinal purpose and a supplementary purpose:

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

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

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<sup>82</sup> This is a point recognized by the courts. *See, e.g.*, *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991) (“Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read ‘lésion corporelle’ in a way that respects that legislative choice.”). In the Canadian case of *Connaught*, the court declared, in regard to the adoption of a limitation of liability, that “[t]his result is a clear balancing of interests based on policy considerations, the delegates having chosen to ‘protect the larger public interest’ by keeping down the cost of international air carriage, ‘even at the expense of the relatively small number injured.’” *Connaught Labs. Ltd. v. British Airways* (2002), 61 O.R. 3d 204, para. 48 (Can. Ont. Sup. Ct. J.).

## B. THE WARSAW CONVENTION'S JURISDICTIONAL REGIME

In the previous part, the general purpose of the Warsaw Convention was identified. In this part, the jurisdictional regime of the Convention will be examined. Given that this Article is primarily concerned with jurisdictional subject matter and the manner of its interpretation by the courts, it is especially important to consider the policy objectives underpinning the Convention's jurisdictional regime. Clearly, that regime is consonant with the general purposes of the Convention, but there is also some specificity of purpose to it which we must identify.

### 1. *The Four Warsaw Jurisdictions*

Article 28(1) of the Warsaw Convention provides four bases for identifying the States' courts in which an action for damages under the Convention may be brought, i.e., the potential forums. These are: (1) the place where the carrier is ordinarily a resident; (2) the principal place of business of the carrier; (3) the place where the carrier has a place of business (*un établissement*) through which the contract has been made; and (4) the place of destination.<sup>83</sup> In all cases, the place must be within the territory of a Contracting State, and where there is more than one possible forum, the choice lies with the plaintiff.<sup>84</sup> The jurisdiction of these forums is mandatory and exclusive.<sup>85</sup> In most cases, a plaintiff is likely to have the choice of only two forums. In some cases, the plaintiff may have no choice at all, i.e., where all the bases point to the same place.<sup>86</sup> What does this scheme and the specific choice of places tell us about the drafters' intentions for the Warsaw Convention's jurisdictional regime?

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<sup>83</sup> Article 28(1) provides:

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

Warsaw Convention, *supra* note 25, art. 28(1).

<sup>84</sup> *Id.*

<sup>85</sup> See *Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corp.* [1981] QB 368 at 385 (CA) (Eng.) (Roskill LJ describing Article 28 as creating a "self-contained code within the limits of which a plaintiff must found his jurisdiction.").

<sup>86</sup> See, e.g., *Roberts v. Guyana Airways Corp.* (1998), 41 O.R. 3d 653 (Can. Ont. Gen. Div.) (identifying Guyana as a forum under all four bases).

The four chosen jurisdictions make it clear that the drafters intended to ensure, as a prerequisite to jurisdiction, that there would exist a strong connecting factor between the carrier and the jurisdiction in question. This requirement was clearly satisfied by the first two jurisdictions as places where the carrier generally has its closest links.<sup>87</sup> These would have provoked little controversy, since they conform with a fundamental principle of jurisdiction, i.e., *actor sequitur forum rei*. The contractual nexus upon which the third jurisdiction was founded is obvious, and there was a clear attempt to ensure that there exists a significant business nexus between the place and the carrier through the requirement of “*un établissement*.”<sup>88</sup> The contractual nexus also firmly underpins the fourth jurisdiction (i.e., the place of destination), since it is the contract of carriage that is decisive for identifying this place.<sup>89</sup> Anchoring jurisdiction to places intimately connected to the contract of carriage promotes certainty and predictability precisely because these places would have been within the contemplation of the parties and can be objectively established.

We can also tell much about the drafters’ intentions from the places they did not choose to bestow jurisdiction upon. The 1925 Avant Projet included the place of the accident as one of the bases for jurisdiction.<sup>90</sup> Although its removal was proposed at the CITEJA’s Second Commission (in April 1927),<sup>91</sup> it re-

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<sup>87</sup> Indeed, in most cases these two jurisdictions coincide. A carrier’s principal place of business will usually be in the same place as its place of incorporation or domicile. Under the CITEJA final draft, there was a provision for jurisdiction at the principal place of business (“*le siège principal de l’exploitation*”). See WARSAW MINUTES, *supra* note 67, at 266. Czechoslovakia observed that this presupposed the existence of the carrier as a company or corporation, and that it would not cover those instances where a natural person provided carriage. *Id.* at 169. It was for this reason that jurisdiction at the place of the domicile (ordinary residence) of the carrier was provided. *Id.*

<sup>88</sup> The meaning of “*un établissement*” has proven controversial in practice, and there are diverging opinions between U.S. and French courts. For some discussion, see GOLDBIRSCH, *supra* note 64, at 184–85.

<sup>89</sup> Warsaw Convention, *supra* note 25, art. 1(2) (defining international carriage as “any transportation in which, according to the contract made by the parties, the place of departure and the place of destination,” regardless of any breaks in carriage, are located in the territories of two Contracting States).

<sup>90</sup> CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, *supra* note 54, at 13.

<sup>91</sup> At the second CITEJA session in April 1927, the report of the Second Commission on the jurisdiction article of the draft convention explained that several States had made observations with regard to jurisdiction, and that during the deliberations, it had been agreed that the place of the accident seemed to be unnecessary because it was only of interest to third parties. COMITÉ INTERNA-

mained in the CITEJA final draft considered at Warsaw in 1929. In the U.K.'s written submission to the Conference, it called for removal of the place of the accident, arguing that it bore no relationship to the contract of carriage, that it would not have been contemplated by the parties as the place for litigation of claims, and that it could not be presumed that the carrier would have a business presence there.<sup>92</sup> The U.K. also perceived a risk of "blackmail"—a plaintiff could opt for the place of accident in order to vex or harass the carrier into settling rather than face the difficulties and expense of answering a claim in a distant forum.<sup>93</sup> During the Conference, the rapporteur explained that the CITEJA had elected for the place of the accident because it would provide a convenient forum from the perspective of establishing the circumstances of the accident (such as access to evidence).<sup>94</sup> The U.K. Delegate referred to the points raised in its submission and elaborated by pointing out the fortuitous nature of the location of the accident, indicating that it could result in a case being heard before courts that were "not at all organized."<sup>95</sup> The Polish and Greek Delegates opposed the deletion.<sup>96</sup> For them, the place of the accident was a natural choice of forum, and they supposed that, since the possible drawbacks of some forums would also be detrimental to plaintiffs, this would discourage them from pursuing litigation there in order to vex the carrier.<sup>97</sup> Speaking in support of the U.K. proposal, the French Delegate opined that the place of the accident would be justifiable in the case of a third party but not where a contractual relationship existed between the parties.<sup>98</sup> The Swiss Delegate was also in support of removing the place of the accident, pointing out that where one is dealing with an organized State, then reliance could be placed on the local authorities to establish the circumstances of the accident, whereas if the State is disorganized, then its forum would be objectionable in any

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TIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS, COMPTE-RENDU DE LA DEUXIÈME SESSION (5 AVRIL), at 65 (1927).

<sup>92</sup> WARSAW MINUTES, *supra* note 67, at 298.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 113.

<sup>95</sup> *Id.* at 113–14.

<sup>96</sup> *Id.* at 114–15.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 115.

case.<sup>99</sup> The British proposal was adopted, and the place of the accident was removed from the Convention.<sup>100</sup>

What is noteworthy in this exchange is the recognition by the other delegates that considerations of convenience and predictability were controlling. As to the possibility of forum shopping, this was neither expressly rejected nor accepted as a consideration. The Polish and Greek Delegates instead regarded it as not really being at issue. The main reason that the place of the accident was removed was because its *raison d'être* had been diminished by the observations of the Swiss Delegate. This is striking given that the convenience posed by the location of evidence is so frequently cited in FNC motions in aviation litigation.<sup>101</sup> Yet in 1929, the delegates had not felt that this convenience was strong enough to guarantee jurisdiction at the place of the accident.

The essential object being pursued via the jurisdictional scheme was the same as the Warsaw Convention's cardinal purpose, i.e., to avoid conflict of laws though unification of certain rules. The drafters chose to establish harmonized rules of jurisdiction. The key features of the scheme were: the guarantee of a forum in a Contracting State, the centrality of the contract of carriage, the requirement that the forum have a substantial business connection to the carrier, and the limited number of possible forums. These key features reflected two core policy considerations: first, the need to ensure legal certainty and predictability; and second, the desire to accommodate the interests and convenience of the parties.

While certainty and predictability were of paramount importance, the drafters were keenly aware of the interests of the parties, and this can be seen in the selection of the four jurisdictions. It has been said that the four jurisdictions are carrier oriented and focus on the convenience of the carrier and not the plaintiff.<sup>102</sup> It is submitted that this is inaccurate. A bal-

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<sup>99</sup> *Id.* at 115–16.

<sup>100</sup> *Id.* at 116.

<sup>101</sup> *See, e.g.,* King v. Cessna Aircraft Co., 505 F.3d 1160, 1164 (11th Cir. 2007); Lueck v. Sundstrand Corp., 236 F.3d 1137, 1146 (9th Cir. 2001); *In re Air Crash Over the South Indian Ocean*, 352 F. Supp. 3d 19, 51 (D.D.C. 2018); Nolan v. Boeing Co., 762 F. Supp. 680, 683 (E.D. La. 1989).

<sup>102</sup> For instance, Mendelsohn and Lieux state:

Article 28 limits the fora in which the plaintiff may bring a cause of action to the territory of one of the High Contracting Parties. The plaintiff may select the initial forum for the action, but is limited to the four fora listed. These sites are all carrier-oriented, rather than



anced approach was taken that weighed the competing interests of both carriers and plaintiff passengers (and shippers) against the desire to secure the overriding goal of certainty and predictability. The general scheme itself inherently benefits plaintiffs because it grants them the initiative in choosing their forum (at least where a choice exists). In addition, the third and fourth jurisdictions are more beneficial to the plaintiff than they are to the carrier. Carriers are disadvantaged because the place of destination is more likely to expose them to litigation in a foreign forum,<sup>103</sup> whereas the fourth jurisdiction clearly benefits plaintiffs because it generally will coincide with their home forums.

It is safe to conclude that convenience and fairness to the parties to litigation was an influential factor in the determination of the Warsaw Convention's jurisdictional scheme. However, its significance should not be overstated. First, the third and fourth

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plaintiff-oriented. The domicile or principal place of business of the carrier, where the carrier has a place of business at which the contract was made, or the place of destination, all focus primarily upon the convenience of the carrier.

Allan I. Mendelsohn & Renée Lieux, *The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff*, 68 J. AIR L. & COM. 75, 79 (2003).

<sup>103</sup> This is also clear from a comparison between the Warsaw Convention's scheme and that of the contemporary international transport conventions: CIM of 1890, CIM of 1924, and CIV of 1924. See *Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer* [International Convention Concerning the Carriage of Goods by Rail], Oct. 14, 1890, 82 BSP 771 [hereinafter CIM 1890] (the CIM of 1890); *Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer* [International Convention Concerning the Traffic of Goods by Rail], Oct. 23, 1924, 77 L.N.T.S. 367 [hereinafter CIM 1924] (the CIM of 1924); *Convention Internationale Concernant le Transport des Voyageurs et des Bagages par Chemins de Fer* [International Convention Concerning the Transport of Passengers and Baggage by Rail], Oct. 23, 1924, 78 L.N.T.S. 17 [hereinafter CIV 1924] (the CIV of 1924). While the Hague Conference on Private International Law did not provide rules for jurisdiction, the CIM and CIV of 1924 did. See *WARSAW MINUTES*, *supra* note 67, at 119–20 (explaining that the Hague Conference omitted questions of procedure). Both the CIM and CIV of 1924 were based on the scheme provided under the CIM of 1890, which gave a right of action to the plaintiff against either the first carrier, the last carrier, or the intermediate carrier upon whose network the damage was caused. See CIM 1890, *supra*, art. XXVII; CIM 1924, *supra*, art. 42(3); CIV 1924, *supra*, art. 42(2). The competent court was identified as the domicile of the chosen defendant railway. CIM 1924, *supra*, art. 42(4); CIV 1924, *supra*, art. 42(3). Therefore, the CIM and CIV both adhered to the classical position of *actor sequitur forum rei*. They provided the plaintiff with a choice of which defendant to sue but not a choice of forum against that chosen defendant; the carrier always had to be sued at its place of domicile. The Warsaw Convention was thus less carrier oriented than the CIM or CIV.

jurisdictions clearly contemplated exposing carriers to litigation in foreign forums, which the drafters understood would entail some inconvenience to carriers. Second, while the drafters emphasized the need to reflect the expectations of the parties to the contract, the test employed to determine said expectations was objective in nature. It looked to the contract of carriage and not to the subjective intentions of the parties.<sup>104</sup> This evidences a preference for legal certainty over the flexibility afforded by a subjective assessment. Third, the potential forums were limited to a small number. More forums to choose from would have offered the plaintiff a greater chance of a convenient forum, but the drafters wisely opted for fewer. Nor was any rule for priority between the four jurisdictions defined, from which it can be inferred that relative convenience of the forums was not a consideration. More likely, the drafters would have regarded each as presumptively convenient and left prioritization to the plaintiff's choice. Lastly, in removing the place of the accident, the drafters opted for predictability over convenience. Overall, the jurisdictional scheme of the Warsaw Convention displays a strong civilian sensibility as to the nomination of forums. Primacy was given to legal certainty and predictability throughout, balanced against the secondary concern for the interests of the parties.

## 2. *Rules of Procedure*

Article 28(2) of the Warsaw Convention provides: “Questions of procedure shall be governed by the law of the court to which the case is submitted.”<sup>105</sup> That the forum legitimately selected by the plaintiff from the choices available under Article 28(1) should apply its own rules of procedure to the running of proceedings for a claim under the Convention would seem uncontroversial. However, this seemingly innocuous provision has proved itself a source of controversy with respect to the availability of FNC under both the Warsaw Convention and MC99. The fundamental question asked has been whether the rules of pro-

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<sup>104</sup> In the Australian case of *Gulf Air v. Fattouh*, Judge Allsop (President of the Court) explained that “the enquiry is as to what is the contractual place of destination, not as to what is, or would be, a place that a traveller might call his or her destination, and not by reference to the individual subjective intention or purpose of the passenger . . . .” *Gulf Air Co GSC v Fattouh* [2008] NSWCA 225 ¶ 62 (Court of Appeal) (Austl.); see also *Swaminathan v. Swiss Air Transp. Co.*, 962 F.2d 387, 389 (5th Cir. 1992); *Galli v. Re-Al Brazilian Int’l Airlines*, 211 N.Y.S.2d 208, 209 (N.Y. Sup. Ct. 1961).

<sup>105</sup> Warsaw Convention, *supra* note 25, art. 28(2).

cedure contemplated by Article 28(2) should be interpreted as including the doctrine of FNC or should the plaintiff's choice of forum under Article 28(1) be preemptive and inviolable? Indeed, this is the key issue to be examined in this Article.

There is no specific mention of FNC in the drafting history of the Warsaw Convention, but there is a very brief mention of the judicial discretion to decline jurisdiction. Commenting on the CITEJA final draft, the U.K. made a proposal to include an additional paragraph in what would become Article 28, part of which would state:

None of the stipulations of this Article shall be deemed to bind any court whatsoever to hear a complaint which it would consider, according to the principles of law and procedure in force in the country to which the said court belongs, as contrary to the rules of justice, or as irrelevant to be submitted to it.<sup>106</sup>

That the U.K. had the discretionary power to decline jurisdiction in mind is clear from its commentary attached to the proposal. It explained, “[a] stipulation of this nature would avoid all interference in the discretionary power of courts, and would give them more latitude to repress vexatious litigation, as in the case where the ‘forum’ of another country would be naturally indicated as being that where the debates should take place.”<sup>107</sup> Had this proposal been adopted, there would be little doubt that it would cover the doctrine of FNC. However, it was not included in the final text of the Convention. All the minutes tell us is that the British Delegate “did not insist” on the proposal; his reasons for doing so were not revealed.<sup>108</sup> Its noninclusion has been taken as support for the argument that the drafters intended that the plaintiff's choice of forum should be final, but as shall be discussed below,<sup>109</sup> it is ultimately inconclusive.

### C. THE AVAILABILITY OF FNC WITHIN THE WARSAW CONVENTION SYSTEM

Surprisingly, it was only in 1984 that the question of the availability of FNC under the Warsaw Convention first arose for consideration by the courts. In *Irish National Insurance Co. v. Aer*

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<sup>106</sup> WARSAW MINUTES, *supra* note 67, at 298–99.

<sup>107</sup> *Id.* at 299. In relation to a separate element of the proposed Article 26 (later Warsaw Article 28), the British voiced opposition to a provision that, in its view, “would constitute . . . an interference with the discretionary powers of courts in matters of procedure.” *Id.*

<sup>108</sup> *See id.* at 169.

<sup>109</sup> *See infra* notes 141–46, 189–91 and accompanying text.

*Lingus Teoranta*, the question was asked whether a court was empowered to dismiss a case on FNC grounds under the Warsaw Convention.<sup>110</sup> On that occasion, the court in question was not required to decide the matter.<sup>111</sup> However, U.S. courts would later make determinations on the question on three occasions: (1) in a 1987 decision in the case of *In re Air Crash Disaster Near New Orleans*;<sup>112</sup> (2) in a 1999 decision in the case of *In re Air Crash Off Long Island*;<sup>113</sup> and (3) in 2002, in the case of *Hosaka v. United Airlines, Inc.*<sup>114</sup> In England, the Court of Appeal would offer its perspective in 1996 in *Milor Srl. v. British Airways Plc.*<sup>115</sup> It is proposed to treat these cases by placing each of them into one of two categories that correspond to the nature of the approach to interpretation adopted, i.e., the literal approach or the comprehensive approach.

### 1. *The Literal Approach*

Under customary international law,<sup>116</sup> the general rule is that courts ought to approach the interpretation of a treaty's provisions by starting with its text.<sup>117</sup> In so doing, a court must endeavor to give to the text its natural and ordinary meaning within its context and in light of the treaty's object and pur-

<sup>110</sup> Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984).

<sup>111</sup> *Id.* ("Although *amici curiae* would have us hold that the district court could not invoke the doctrine of *forum non conveniens* to deprive appellant of this right to litigate in the United States, we see no need to decide that issue in the instant case.").

<sup>112</sup> 821 F.2d 1147, 1153 (5th Cir. 1987).

<sup>113</sup> 65 F. Supp. 2d 207, 212 (S.D.N.Y. 1999).

<sup>114</sup> 305 F.3d 989, 993 (9th Cir. 2002).

<sup>115</sup> [1996] QB 702 (CA) (Eng.).

<sup>116</sup> Articles 31 and 32 of the Vienna Convention on the Law of Treaties codifies the general rule. See Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>117</sup> When a court is faced with interpreting a provision of a treaty, it must first start with the text; this is because, as the International Law Commission (ILC) stated, "the text must be presumed to be the authentic expression of the intentions of the parties . . ." *Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session*, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 169, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter *Reports of the ILC*]. As articulated by Jennings: "It is the intention of the parties as expressed in the actual words agreed by them at the moment of concluding the treaty that is in point. . . . The basic intention of the parties is always to agree a text, and the text is therefore the only proper approach to the intention of the parties." R.Y. Jennings, *General Course on Principles of International Law*, in 121 RECUEIL DES COURS 323, 545 (1967).

pose.<sup>118</sup> As will now be shown, when it came to the interpretation of Article 28 of the Warsaw Convention, the courts in *In re Air Crash Disaster Near New Orleans* and *In re Air Crash Off Long Island* began their analyses with the text of the Convention but never strayed too far from there, taking an overly literal approach that failed to adequately consider the text in its context and in light of the object and purpose of the Convention.

The plaintiffs in *In re Air Crash Disaster Near New Orleans* were the families of Uruguayan passengers killed when Pan Am Flight 759 crashed shortly after takeoff from New Orleans.<sup>119</sup> The plaintiffs sought to resist the defendant's motion for FNC dismissal, arguing that the phrase in Article 28, "at the option of the plaintiff," meant they were granted "the absolute and inalterable right to choose the national forum in which their claims will be litigated."<sup>120</sup> The question, therefore, turned on the interpretation to be given to that provision of the Warsaw Convention.

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

Commentators are in general agreement that the delegates to the Convention were concerned with limiting the locations in which an air carrier would have to defend an action, with ensuring that an injured party have an available forum in which to redress his injuries, and with allowing the suit to be heard in a forum that had some interest in the dispute.<sup>121</sup>

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<sup>118</sup> The International Court of Justice (ICJ) summarized the approach in the *Libyan Arab Jamahiriya* case:

[I]n accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 41 (Feb. 3). This was affirmed by the ICJ in *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), Judgment, 2002 I.C.J. Rep. 625, ¶ 37 (Dec. 17). See also *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahr.), Judgment, 1995 I.C.J. Rep. 6, ¶¶ 30–31 (Feb. 15).

<sup>119</sup> *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1150–51 (5th Cir. 1987).

<sup>120</sup> *Id.* at 1161.

<sup>121</sup> *Id.* (citing Carl E.B. McKenry, Jr., *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205 (1963); Andreas F. Lowenfeld & Allan I. Mendel-

We will assess this below,<sup>122</sup> but it is worth noting here that the court's assessment fails to mention the overarching goal of ensuring certainty and predictability and makes no reference to the interests of the carrier. With respect to Article 28(2), the court was less concerned with the reasons for its inclusion, satisfied—without citing any authority—that it was included because the delegates understood that the provisions of the Warsaw Convention would be “applied and adopted to a variety of legal systems.”<sup>123</sup> The court understood this to mean that Article 28(2) manifested the delegates' intention not to interfere with the internal workings of the States' legal systems on procedural matters. The interpretation of the text adopted by the court was that Article 28(1) grants the plaintiff a choice of forum, with Article 28(2) making that choice subject to the procedural rules of the chosen forum.<sup>124</sup> In the court's view, FNC is a procedural rule of the legal system of the United States; therefore, it is available under the Convention.<sup>125</sup> The court might have left it there, but instead, it stated: “We simply do not *believe* that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of *forum non conveniens*.”<sup>126</sup>

The significance attached by the court to the United States' adherence is predicated on a number of assumptions. First, the court assumed that FNC was a valuable procedural tool in 1934. Second, in adhering to the Convention, the United States gave consideration to, and had an understanding of, the status of FNC therein. Third, even presupposing that the United States understood that FNC would not be available, explanations nonetheless justifying U.S. adherence could not be found. However, FNC was not the valuable procedural tool in 1934 that the court

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sohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Charles E. Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 MCGILL L.J. 352 (1963); Note, *Article 28 of the Warsaw Convention: A Suggested Analysis*, 50 MINN. L. REV. 697 (1966)).

<sup>122</sup> See *infra* note 429 and accompanying text.

<sup>123</sup> *In re Air Crash Disaster Near New Orleans*, 821 F.2d at 1161.

<sup>124</sup> The court stated: “The party initiating the action enjoys the prerogative of choosing between these possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws.” *Id.* The court cited a number of authorities in support of this point, none of which involved FNC. See *id.* at 1161 & n.22. The court felt these cases demonstrated the reluctance of U.S. courts to hold national rules of procedure as unavailable under the Convention. *Id.*

<sup>125</sup> *Id.* at 1161–62.

<sup>126</sup> *Id.* at 1162 (first emphasis added).

assumed it to be. In all likelihood, the United States gave no consideration to its availability when adhering to the Convention, and even if it had, there are many compelling reasons why it might have justified forfeiting it solely for Convention claims.<sup>127</sup>

The second ground for the court's decision was that accepting the plaintiffs' interpretation of Article 28 would undermine the purpose of the Warsaw Convention's provisions on jurisdiction by allowing cases to be heard in forums without an interest in the matter.<sup>128</sup> This is dubious in the extreme. As shown above,<sup>129</sup> there is no evidence supporting the court's view that the forums were so chosen.<sup>130</sup> They were not chosen for the purpose of ensuring that the forum itself had an interest in the dispute. Had the drafters had such a purpose in mind, then they would surely have adopted the place of the accident as a possible forum. What the court's approach amounted to was a reading of Article 28 from a U.S. common law perspective,<sup>131</sup> importing considerations of the relative appropriateness of the available forums.<sup>132</sup> Such an approach is inconsistent with the text of the Convention, which imposes no hierarchy on the forums and explicitly grants the plaintiff a free choice.

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<sup>127</sup> Indeed, precedent for the U.S. Legislature excluding the option of FNC exists. See *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 585–90 (1948).

<sup>128</sup> The court opined that “[i]f we were to adopt the plaintiffs’ construction of article 28(1) and ignore the language of article 28(2), American courts could become the forums for litigation that has little or no relationship with this country.” *In re Air Crash Disaster Near New Orleans*, 821 F.2d at 1162.

<sup>129</sup> See *supra* part II.B.1.

<sup>130</sup> The court's only support was a general reference to McKenry's article on Article 28. *In re Air Crash Disaster Near New Orleans*, 821 F.2d at 1162. However, what McKenry's article shows is that the drafters of the Warsaw Convention chose forums that would ensure a connection to the carrier and that would be within the territory of a Contracting Party. McKenry, *supra* note 121, at 208–09, 217. McKenry stated, of Article 28, that “[t]he main intent of this Article is to set forth the courts which are competent forums for actions under the Warsaw Convention. Four specific jurisdictional contacts are provided, three relating to the carrier, and the last based on place of destination.” *Id.* at 208.

<sup>131</sup> See *In re Air Crash Disaster Near New Orleans*, 821 F.2d at 1160–61, 1161 n.21. The court's argumentation displays a distinct common law bias. Civilian law courts exercise their jurisdiction on the fact of it having been vested in them by the relevant legislative or constitutional instrument. The appropriateness of the forum is not contemplated by the court itself, but if anything, it is presumed from the fact of its vestiture. It is a feature of the common law that the relative appropriateness of the forums is considered, i.e., *forum conveniens*. See *id.* at 1158.

<sup>132</sup> *Id.* at 1154, 1162. This is clear from the factual scenario the court provided as illustration. See *id.* at 1162 n.23.

Once the fact of U.S. adherence is dismissed and the dubious account of the purposes of Article 28 exposed, the decision of the Fifth Circuit in *In re Air Crash Disaster Near New Orleans* effectively boils down to little more than a purely literal interpretation of Article 28. Although ultimately resting its decision on the same grounds, the U.S. District Court for the Southern District of New York in *In re Air Crash Off Long Island* did engage in a somewhat broader interpretative analysis.<sup>133</sup> The litigation in that case had been initiated by the relatives of forty-five French passengers who had died in the 1996 crash of TWA Flight 800.<sup>134</sup> The defendants' FNC motion was ultimately denied but not before the question was raised regarding the availability of FNC.<sup>135</sup>

The court summarized the plaintiffs' contention as follows: "the language of Article 28(1), considered in the context of the Convention as a whole and of its drafting history, prohibits a court from declining to exercise its jurisdiction in a case properly brought under Article 28(1)."<sup>136</sup> The plaintiffs presented a number of arguments to support their contention, one of which was the precedent of *United States v. National City Lines*, a case in which the U.S. Supreme Court considered the special jurisdiction provisions of a federal act that prohibited a court from interfering with the plaintiff's choice of forum through the application of FNC.<sup>137</sup> The *Long Island* plaintiffs sought to draw an analogy from that act to the Warsaw Convention, arguing that it too established special jurisdiction rules that could not be displaced by FNC.<sup>138</sup> The court distinguished *National City Lines* because, in that case, the Legislature had expressed a clear legislative intent to preclude interference with the plaintiff's choice of forum.<sup>139</sup> It held that the mere fact that the Warsaw Conven-

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<sup>133</sup> See *In re Air Crash Off Long Island*, 65 F. Supp. 2d 207, 212–15 (S.D.N.Y. 1999).

<sup>134</sup> *Id.* at 209.

<sup>135</sup> See *id.* at 218.

<sup>136</sup> *Id.* at 213.

<sup>137</sup> *Id.* at 213–14; see *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 587–89 (1948). Under the act in question, in addition to the general jurisdiction of the court of the residence of the corporation, the plaintiff was given the choice of pursuing the defendant corporation within any jurisdiction where the defendant transacted business. See *Nat'l City Lines, Inc.*, 334 U.S. at 579–80.

<sup>138</sup> *In re Air Crash Off Long Island*, 65 F. Supp. 2d at 214.

<sup>139</sup> *Id.* at 213 (citing *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 608 (2d Cir. 1998); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir. 1991); *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1987) (per curiam)).



tion contains a special jurisdiction provision is not enough to conclude that dismissal on grounds of FNC is precluded.<sup>140</sup> Something more was required.

The missing element of the plaintiffs' argument was the manifest intention that a plaintiff's choice of forum be inviolable under the Warsaw Convention. They sought to supply this by reference to the drafting history.<sup>141</sup> In particular, the plaintiffs relied on the lack of insistence by the British Delegate for inclusion of the U.K.'s proposal for judicial discretion to decline jurisdiction.<sup>142</sup> For the plaintiffs, this was proof that the delegates had intended the choice of forum under Article 28(1) to be final.<sup>143</sup> The court, however, found the drafting history to be inconclusive.<sup>144</sup> The court opined that the U.K.'s withdrawal of the proposal may simply have been because it did not wish to impose the procedural device on other signatories, understanding that the U.K. and other States in which an FNC-like doctrine is a feature could continue to apply it based on Article 28(2).<sup>145</sup> It did not "necessarily signify an intention by the drafters to prohibit signatory nations for which the [FNC] doctrine was part of [their] procedural law from employing that doctrine in a Convention case."<sup>146</sup>

The court's reading of the drafting history led it to conclude that "[n]othing in the discussion indicates a desire to restrict defendant carriers to the fora listed in Article 28(1)."<sup>147</sup> The court meant that there was no suggestion that once a forum was chosen, that choice was inviolable. In any case, the court's observations on the drafting history were purely obiter dictum because the court based its finding on the literal interpretation of Article 28. The language of Article 28(2) was clear; the court determined that "[FNC] is a procedural tool available to U.S. courts and thus squarely falls within the literal language of Arti-

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<sup>140</sup> *Id.* ("The fact that the Warsaw Convention has a special venue provision does not, by itself, preclude the possibility of dismissal on *forum non conveniens* grounds.").

<sup>141</sup> *Id.* at 214.

<sup>142</sup> *Id.*; see also *infra* part II.B.2.

<sup>143</sup> See *In re Air Crash Off Long Island*, 65 F. Supp. 2d at 214.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* Likewise, the civil law drafters may have adopted Article 28(2) precisely because they recognized that there were procedural rules in other systems with which they were unfamiliar and did not wish to interfere. *Id.* at 214–15.

<sup>146</sup> *Id.* at 214.

<sup>147</sup> *Id.*

cle 28(2).<sup>148</sup> Like in *In re Air Crash Disaster Near New Orleans*, the court argued that Article 28(1) had to be read in conjunction with Article 28(2) and that the plaintiff's choice of forum was subject to the forum's rules of procedure, which in the United States includes FNC.<sup>149</sup>

The approach to treaty interpretation adopted by the two courts might have been justified by a restrictive reading of the Supreme Court's judgment in *Chan v. Korean Air Lines*,<sup>150</sup> but it does not pass muster under the Vienna Convention on the Law of Treaties.<sup>151</sup> Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>152</sup> The context considered by the two courts in reaching their determinations did not go beyond Article 28. Even in *In re Air Crash Off Long Island*, where the plaintiffs asked the court to consider the jurisdictional scheme in the context of the Warsaw Convention as a whole and in light of its object and purpose, the court did not do so and contained itself to the immediate context of Article 28.<sup>153</sup> In so doing, the courts failed to consider the meaning of Article 28 in light of the Convention's dual purposes. Had the courts asked themselves how compatible FNC is

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see *supra* notes 123–28 and accompanying text.

<sup>150</sup> The court in *In re Air Crash Off Long Island* followed the precedent of a case in its own district that had itself followed *Chan* to limit its interpretation to the treaty's text. *In re Air Crash Off Long Island*, 65 F. Supp. 2d at 214 (citing *Am. Home Assurance Co. v. Jacky Maeder (H.K.) Ltd.*, 969 F. Supp. 184, 188 n.2 (S.D.N.Y. 1997) (citing *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 9 (2d Cir. 1990))).

<sup>151</sup> It is arguable however that the courts' approach was not consistent with contemporary Supreme Court authority on treaty interpretation in *Chan*. The Supreme Court stated that in interpreting a treaty:

[A court] must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous. But where the text is clear, as it is here, we have no power to insert an amendment.

*Chan*, 490 U.S. at 134 (citation omitted) (citing *Air France v. Saks*, 470 U.S. 392 (1985)). Even solely based on the strength of *Chan's* rule, the courts in *In re Air Crash Disaster Near New Orleans* and *In re Air Crash Off Long Island* should have adopted a broader approach to treaty interpretation.

<sup>152</sup> Vienna Convention, *supra* note 116, art. 31(1).

<sup>153</sup> See *In re Air Crash Off Long Island*, 65 F. Supp. 2d at 212–15.

with the Warsaw Convention's cardinal purpose of uniformity and the supplementary purpose that involves the balancing of interests between carriers, users, and plaintiffs, then their ability to adopt the stance that the meaning of Article 28 is clear and unambiguous would surely have been upset. Even the limited context of Article 28 itself should have given the courts pause for thought, but there the courts still failed to identify the primary purpose of the jurisdictional scheme, i.e., certainty and predictability.

## 2. *The Comprehensive Approach*

The courts in *In re Air Crash Disaster Near New Orleans* and *In re Air Crash Off Long Island* probably felt satisfied that, since the ordinary meaning of the terms was clear, recourse to supplementary means of interpretation, such as the drafting history and background circumstances, was not required. In the context of the Vienna Convention, it could be said that the courts did not see any requirement to go beyond the general rule of interpretation in Vienna Convention Article 31(1). On the face of it, this seems plausible. Under Article 32 of the Vienna Convention, a court may have recourse to supplementary means of interpretation in two defined circumstances: first, to "confirm the meaning resulting from the application" of the general rule in Article 31; and second, to "determine the meaning" where the application of the general rule fails to produce an acceptable meaning.<sup>154</sup> The International Court of Justice (ICJ) stated in an advisory opinion in *Admission of a State to the United Nations* that "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself."<sup>155</sup> This might have given the courts in *In re Air Crash Disaster Near New Orleans* and *In re Air Crash Off Long Island* a sense of vindication for their inattentiveness to supplementary means of interpretation.

Even so, the courts would nevertheless have been permitted by Vienna Convention Article 32 to have recourse to supplementary means of interpretation for the purpose of "confirming" the meaning arrived at from the operation of the general rule in

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<sup>154</sup> Vienna Convention, *supra* note 116, art. 32.

<sup>155</sup> Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. Rep. 57, at 63 (May 28). In 1952, the ICJ maintained this position by claiming that "[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter." Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, at 8 (Mar. 3).

Article 31—a paradoxical position confirmed by the International Law Commission (ILC).<sup>156</sup> The courts elected not to do so, and given that this recourse is couched in permissive rather than mandatory terms, their decision to do so is defensible. However, in the second set of circumstances, where the application of the general rule leaves the meaning “ambiguous or obscure” or where it “[l]eads to a result which is manifestly absurd or unreasonable,”<sup>157</sup> supplementary means of interpretation may be used to determine the meaning. This second scenario is a strictly limited exception to the general rule of interpretation<sup>158</sup> whereby the supplementary means play a more significant role than that of mere confirmation; they may be used to determine the meaning. As argued above,<sup>159</sup> if properly applied, the general rule of interpretation would result in the conclusion that the meaning of Warsaw Convention Article 28 is ambiguous. Therefore, recourse to supplementary means of interpretation was both valid and necessary. These means include the *travaux préparatoires* and the circumstances of the treaty’s conclusion. It is not clear what is meant by the latter, but the ILC Special Rapporteur understood it to mean “both the contemporary

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<sup>156</sup> The ILC justified this apparent contradiction between these above noted precedents and Article 32 by arguing that the ICJ (and the Permanent Court of International Justice (PCIJ)) had on numerous occasions referred to the *travaux préparatoires* for confirmation of meaning and that not allowing recourse to these sources “would be unrealistic and inappropriate.” *Reports of the ILC, supra* note 117, at 223. The ILC only cites one authority that clearly supports this view, in which the PCIJ stated: “The preparatory work thus confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words.” *Id.* (quoting Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50, at 380 (Nov. 15)). The other authority cited by the ILC is not so unequivocal, where the PCIJ stated: “As the bonds themselves are not ambiguous, there is no occasion for reference to the preliminary documents. But if these are examined, it will appear that they tend to confirm the agreement for gold payments.” Payment of Various Serbian Loans Issued in France (Fr./Kingdom of the Serbs, Croats and Slovenes), Judgment, 1929 P.C.I.J. (ser. A) No. 20, at 30 (July 12).

<sup>157</sup> Vienna Convention, *supra* note 116, art. 32.

<sup>158</sup> “The Court has recognized this exception to the rule that the ordinary meaning of the terms must prevail.” *Reports of the ILC, supra* note 117, at 223 (citing Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. Rep. at 8).

<sup>159</sup> *See supra* part II.C.1.

circumstances and the historical context in which the treaty was concluded.”<sup>160</sup>

How then would a more complete application of the general rule of treaty interpretation and recourse to supplementary means of interpretation resolve the critical question of the applicability of FNC within the Warsaw Convention? The English Court of Appeal wrestled with this question in *Milor*.<sup>161</sup>

Plaintiff Milor sought to resist an FNC stay, arguing that Warsaw Article 28 gave plaintiffs “the right to select within which of the competent jurisdictions their claim will be tried, and that accordingly there is no scope for the application of the doctrine of forum non conveniens.”<sup>162</sup> Much of the argument turned on the meaning to be given to the word “bring” in the context of Article 28.<sup>163</sup> Did it merely mean the right to initiate proceedings in the forum, or did its meaning cover both initiation and resolution of proceedings? Making reference to the French text of Article 28, Lord Justice Phillips (later President of the Supreme Court of the United Kingdom) noted that the word used is “portée,” and he contrasted this with the use of the word “intentée” in Article 29—both translated into English as “brought.”<sup>164</sup> For Lord Justice Phillips, this was significant; in his view, *intentée* carried the restrictive meaning of merely initiating proceedings, whereas *portée* carried the meaning of commencing and pursuing.<sup>165</sup> Lord Justice Phillips favored the latter meaning, stating:

To give a plaintiff the option to chose in which of a number of competent jurisdictions to commence his suit is to give him nothing. . . . If the option granted by article 28 is to have value, it must be an option to the plaintiff to decide in which forum his claim is to be resolved.<sup>166</sup>

The operation of FNC would be inconsistent with this right. There is much to commend in this line of argument, even if

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<sup>160</sup> *Third Report on the Law of Treaties*, at 59, U.N. Doc. A/CN.4/167 (1964), reprinted in [1964] 2 Y.B. Int'l L. Comm'n 5, 59, U.N. Doc. A/CN.4/SER.A/1964/ADD.1 (footnote omitted). The *Anglo-Iranian Oil Co.* case is cited by Harris as an example. D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 842 (6th ed. 2004) (citing *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment, 1952 I.C.J. Rep. 93 (July 22)).

<sup>161</sup> *Milor Srl. v. British Airways Plc.* [1996] QB 702 (CA) (Eng.).

<sup>162</sup> *Id.* at 706.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 707.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 706–07.

there is also some hyperbole to suggesting that plaintiffs are given nothing because their choice may be subject to a rule of procedure. For Lord Justice Phillips, the crux of the matter was whether the drafters intended to bestow a substantive right on plaintiffs to absolutely determine the forum for resolution of their claims under the Convention.

The court thought the natural meaning of Article 28 was not so unambiguous that reference to extrinsic considerations need not be made.<sup>167</sup> So, it looked beyond the natural meaning of the text in its context and examined the object of the Convention, its drafting history, and historical background. Agreement was expressed with the trial judge's opinion that the object of the Convention, as far as jurisdiction was concerned, was to harmonize national views on jurisdiction, i.e., to establish uniformity.<sup>168</sup> Support for this position was found in *Rothmans*, where the court described Article 28 as creating a "self-contained code."<sup>169</sup> Lord Justice Phillips understood this to mean that the object of the Convention's jurisdictional provisions was to establish a uniform regime that would be self-reliant and independent of the substantive law of the individual national legal systems. On this view, if the parties had intended FNC to apply within this "self-contained code," then they would surely have made express provision for it. That they did not do so not only reflected the desire for uniformity but also the fact that FNC was not an established doctrine in all common law countries in 1929, and it would have been unknown to many civilian jurists. In light of its purpose and in the context of its historical background, the following conclusions were reached:

I think it would be surprising if the high contracting parties had preserved to that small minority of countries which applied the doctrine of forum non conveniens a power to affect the choice of the forum in which a dispute should be tried by a process unknown to the majority of the parties. It seems to me that the jurisdictional code that was agreed in the form of article 28 aimed at providing the plaintiff with a limited choice of competent jurisdictions, each of which to a greater or lesser degree was likely to be appropriate for the bringing of a claim. It was implicit that the court of the chosen forum would remain seised of the matter, trying it in accordance with its own rules of procedure, and there

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<sup>167</sup> *Id.* at 707.

<sup>168</sup> *Id.* at 707–08.

<sup>169</sup> *Id.* at 708 (citing *Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corp.* [1981] QB 368, 385 (CA) (Eng.)).

was no scope for an individual court to impose a venue that conflicted with the plaintiff's choice.<sup>170</sup>

The U.S. authorities supporting the availability of the doctrine were very briefly considered, but their reasoning was not thought compelling.<sup>171</sup> The conclusion thus reached by the Court of Appeal was that FNC is not available under the Warsaw Convention; a plaintiff's choice of forum under Article 28 is absolute.<sup>172</sup>

Lord Justice Phillips's concept of a "self-contained code" on jurisdiction appears to be at variance with the text of Article 28(2), which provides that matters of procedure will be determined by the procedural law of the chosen forum.<sup>173</sup> As far as procedural law is concerned, the code is not at all self-contained. Lord Justice Phillips was clearly aware of this. This apparent inconsistency is reconcilable once it is understood that his essential point was that the drafters intended to bestow upon the plaintiff a substantive right to choose a forum and have the dispute determined there. Yes, Article 28(2) provides for the application of the forum's rules of procedure, but in light of the Convention's cardinal purpose of achieving uniformity, it would be inconsistent to allow such a rule of procedure to undermine the substantive right of Article 28(1). The validity of the decision in *Milor* rests entirely on the nature of the substantive right intended under Article 28(1). Was that right limited to the choice of forum, or did it also include the right to have the dispute resolved in that forum? If it is the latter, then the reference to national rules of procedure in Article 28(2) must be interpreted as precluding FNC; otherwise, Article 29(2) would conflict with the substantive provisions of the Warsaw Convention.

Decided in 2002, *Hosaka* concerned claims made by forty-six Japanese tourists for injuries (as well as one fatality) suffered during severe turbulence encountered while traveling with United Airlines from Tokyo to Hawaii.<sup>174</sup> The trial court dis-

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<sup>170</sup> *Id.* at 708–09.

<sup>171</sup> *Id.* at 709–10. The court also referred to a case of the Singapore Court of Appeal, which had applied the doctrine in a Warsaw Convention case. *Id.* at 710 (citing *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 (CA) (Sing.)).

<sup>172</sup> *Id.* (stating that Lord Justice Phillips considered "that article 28 of the Warsaw Convention leaves no scope for a challenge to the jurisdiction on the grounds of forum non conveniens . . .").

<sup>173</sup> See Warsaw Convention, *supra* note 25, art. 28(2).

<sup>174</sup> *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002).

missed on grounds of FNC, giving the Ninth Circuit the opportunity to weigh in on the question of the availability of FNC.<sup>175</sup>

Starting with the text of Article 28, Judge Fisher concluded that the text was ambiguous; the fact that two plausible interpretations were possible, as illustrated by the conflicting positions between the U.S. courts<sup>176</sup> and the English court in *Milor*,<sup>177</sup> was proof enough for Judge Fisher.<sup>178</sup>

With the text alone not being sufficient to provide the answer, the court turned to Supreme Court precedent from *Tseng, Chan*, and *Saks* to guide its interpretation of the Warsaw Convention,<sup>179</sup> and it looked to other sources to discover the meaning of Article 28. This involved looking to the purposes of the Convention, its drafting history, and the post-ratification understanding of the parties whilst attempting “to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.”<sup>180</sup>

Following precedent, the court identified the two purposes of the Warsaw Convention as: (1) “uniformity of rules governing claims arising from international air transportation”;<sup>181</sup> and (2) balance between the interests of air carriers and those of passengers.<sup>182</sup> This sought after uniformity extended to matters of jurisdiction; the court opined that “[b]y including an article addressing jurisdiction, the signatories manifested their intent to create not just uniform rules of liability, but also uniform rules of jurisdiction.”<sup>183</sup> Quoting approvingly from *Milor*, Judge Fisher identified the purpose of the jurisdictional rules con-

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 995 (citing *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1161 (5th Cir. 1987); *In re Air Crash Off Long Island*, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999)).

<sup>177</sup> *Id.* at 994. Judge Fisher regarded *Milor* as being entitled to considerable weight. *Id.* at 995 n.5. However, he declined to adopt the *Milor* textual analysis of the authentic French version that distinguished between the terms *portée* and *intentionnée*. *Id.* at 995–96. Judge Fisher’s reading of the French–English dictionary entries for *portée* and *intentionnée* did not yield the same conclusion. *Id.* at 996. He doubted the meaning attributed to *portée* as requiring “that the action must be litigated to conclusion in the forum selected by the plaintiff.” *Id.*

<sup>178</sup> *Id.* at 994–96.

<sup>179</sup> *Id.* at 993–94 (citing *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

<sup>180</sup> *Id.* at 994 (quoting *Saks*, 470 U.S. at 399).

<sup>181</sup> *Id.* at 996 (quoting *Tseng*, 525 U.S. at 169).

<sup>182</sup> *Id.* at 997 (citing *Tseng*, 525 U.S. at 170).

<sup>183</sup> *Id.* at 996.



tained in Article 28(1) as being aimed at creating a “self-contained code on jurisdiction” that sought to harmonize the rules of jurisdiction.<sup>184</sup> FNC would undermine this harmony and uniformity because plaintiffs could find their right to choose their forum denied before the courts of one Contracting State yet recognized in another.<sup>185</sup> Additionally, the doctrine of FNC is itself “vague and discretionary” and therefore “unlikely to produce uniform results.”<sup>186</sup>

In light of the dual purpose of the Warsaw Convention, the court took the view that by limiting the number of forums available to a plaintiff and balancing that against the plaintiff’s right to choose, the drafters were conferring a benefit on the passenger (echoing the view of Lord Justice Phillips in *Milor*).<sup>187</sup> This benefit was to be understood as part of the balance struck between passenger and carrier. The court reached the view that “[p]ermitt[ing] defendants to utilize forum non conveniens to cancel out the plaintiff’s choice would undermine this balance just as it would undermine uniformity,” concluding that “[t]he doctrine of forum non conveniens is inconsistent with the Convention’s dual purposes of uniformity and balance.”<sup>188</sup>

Moving then to the drafting history, the court considered the U.K. proposal to include wording relating to discretion to decline jurisdiction.<sup>189</sup> Like the court in *In re Air Crash Off Long Island*, it considered the possible reasons for not including the U.K. proposal in the final draft of the Convention, but it determined that nothing conclusive could be established.<sup>190</sup> However, the court stopped short of dismissing the U.K. proposal as irrelevant. Instead, it determined that the proposal suggested that the delegates at the Warsaw Conference were aware of FNC and that they did not see Article 28(2) as silently incorporating nor acquiescing to it.<sup>191</sup> When further considered against the historical context of the Convention’s drafting, implicit incorporation of FNC under Article 28(2) was even more difficult to accept because, with the exception of the U.K., the drafters

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<sup>184</sup> *Id.* at 997 (quoting *Milor Srl. v. British Airways Plc.* [1996] QB 702 at 707 (CA) (Eng.)).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (first quoting *United States v. Nat’l City Lines, Inc.*, 334 U.S. 573, 581 (1948); and then quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 997–98.

<sup>190</sup> *Id.* at 998.

<sup>191</sup> *Id.*

hailed from predominantly civilian legal systems where FNC was unknown.<sup>192</sup> Judge Fisher thought it would be unreasonable and unlikely to assume that the majority of drafters would have acquiesced to the application of FNC under Article 28(2).<sup>193</sup> He thought that if the drafters intended this doctrine to apply, then they would surely have made express provision for it.<sup>194</sup> Faced with a choice between interpretations that would either permit or prohibit FNC in circumstances where the majority of the drafters hailed from jurisdictions where such a doctrine was all but unknown, Judge Fisher was not prepared to adopt a construction of Article 28(2) that “would be controversial for most signatory countries.”<sup>195</sup>

The next port of call for the consideration of extrinsic means of interpretation was the post-ratification understanding of the parties and any decisions of other courts.<sup>196</sup> Judge Fisher did not think the *travaux* of MC99 was helpful for discerning the intentions of the drafters of the Warsaw Convention.<sup>197</sup> He was not persuaded by the Fifth Circuit’s reasoning in *In re Air Crash Disaster Near New Orleans* precisely because that court did not have the benefit of the *Milor* decision nor had it considered the purpose, drafting history, and post-ratification understanding of the parties.<sup>198</sup> Having completed the consideration of extrinsic guides to interpretation, the court came to the same conclusion as *Milor*, i.e., FNC is not available under the Warsaw Conven-

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<sup>192</sup> *Id.* at 999.

<sup>193</sup> *Id.* (“Following these rules of construction, we do not infer from the treaty’s incorporation of local procedural law that the drafters acquiesced in the application of forum non conveniens, a concept that was (and is) both alien to and unwelcome by the majority of the contracting parties.”).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 998 (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)). Judge Fisher cited *Zicherman* and *Floyd*, noting that the Supreme Court had refused to adopt interpretations of the Warsaw Convention that would have been “discordant or offensive to the majority of signatories.” *Id.* (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223 (1996); *Floyd*, 499 U.S. at 540).

<sup>196</sup> *See id.* at 999–1002.

<sup>197</sup> *Id.* at 1001.

<sup>198</sup> *Id.* at 1002.

tion.<sup>199</sup> The Supreme Court declined to review *Hosaka* on appeal.<sup>200</sup>

### 3. *Concluding Remarks*

Should the plaintiff's choice of forum be conditioned on the application of local rules of procedure? Or should those local rules of procedure be constrained by the jurisdictional scheme providing the plaintiff the choice of forum? To put this another way, must Article 28(2) be read as constrained by the jurisdictional scheme provided by Article 28(1)? These are questions for which we are now in a position to provide some answers.

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

These doubts are only intensified by consideration of the object and purpose, not only of the jurisdictional provisions themselves but also of the Convention as a whole. As defined earlier,<sup>201</sup> the cardinal purpose of the Warsaw Convention is the avoidance of conflict of laws through unification of certain rules relating to carriage documentation and air carrier liability; let us refer to this as the uniformity goal. This purpose is confirmed by the historical context that shows that the legal status of the air carrier within the existing regimes of *le droit commun* was uncertain, and the introduction of statutory solutions by various States produced substantial nonuniformity. The supplementary purpose of the Convention was the furtherance of the public interest in the development of air transport while striking an equitable balance of interests between carriers, users, and plain-

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<sup>199</sup> *Id.* at 1003–04. (Judge Fisher concluded: “[T]he contracting parties did not intend to permit the plaintiff's choice of national forum to be negated by the doctrine of forum non conveniens. We therefore hold that Article 28(1) of the Warsaw Convention precludes a federal court from dismissing an action on the ground of forum non conveniens.”).

<sup>200</sup> *United Airlines, Inc. v. Hosaka*, 537 U.S. 1227 (2003).

<sup>201</sup> *See supra* part II.A.3.

tiffs;<sup>202</sup> let us refer to this as the balance-of-interests goal. Together these can be understood as providing the general purposes of the Warsaw Convention. The jurisdictional scheme of the Convention also serves specific purposes, primarily, the harmonization of jurisdictional rules. Supplementary to which, the drafters, in defining the jurisdictional scheme, gave primacy to legal certainty and predictability, but they balanced this with regard to the interests of the parties to litigation. With the former (harmonization), the drafters followed the Convention's cardinal purpose. With the latter (certainty and predictability), the jurisdictional scheme explicitly followed the supplementary purpose of the Convention by ensuring an equitable balance of interests.

The application of a discretionary doctrine that operates to displace the plaintiff's choice of forum in preference for the defendant's choice of forum, on the face of it, offends both the uniformity goal and the balance-of-interests goal as well as the specific purposes of the jurisdictional scheme. However, it is important not to overestimate the reach of uniformity in the context of the Warsaw Convention. How exactly does FNC offend uniformity? In one obvious way, FNC means the treatment of jurisdiction in a Warsaw Convention case will be different depending on whether the court seized applies FNC or not. In this sense, the plaintiff's choice of forum is worth less and therefore does not carry a uniform value amongst the courts of Contracting States. But that can be said for any rule of substance or procedure that differs from one jurisdiction to the next. For example, the Warsaw Convention does not define damages. For the most part, it is left to *le droit commun* to determine the recoverable heads of damage.<sup>203</sup> As a consequence, a plaintiff who sues under Swedish law will not be able to recover the same range of heads of damage available under U.S. law. But we do not impugn this lack of uniformity as a breach of the Convention's goals and purpose. This is because one must show that the uniformity that is being undermined by *le droit commun* is one which the Convention intended to establish. Uniformity in the context of the Warsaw Convention was pursued to ensure legal certainty and predictability. Undoubtedly, FNC disturbs legal certainty and predictability. But the extent of this disturbance is greatly mitigated by the Warsaw Convention's limited number of

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<sup>202</sup> See *supra* part II.A.2.

<sup>203</sup> See *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 170 (1999).

possible forums. While plaintiffs are deprived of the certainty of knowing that their own choice of forum is final, they are assured that their cases will be heard in one of the other forums available under the Warsaw Convention. This is because even in the case of FNC dismissal, the alternative forum must be one of those identified by Article 28.<sup>204</sup>

From the other point of view, the strongest argument against the inconsistency of FNC within the Warsaw Convention is the literal interpretation of Article 28(2). Another argument is that the goal of uniformity pursued by the Warsaw Convention is only partial. Clearly, the Warsaw Convention did not seek to secure absolute uniformity of rules; the drafters sought only to unify “certain rules.” They maintained throughout that only matters essential to a treaty on private aeronautical law should be within its scope, and that they did not wish to encroach on matters of general private international law or questions of procedure.<sup>205</sup> Read in this light, Article 28(2) appears as an affirmation of that intention. However, by including a bespoke jurisdictional scheme, the drafters undoubtedly intended to regulate this area of law within the context of international carriage by air. Thus, the question still remains as to what extent they intended to regulate jurisdiction.

The drafters were conscious that the adoption of a fault-based theory of liability with a low limitation of liability was fundamentally pro-carrier.<sup>206</sup> However, contrary to what is often assumed, this was not done in order to directly protect the interests of carriers but rather in furtherance of the public interest in the development of air transport. The purpose of the Convention was not only to protect the carrier per se but also to promote the public interest in air transport to the extent necessary.<sup>207</sup> The drafters were keenly aware that the basic regime favored carriers at the expense of plaintiffs, and they made a number of concessions to the latter in order to provide for an equitable balancing of interests. The jurisdictional scheme of the Warsaw Convention must be examined in light of this context. Having established the basic liability regime, the drafters were of a mindset to make concessions to the plaintiff. The jurisdictional scheme is reflective of this mindset, and it is submitted that the drafters

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<sup>204</sup> See *infra* note 432 and accompanying text.

<sup>205</sup> See *supra* part II.A.1.

<sup>206</sup> See Lowenfeld & Mendelsohn, *supra* note 121, at 499–500.

<sup>207</sup> See *id.*

would have looked dimly on granting further benefits to the carrier at the expense of the plaintiff where not justified by the public interest.

The drafters of the Warsaw Convention hailed almost entirely from civilian law jurisdictions for which the competence of a court was obligatory, and thus, where the concept of judicial discretion to decline jurisdiction did not exist. Generally speaking, FNC is anathema to the civilian lawyer. Bearing this historical context in mind, it is eminently more likely that the drafters would have intended that the right to choose the forum in which to bring an action against a carrier would amount to a substantive right for plaintiffs to determine the forum in which their claims would be settled. The possible forums ensured a significant business connection to the carrier in whichever forum it was sued, whereas the convenience of the plaintiff was principally served by having the initiative in choosing the forum. FNC would upset this balance of interests in favor of the defendant carrier. The desire to secure legal certainty and predictability for the parties outweighed considerations of convenience, and no effort was made by the drafters to inject considerations of relative convenience into their jurisdictional scheme. The idea that the choice of forum provided under Article 28(1) could be disturbed by a discretionary rule for declining jurisdiction, whose *sine qua non* is relative convenience, would not have been within the contemplation of the drafters.

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

As codified by Article 26 of the Vienna Convention, customary international law provides that a contracting party to a convention is under a duty to perform its obligations thereunder in good faith, and as codified by Article 27 of the Vienna Convention, a State may not invoke provisions of its internal law as justi-

fication for its failure to perform.<sup>208</sup> The rule of Article 26 is also referred to as “*pacta sunt servanda*.”<sup>209</sup> In the simplest of terms, this means that the parties to a treaty are obliged not to defeat the object and purpose of that treaty.<sup>210</sup> In the context of the Warsaw Convention, a Contracting State would, as a matter of good faith, be precluded from applying a doctrinal principle such as FNC in a manner inconsistent with its obligations under the Convention. Given that Article 28(1) must be interpreted as giving plaintiffs the absolute right to choose the forum for the resolution of their claims, Article 28(2) must be read as precluding the application of FNC. Indeed, this has been the position reached by the stronger judicial authorities, i.e., *Milor* and *Hosaka*.<sup>211</sup>

*Hosaka* spelled the death knell for FNC under the Warsaw Convention within the Ninth Circuit, and it seriously undermined its continued availability for Warsaw claims in other U.S. circuits. The great irony of the *Hosaka* decision was that it came just two years after the U.S. Delegate at the Montreal Conference in 1999 had been allaying the fears of other States (regarding the fifth jurisdiction), stating that the application of the doctrine of FNC by U.S. courts would continue to restrict forum shopping.<sup>212</sup> The irony is that while the U.S. Delegate was holding up FNC as the saving grace for what was the most hotly debated issue at the Montreal Conference, one of the United States’ own courts was in the process of whipping it away. Even

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<sup>208</sup> See MALCOM N. SHAW, INTERNATIONAL LAW 124–25 (5th ed. 2003); see also *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4, 20–21 (Apr. 6); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 23–24 (Feb. 4).

<sup>209</sup> Vienna Convention, *supra* note 116, art. 26. There are, in fact, two interrelated principles: first, that a treaty must be followed, and second, that it must be performed in good faith. *Id.* Strictly speaking, the former is the rule of *pacta sunt servanda*.

<sup>210</sup> See Manfred Lachs, *The Development and General Trends of International Law in Our Time*, in 168 RECUEIL DES COURS 1, 190–91 (1980). “As the guarantor of *pacta sunt servanda*, good faith impregnates every treaty with sense and value, and may even overcome any formal deficiencies to preserve the intended utility of an instrument.” *Id.* at 198 (footnote omitted).

<sup>211</sup> See *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1003–04 (9th Cir. 2002); *Milor Srl v. British Airways Plc.* [1996] QB 702 (CA) (Eng.).

<sup>212</sup> Int’l Civil Aviation Org. [ICAO], *Minutes of the Eighth Meeting of the Commission of the Whole*, at 11 (May 17, 1999), in I INTERNATIONAL CONFERENCE ON AIR LAW (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR), MONTREAL: MINUTES 98, 108, ICAO Doc. 9775-DC/2 (1999) [hereinafter MC99 MINUTES].

before MC99 came into effect, the *Hosaka* decision had effectively undermined one of the key components that had paved the way for MC99's agreement. The question that was inevitably going to arise therefore was whether or not FNC would be available under MC99.

### III. MONTREAL: NEW DEAL, SAME OLE PROBLEM

#### A. THE NEW DEAL

Time inevitably pulled at the loose threads of WCS, and expressions of dissatisfaction with the regime became more frequent and vociferous, especially from within the United States. As air transport blossomed, the underlying policy justifications for protecting the industry ebbed away, and the balance of interests agreed to in 1929 became harder and harder to justify. This was exacerbated by the low limits of liability, which had been eaten away by inflation. Discontent led to attempts to remedy the situation, and the Warsaw Convention evolved into WCS. However, the result was a system which was fragmented, disunified, and the subject of conflicting jurisprudence.<sup>213</sup> With the emergence of private intercarrier agreements and other regional initiatives,<sup>214</sup> this disunification was on the verge of causing the disintegration of WCS.<sup>215</sup> The time had come for the international community to take collective and decisive action, and it was decided that concerted action should be taken through the International Civil Aviation Organization (ICAO) with the aim of producing a new instrument in order to ensure worldwide uniformity.

#### 1. Background

The drafting history of MC99 followed a rather convoluted and unorthodox course.<sup>216</sup> On November 15, 1995, the ICAO

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<sup>213</sup> See P.P.C. HAANAPPEL, *THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE* 72–74 (2003).

<sup>214</sup> The private law instruments of the Japanese initiative and, to a lesser extent, the International Air Transport Association (IATA) Intercarrier Agreements threatened the global reach of WCS. *Id.* at 73. As Haanappel observed, MC99 was, at least in part, an attempt to officialize and globalize the Japanese and IATA initiatives. *Id.* at 74.

<sup>215</sup> See *id.* at 72–73.

<sup>216</sup> So unprecedented was it that Milde and Dempsey claim that the established procedures for the preparation of a draft convention were jettisoned by ICAO for the first time, with the result that “the procedure became far less transparent and representative, did not offer to all ICAO member States an opportunity to voice



Council decided to amend the General Work Programme of the Legal Committee to provide for the modernization of WCS and to allow for a Secretariat Study Group (SSG) to be established to assist the Legal Bureau in developing a mechanism by which such modernization could be accelerated.<sup>217</sup> The SSG met in February 1996, and submitted a report to the Council that recommended the development of a new instrument to consolidate and modernize WCS.<sup>218</sup> The Warsaw Convention was to be taken as the starting point, and useful elements of the various subsequent instruments of WCS were to be incorporated.<sup>219</sup> The hoped for result would be a consolidation and modernization of WCS.<sup>220</sup>

In early 1996, the ICAO Council considered the recommendations of the SSG and referred them to the Legal Committee that was to have the Legal Bureau (with the assistance of the SSG) develop a draft.<sup>221</sup> The Council referred the draft to the Legal Committee, which appointed a rapporteur to review and revise it.<sup>222</sup> The Rapporteur's report detailed the need for a new deal to replace the one struck in Warsaw in 1929.<sup>223</sup> It was gener-

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their views, and was heavily subject to the 'discretion' of the President of the Council." PAUL STEPHEN DEMPSEY & MICHAEL MILDE, *INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999*, at 38 (2005).

<sup>217</sup> See ICAO, *Council Decision C-DEC 146/3* (Nov. 15, 1995), in III INTERNATIONAL CONFERENCE ON AIR LAW (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR), MONTREAL: PREPARATORY MATERIAL 129, 129, ICAO Doc. 9775-DC/2 (1999) [hereinafter MC99 PREPARATORY MATERIAL].

<sup>218</sup> See Int'l Civil Aviation Org. [ICAO], *Report on Modernization of the "Warsaw System"*, at 1-2, ICAO Doc. C-WP/10381 (Mar. 5, 1996), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 1, 1-2.

<sup>219</sup> *Id.* at 1 app. at A-10, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 16.

<sup>220</sup> This was the first of the goals of MC99, as recognized by its preamble, which expressly states the need "to modernise and consolidate" WCS. See Bin Cheng, *The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part I)*, 49 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT [ZLW] 287, 292 (2000). For an excellent account of the manner in which MC99 modernized WCS, see generally *id.*

<sup>221</sup> See ICAO, *Council Decision C-DEC 147/15*, at 1 (Mar. 15, 1996), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 131, 131.

<sup>222</sup> See *id.*

<sup>223</sup> The Rapporteur's new deal would seek to "marry desirability and acceptability" and follow a guiding principle of "fairness, not only to consumers but also as between them and the carriers and the Governments which will be called upon to endorse any new Convention." ICAO, *Modernization of the "Warsaw System" - Rapporteur's Report and Matters Relating to the 30th Session of the Legal Committee*, at 1 app. at A-15, ICAO Doc. C-WP/10576 (Mar. 7, 1997), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 49, 67.

ally accepted that the need to protect an infant industry was no longer a legitimate justification and that the applicable limits were indefensibly low for many jurisdictions.<sup>224</sup> However, some key issues were still hotly contested within the Legal Committee, and this dissuaded the ICAO Council from calling a diplomatic conference.<sup>225</sup> Instead, the Council circulated the latest draft to States and international organizations for comment.<sup>226</sup> Preferring to have these outstanding matters resolved prior to convening a conference, the ICAO Secretariat recommended not only further sessions of the SSG but also the establishment of an expert panel.<sup>227</sup> This panel was created by the Council and named the Special Group on the Modernization and Consolidation of the “Warsaw System” (SGMW).<sup>228</sup>

The SGMW convened April 14–18, 1998.<sup>229</sup> The hope was that by having the “flexibility to consider the political, economic and legal aspects of the problems at hand,”<sup>230</sup> the SGMW would be able to resolve the outstanding issues.<sup>231</sup> The conclusions or recommendations of the SGMW would not be final but would be presented to the Council for a final decision.<sup>232</sup> The SGMW *refined* the text on several points.<sup>233</sup> A report<sup>234</sup> and an approved

<sup>224</sup> *Id.* at A-7, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 59.

<sup>225</sup> See ICAO, *Modernization of the “Warsaw System,”* at 2, ICAO Doc. C-WP/10688 (Nov. 24, 1997), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 105, 106.

<sup>226</sup> *Id.* at 1, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 105.

<sup>227</sup> The rationale given was that the outstanding issues were not solely legal but also ones of policy and that the input of such a panel “may add an element of governmental representation to the process, without unduly delaying the completion of a refined draft.” *Id.* at 2, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 106.

<sup>228</sup> ICAO, *Modernization of the “Warsaw System,”* at 1, ICAO Doc. C-WP/10862 (May 27, 1998), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 109, 109. The SGMW consisted of thirty-nine delegates from eighteen Contracting States, five members of the SSG (who attended as advisors), seven observers from four Contracting States, and three international organizations. *Id.* at 2, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 110.

<sup>229</sup> *Id.*

<sup>230</sup> ICAO, *Council Decision C-DEC 152/8*, at 1 (Nov. 27, 1997), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 141, 141.

<sup>231</sup> See ICAO, *Modernization of the “Warsaw System,”* *supra* note 228, at 1–2, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 109–10.

<sup>232</sup> ICAO, *Council Decision C-DEC 152/8*, *supra* note 230, at 1, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 141.

<sup>233</sup> For a summary of these points, see ICAO, *Final Report of the Special Group on the Modernization and Consolidation of the “Warsaw System” (SGMW/1)*, at 2-1 to 2-20 (May 27, 1998), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 225, 237–56.

<sup>234</sup> See generally *id.* at i-1 to A6-3, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 233–89.

text of the Convention<sup>235</sup> were sent to the ICAO Council, which then took the decision to convene the Diplomatic Conference in Montreal in May 1999.<sup>236</sup>

It was clear from early on in the Conference that “[S]tates were not prepared to commit themselves on particular key issues until the central matters of the passenger liability regime and the ‘fifth’ jurisdiction had been resolved.”<sup>237</sup> In order to achieve that, it was acknowledged that a smaller, dedicated group should be created to deal with the matters that could not be resolved by the Commission of the Whole.<sup>238</sup> This group, the Friends of the Chairman’s Group (FCG), was to conduct a careful and thorough analysis of the issues with a view toward finding common ground on key liability issues upon which a consensus could be built.<sup>239</sup> The FCG produced a consensus package that was subsequently adopted by the Conference and formed the heart of MC99.<sup>240</sup>

Regarding the liability regime for passenger death and bodily injury, MC99 consists of a two-tier system: strict liability for the carrier, up to 128,821 Special Drawing Rights (SDR), and presumed-fault liability for claims in excess of that amount.<sup>241</sup> In

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<sup>235</sup> ICAO, *Modernization of the “Warsaw System,”* *supra* note 228, at 1 app. at A-1 to A-16, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 113–28 (approved text entitled *Draft Convention for the Unification of Certain Rules for International Carriage by Air*).

<sup>236</sup> ICAO, *Council Decision C-DEC 154/7*, at 1–2 (June 4, 1998), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 143, 143–44.

<sup>237</sup> Anthony G. Mercer, *The 1999 Montreal Convention: An Airline Perspective*, 27 ANNALS AIR & SPACE L. 451, 457–58 (2002). For the account of Mercer, a member of New Zealand’s Delegation at Montreal, see generally *id.*

<sup>238</sup> *See id.* at 458, 474.

<sup>239</sup> ICAO, *Minutes of the Thirteenth Meeting of the Commission of the Whole*, at 1 (May 25, 1999), in MC99 MINUTES, *supra* note 212, at 199. This core package consisted of the key liability provisions governing death and injury to passengers, exoneration, compensation in case of death or injury of passengers, limits of liability, freedom to contract, jurisdiction, and advance payments. *See* Int’l Civil Aviation Org. [ICAO], *Consensus Package (Presented by the President of the Conference)*, at 1–4, DCW Doc. No. 50 (May 25, 1999), in II INTERNATIONAL CONFERENCE ON AIR LAW (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR), MONTREAL: DOCUMENTS 271, 271–74, ICAO Doc. 9775-DC/2 (1999) [hereinafter MC99 DOCUMENTS].

<sup>240</sup> *See* ICAO, *Consensus Package (Presented by the President of the Conference)*, *supra* note 239, at 1–4, in MC99 DOCUMENTS, *supra* note 239, at 271–74.

<sup>241</sup> MC99, *supra* note 14, art. 21. The limit was originally SDR 100,000, but this figure was raised in 2009 to SDR 113,000 and then again in 2019 to SDR 128,821, pursuant to Article 24 of MC99. *See id.* art. 24.; Int’l Civil Aviation Org. [ICAO], *2019 Revised Limits of Liability Under the Montreal Convention of 1999*, [https://www.icao.int/secretariat/legal/Pages/2019\\_Re-](https://www.icao.int/secretariat/legal/Pages/2019_Re-)

respect of both tiers, the carrier can invoke the defense of contributory negligence.<sup>242</sup> For second-tier liability, the carrier can exonerate itself by proving the absence of fault,<sup>243</sup> rather than the previous “all necessary measures” defense from the Warsaw Convention.<sup>244</sup> An additional ground for exoneration was introduced that released the carrier from liability under the second tier where it could prove that the damage was solely due to the negligence or other wrongful act or omission of a third party.<sup>245</sup>

The new regime is very beneficial for the plaintiff passenger because unlimited recovery is available without a prima facie obligation to prove fault of the carrier. Indeed, once a plaintiff has proved recoverable damages in excess of the first-tier limit, this limit will only come into play where the carrier elects and successfully raises one of the available defenses. Given that the great majority of aviation disasters will involve some element of carrier negligence, the likelihood of the carrier even deciding to raise a defense, let alone prove it, is rare.<sup>246</sup>

MC99 is not without its critics.<sup>247</sup> However, in terms of ratification, it has been an overwhelming success.<sup>248</sup> It was hoped that MC99 would result in a reduction in the amount of litigation and a speedier resolution of claims. Again, the consensus amongst carrier and plaintiff lawyers is that MC99 has been successful in this regard. An MC99 claim is usually regarded as a

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vised\_Limits\_of\_Liability\_Under\_the\_Montreal\_Convention\_1999.aspx [https://perma.cc/4XSK-WQ99] (last visited Mar. 12, 2020).

<sup>242</sup> MC99, *supra* note 14, art. 20.

<sup>243</sup> *Id.* art. 21(2)(a).

<sup>244</sup> Mercer, *supra* note 237, at 459. Some suggest this could be viewed as a lesser burden on the carrier. *Id.* at 459–60.

<sup>245</sup> MC99, *supra* note 14, art. 21(2)(b).

<sup>246</sup> *See, e.g.*, VII SHAWCROSS & BEAUMONT: AIR LAW § 505, at 247–49 (J. David McClean et al. eds., 169th ed. Jan 2020) (1997) (discussing *Wright v. Am. Airlines, Inc.*, No. 08-CV-660, 2010 WL 446077 (N.D. Tex. Feb. 8, 2010)); Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 AIR & SPACE L. 12, 19 (2000).

<sup>247</sup> While admiring the progress made, Milde and Dempsey lament the paucity of creative ideas, the scarcity of substantive enhancements to the unification of law, and the glaring lack of clarification of several features of the system that fueled practical difficulties for decades. DEMPSEY & MILDE, *supra* note 216, at 39.

<sup>248</sup> Having entered into force on November 4, 2003, MC99 currently has 136 Contracting Parties. Int’l Civil Aviation Org. [ICAO], *Current Lists of Parties to Multilateral Air Law Treaties: Montreal Convention (1999)*, at 1, ICAO Doc. 9740, https://www.icao.int/secretariat/legal/lists/current\_lists\_of\_parties/allitems.aspx (search “9740” in the “Find an item” field; then select “English” under “Status (EN)”) [https://perma.cc/8JRR-EUMN] (last visited May 26, 2020).

“slam dunk” by plaintiffs’ lawyers.<sup>249</sup> In fact, they are more likely to complain about the loss of work they have incurred from MC99 than they are to complain of its substantive provisions. Nevertheless, MC99’s success is conditional on it offering plaintiffs their desired choice of forum. Therefore, it is the evolution of MC99’s jurisdictional provisions from those provided under WCS that must be analyzed. First, however, a few words are necessary on the general purpose of MC99.

## 2. Purpose

Unlike the Warsaw Convention of 1929, MC99 did not spring into existence from within a vacuum of international private air law. By 1999, the Warsaw Convention was itself seventy years old and had developed into a system (i.e., WCS) comprising amending protocols, a supplementary convention, and several intercarrier agreements. Surrounding this system was a huge body of jurisprudence and commentary. The juristic landscape of private international air law was infinitely richer and more developed in 1999 than it had been in 1929.<sup>250</sup> MC99 is a modernization and a consolidation of WCS. This requires the appreciation of two key factors regarding its purpose: (1) the continuing relevance of WCS; and (2) the extent to which MC99 diverges in purpose from WCS.

### a. Enduring Relevance of WCS

As between Contracting States, MC99 completely replaces WCS.<sup>251</sup> It is a new convention, neither supplemental to nor an amendment of WCS.<sup>252</sup> However, this does not render WCS an irrelevancy. It retains relevance. First, it continues to govern certain international air transportation involving Contracting States of that system where one (or both) of those States have not ratified MC99. Second, it lives on through its jurisprudence. Much of the wording for the provisions of MC99 was directly trans-

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<sup>249</sup> See Whalen, *supra* note 246, at 15.

<sup>250</sup> The industry itself had evolved further than even the most prescient observer could have predicted, and as ICAO President Assad Koitaite explained in the opening address to the Montreal Conference, “the present-day aviation industry bears little resemblance to its precursor.” See ICAO, *Minutes of the First Plenary Meeting*, at 2 (May 10, 1999), in MC99 MINUTES, *supra* note 212, at 36, 37.

<sup>251</sup> This supremacy is provided for under Article 55. MC99, *supra* note 14, art. 55.

<sup>252</sup> As recognized by the U.S. courts, see for example *Schopenhauer v. Compagnie Nationale Air France*, 255 F. Supp. 2d 81, 87 (E.D.N.Y. 2003).

ferred from WCS. It is abundantly clear that the drafters of MC99 did not intend to throw out the baby with the bathwater but wished instead to hold onto the valuable jurisprudence that had built up through applying and interpreting WCS.<sup>253</sup> Courts have since relied on the jurisprudence of WCS to assist in interpreting MC99.<sup>254</sup>

b. At Cross-Purposes?

When it comes to defining the purpose of MC99, new considerations arise that were not at play in 1929 with the Warsaw Convention. Likewise, other considerations have fallen away as they lost import with the passage of time and the progress of air transport.<sup>255</sup> The recognition by the preamble of the need to *modernize* and *consolidate* the Warsaw Convention is the first clear indication of one of MC99's purposes.<sup>256</sup> In modernizing and

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<sup>253</sup> During a meeting of the SSG, “[i]t was stressed that for the sake of uniformity, certain concepts in the Warsaw Convention should be retained since these had been subjected to decades of judicial interpretation.” *Report on the Modernization of the “Warsaw System,”* *supra* note 218, at 1 app. at A-6, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 12. Tompkins (a member of the U.S. Delegation) states that MC99 “was drafted and adopted to replace the Warsaw System, the drafters and the States Party fully intended to preserve the seventy years of judicial decisions interpreting and applying the liability rules of the Warsaw System to be used in interpreting and applying the MC99 liability rules.” George N. Tompkins, Jr., *Are the Objectives of the 1999 Montreal Convention in Danger of Failure?*, 39 AIR & SPACE L. 203, 204 (2014).

<sup>254</sup> *E.g.*, *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 205 (E.D.N.Y. 2012) (alterations in original) (“Although the Convention ‘unifie[d] and replace[d] the system of liability that derives’ from its predecessor, the Warsaw Convention, the Convention still retains many of its original provisions and terms and thus courts have continued to rely on cases interpreting equivalent provisions in the Warsaw Convention.”); *see also* *Baah v. Virgin Atlantic Airways Ltd.*, 473 F. Supp. 2d 591, 596 (S.D.N.Y. 2007); *Stott v. Thomas Cook Tour Operators Ltd.* [2014] UKSC 15 [23]–[26], [2014] AC 1347 [1359] (appeal taken from Eng.) (U.K.).

<sup>255</sup> An extremely clear statement of the objects of the Conference was given by the President of the Conference at the final plenary session. *See* ICAO, *Minutes of the Seventh Plenary Meeting*, at 2 (May 28, 1999), in MC99 MINUTES, *supra* note 212, at 244, 245.

<sup>256</sup> For example, the U.S. Court of Appeals for the Second Circuit described MC99 as having been passed to “‘harmonize the hodgepodge of supplementary amendments and intercarrier agreements’ of which the Warsaw Convention system of liability consists.” *Ehrlich v. Am. Airlines Inc.*, 360 F.3d 366, 371 n.4 (2d Cir. 2004) (quoting Carl E. Fumarola, Note, *Stratospheric Recovery: Recent and Forthcoming Changes in International Air Disaster Law and Its Effect on Air Terrorism Recovery*, 36 SUFFOLK U. L. REV. 821, 835 (2003)); *see also* *Sompo Japan Ins. v. Nippon Cargo Airlines Co.*, 522 F.3d 776, 780–81 (7th Cir. 2008); *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 364–65 (S.D.N.Y. 2006).

consolidating aspects of WCS, MC99 was also (at least partially) reaffirming them. Therefore, the denomination of the objects and purposes of MC99 must begin with the objects and purposes of the Warsaw Convention and its subsequent instruments.<sup>257</sup> The courts have generally supported the view that there exists great commonality of purpose between the Warsaw Convention and MC99.<sup>258</sup> However, equating the purpose of MC99 with that of the Warsaw Convention requires qualification in order to accommodate the effects and changes of the process of modernization and consolidation.

In part II.A., the object and purpose of the Warsaw Convention was defined in twofold form, the first part of which was the cardinal purpose of avoiding conflict of laws through the unification of certain rules, and this remains the case with MC99 and is regarded as such by the courts.<sup>259</sup> Indeed, the mere act of modernization and consolidation is itself a poignant and powerful reaffirmation by the drafters of MC99 of this cardinal purpose.

A supplementary objective to the Warsaw Convention was also identified, i.e., the desire to further the public interest in the development of air transport while striking an equitable balance of interests. While the development of air transport remains a

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<sup>257</sup> As recognized by the Supreme Court of Canada in *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, 363 (Can.), “[t]o understand the purposes of the *Montreal Convention*, we therefore must go back to its predecessor, the *Warsaw Convention* . . . .”

<sup>258</sup> The U.K. Supreme Court noted in *Stott*:

One of the original purposes of the Warsaw Convention was to bring some order to a fragmented international aviation system by partial harmonisation of the applicable law and to provide benefit to both prospective passengers and to the airlines in reaching an equitable balance of interests; the same purpose applies to the Montreal Convention.

*Stott*, [2014] AC at 1359; see also *Matz v. Nw. Airlines*, No. 07-13447, 2008 WL 2064800, at \*2 (E.D. Mich. May 13, 2008).

<sup>259</sup> *Allianz Glob. Corp. & Specialty v. EMO Trans Calif. Inc.*, No. C 09-4893 MPH, 2010 WL 2594360, at \*4 (N.D. Cal. June 22, 2010) (“The goal of the Montreal Convention was to create an international unified system of rules and procedures to alleviate the uncertainty of operating under a diverse set of legal systems.”); see also *Brauner v. British Airways PLC*, No. 12-CV-343, 2012 WL 1229507, at \*5 (E.D.N.Y. Apr. 12, 2012) (quoting *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169–70 (1999)). In *Thibodeau*, the Supreme Court of Canada observed that “two of the main purposes of the *Warsaw Convention*, and hence of the *Montreal Convention*, are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability.” *Thibodeau*, [2014] 3 S.C.R. at 370.

fundamental objective under MC99, there has been a substantial shift in the balance of interests. What was new about the approach taken in Montreal was the weight given to protecting the interests of consumers.<sup>260</sup> Thus the preamble of MC99 specifically recognizes the importance of ensuring protection for consumers. Both the courts<sup>261</sup> and commentators<sup>262</sup> have echoed the centrality of this objective.

At the same time, the preamble also notes the need for an equitable balance of interests. Just as it would be unjust to claim that the Warsaw Convention was drafted with only the carriers' interests in mind, so too it would be unjust to claim that MC99 had only the consumers' interests in mind. The interests of the carrier, in particular those of the small- to medium-sized airlines (especially from developing nations), were strongly advocated at the Conference with several States raising concerns about the

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<sup>260</sup> See Bin Cheng, *The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part II)*, 49 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT [ZLW] 484, 497 (2000) (“In drawing up the new Convention [MC99], it was constantly being emphasized that the interests of the consumer are paramount.”). Ensuring the protection of the interests of consumers in international carriage by air has been described by Cheng as a “new objective.” Bin Cheng, *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 INT’L & COMP. L.Q. 833, 848 (2004).

<sup>261</sup> See *Sompo Japan Ins.*, 522 F.3d at 780–81 (“The new treaty ‘unifies and replaces the system of liability that derives from the Warsaw Convention,’ explicitly recognizing ‘the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.’ . . . This Convention seems to have reversed one of the premises of the original Warsaw Convention, which favored the airlines at the expense of consumers. Nevertheless, the Montreal Convention did not alter the original Warsaw Convention goal of maintaining limited and predictable damage amounts for airlines.” (citations omitted) (first quoting MC99, *supra* note 14, pmbl.; and then citing *Ehrlich*, 360 F.3d at 371 n.4)); *Weiss*, 433 F. Supp. 2d at 365 (“[T]he Montreal Convention represents a significant shift away from a treaty that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers.”); see also *Bassam v. Am. Airlines, Inc.*, 287 F. App’x 309, 312 (5th Cir. 2008) (per curiam) (“Even though the Montreal Convention is directed more at consumers, it does not alter the original goal of the Warsaw Convention of maintaining limited and predictable damage amounts for airlines.”).

<sup>262</sup> See, e.g., Whalen, *supra* note 246, at 14. Whalen noted the shift in policy away from the interests of the carriers to those of the consumer–passenger. *Id.*; see also GEORGE N. TOMPKINS, JR., *LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES: FROM WARSAW 1929 TO MONTREAL 1999*, at 33–34 (2010); Cheng, *A New Era*, *supra* note 260, at 844–45.



negative impact of being too pro-consumer.<sup>263</sup> Under both Conventions, it was a question of achieving an equitable balance between the interests of all parties.<sup>264</sup> Without a doubt, there was a shift in the balance of interests; MC99 was to be a new deal. There was to be better protection of the interests of consumers and equitable compensation secured for victims and their families.<sup>265</sup> Thus, the carriers and the traveling public were expected to carry more of the burden of the fewer risks inherent to air transportation.

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

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

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<sup>263</sup> For comments made by Algeria, India, Canada, China, Madagascar, Indonesia, Mexico, and Egypt in the general observations on the draft Convention, see ICAO, *Minutes of the Second Plenary Meeting*, at 1–7 (May 10, 1999), in MC99 MINUTES, *supra* note 212, at 45, 45–51.

<sup>264</sup> As Mercer states of MC99, “‘equity’ and ‘balance’ were cardinal guiding considerations in the crafting of the new Convention.” Mercer, *supra* note 237, at 457.

<sup>265</sup> This is evidenced by two of the clauses to MC99’s preamble:

Recognizing the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution; . . .

. . . .

Convinced that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests.

MC99, *supra* note 14, pmb1.

## B. THE LONG PATH TO THE FIFTH JURISDICTION

The plaintiffs in *Osborne v. British Airways PLC* were two American missionaries working in Nairobi, Kenya.<sup>266</sup> Wishing to travel home for Christmas, they had purchased return tickets in Kenya for carriage by air between Nairobi and Orlando (via London) with British Airways.<sup>267</sup> Alleging injury arising during international carriage by air, the plaintiffs brought proceedings in the U.S. District Court for the Southern District of Texas.<sup>268</sup> In *Hornsby v. Lufthansa German Airlines*, the plaintiff was an American citizen living and working in Kaiserslautern, Germany.<sup>269</sup> She had purchased a return ticket in Germany for carriage by air between Frankfurt and Los Angeles.<sup>270</sup> Her action was brought against Lufthansa in the U.S. District Court for the Central District of California.<sup>271</sup> In *Osborne*, the court declared itself to be without jurisdiction and dismissed the plaintiffs' claims,<sup>272</sup> whereas in *Hornsby*, the court assumed jurisdiction.<sup>273</sup> What differentiated the cases?

In neither case was the domicile of the carrier, the principal place of business of the carrier, or the place of destination located within the United States, and in both cases, the ticket in question had been purchased outside the United States.<sup>274</sup> Thus, under Article 28(1) of the Warsaw Convention, grounds for a U.S. forum did not exist under the four possible jurisdictions available; indeed, this had been the very reason for the district court's dismissal in the case of *Osborne*.<sup>275</sup> The difference in the case of *Hornsby* was that the plaintiff's claim had not been brought under the Warsaw Convention but under MC99.<sup>276</sup> The specific advantage of MC99 was the addition of the fifth jurisdiction, which grants the plaintiff the option to bring an action against the carrier before the courts of the plaintiff's home forum, provided the carrier has a sufficient business connection

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<sup>266</sup> *Osborne v. British Airways PLC*, 198 F. Supp. 2d 901, 903 (S.D. Tex. 2002).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Hornsby v. Lufthansa German Airlines*, 593 F. Supp. 2d 1132, 1133 (C.D. Cal. 2009).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Osborne*, 198 F. Supp. 2d at 906.

<sup>273</sup> *Hornsby*, 593 F. Supp. 2d at 1139.

<sup>274</sup> *See id.* at 1133–36, 1136 n.3; *Osborne*, 198 F. Supp. 2d at 904–06.

<sup>275</sup> *Osborne*, 198 F. Supp. 2d at 904–06.

<sup>276</sup> *See Hornsby*, 593 F. Supp. 2d at 1133.

there.<sup>277</sup> Although first made effective through MC99, the fifth jurisdiction's history stretches much further back.

1. *Guatemala City and the Impetus for a Fifth Jurisdiction*

The impetus for a fifth jurisdiction arose from U.S. dissatisfaction with WCS.<sup>278</sup> While the low limits of liability were its chief complaint, the United States was also concerned with the absence of a choice of law provision for establishing and quantifying damages.<sup>279</sup> This raised the risk that the forum hearing the claim of a foreign plaintiff may apply rules that result in plaintiffs receiving a level or scope of compensation that is inadequate in comparison to that which they might have received in their home forum.<sup>280</sup> Aside from choice of law issues, the perception in U.S. quarters was that foreign courts would prove less favorable to American plaintiffs, and this would prejudice the interests of the U.S. expat community working or traveling throughout the world.<sup>281</sup> The solution preferred by the United States to the problems described above was to guarantee to plaintiffs jurisdiction in their home forum.

The possible amendment of the Warsaw Convention to make provision for a fifth jurisdiction—in response to U.S. insistence—was raised at the Seventeenth Session of the ICAO Legal Committee in 1970, which agreed to a draft proposal.<sup>282</sup> This proposal was considered at the Diplomatic Conference at Guatemala City in 1971 where there was considerable support for it.<sup>283</sup>

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<sup>277</sup> See *id.* at 1136.

<sup>278</sup> See Mercer, *supra* note 237, at 463.

<sup>279</sup> See *Minutes of the Eighth Meeting of the Commission of the Whole*, *supra* note 212, at 11, in MC99 MINUTES, *supra* note 212, at 108.

<sup>280</sup> See *id.* at 7–8, in MC99 MINUTES, *supra* note 212, at 104–05.

<sup>281</sup> See *id.* at 12, in MC99 MINUTES, *supra* note 212, at 109.

<sup>282</sup> Int'l Civil Aviation Org. [ICAO], *Minutes of the Second Meeting*, at 16 (Feb. 9, 1971), in I INTERNATIONAL CONFERENCE ON AIR LAW—GUATEMALA CITY, FEBRUARY–MARCH 1971: MINUTES 13, 16, ICAO Doc. 9040-LC/167-1 (1972) [hereinafter GUATEMALA CITY MINUTES]. New Zealand, in collaboration with several western European States and a number of Commonwealth States, had put together a draft package of proposals regarding possible revision of the Warsaw Convention that included, in response to U.S. insistence, the addition of a fifth jurisdiction. See Gerald F. FitzGerald, *The Revision of the Warsaw Convention*, 8 CANADIAN Y.B. INT'L L. 284, 291, 302 (1970).

<sup>283</sup> Mexico, Ireland, Argentina, the Netherlands, Spain, China, and Japan all assented to its introduction, albeit without any great passion or conviction. See ICAO, *Tenth Meeting of the Commission of the Whole* (Feb. 16, 1971), in GUATEMALA CITY MINUTES, *supra* note 282, at 107, 112–15; ICAO, *Eleventh Meeting of the Commission of the Whole* (Feb. 17, 1971), in GUATEMALA CITY MINUTES, *supra* note 282, at 117, 117–19. IATA similarly spoke in sober terms that suggested indifference

The only opposition to the fifth jurisdiction came from behind the Iron Curtain, from Czechoslovakia,<sup>284</sup> the Union of Soviet Socialist Republics (U.S.S.R.),<sup>285</sup> and Poland.<sup>286</sup> The main substantive issue that caused problems was the meaning to be ascribed to the term “establishment,” as it was to be a requirement of the fifth jurisdiction that the carrier have an “establishment” in the forum State.<sup>287</sup> Particularly noteworthy was the minimal concern expressed with respect to the risk of forum shopping posed by the addition of the fifth jurisdiction;<sup>288</sup> the situation would be totally different in Montreal in 1999. Ulti-

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on the matter. See *Eleventh Meeting of the Commission of the Whole, supra*, at 119. The IATA Observer said that “he had no objection to the proposal for an additional forum, which merely restored the jurisdiction which the court would otherwise clearly have had over the person of the carrier.” *Id.* Even the French, although “not enthusiastic” about the fifth jurisdiction, were prepared to accept it in the spirit of international cooperation and “in an effort to achieve a widely acceptable agreement.” *Tenth Meeting of the Commission of the Whole, supra*, at 114. The Federal Republic of Germany was likewise unenthusiastic but was prepared to accept it as part of what Germany referred to as the New Zealand “package.” *Eleventh Meeting of the Commission of the Whole, supra*, at 118.

<sup>284</sup> See *Eleventh Meeting of the Commission of the Whole, supra* note 283, at 113.

<sup>285</sup> The Delegate of the Union of Soviet Socialist Republics indicated: [This] Delegation could not support the proposed new Article 28(2) for two reasons. The first was that the additional forum would not be available to passengers using the services of small carriers that had an establishment only in the territory of the State where they were registered. Such discrimination was inadmissible, especially in the matter of jurisdiction, which was of great practical importance. The second reason for their objection to it was that the forum it provided was a place with no link with the place where the contract of carriage had been made. This was contrary to an old and important rule of both international and domestic law governing transportation, a rule to be found in many international conventions on carriage, including the Warsaw Convention itself in the existing Article 28.

*Id.*

<sup>286</sup> See *id.* at 113–14.

<sup>287</sup> For discussion of this point, see *id.* at 114.

<sup>288</sup> Only the Jamaican Delegate noted the greater possibility of forum shopping with a fifth jurisdiction, but even so, he was satisfied that the general scheme provided sufficient counterbalancing benefits, e.g., strict liability with an unbreakable limit. *Id.* at 115–16. The Delegate from Poland may have had forum shopping in mind when expressing the fear that providing claimants with a forum in their home country might encourage litigation, and since the objective of the new instrument was to reduce litigation, the fifth jurisdiction could therefore be counterproductive. *Id.* at 113–14. The lack of objections to forum shopping is partially explained by the proposed liability scheme of the Guatemala City Protocol (GCP). It would have provided for strict liability with an unbreakable limit. As such, the incentive to forum shop would have been greatly reduced.

mately, although the text of the Guatemala City Protocol (GCP) would have granted a fifth jurisdiction,<sup>289</sup> it failed to achieve the necessary number of ratifications and has not come into effect.<sup>290</sup> The attempts by the United States to secure the fifth jurisdiction were thus ultimately unsuccessful, but as momentum built for the conclusion of a new convention to replace WCS, the opportunity reemerged in the late 1990s.

## 2. *Second Chance at a Fifth Jurisdiction*

From the very start, the fifth jurisdiction featured prominently in MC99's long drafting history.<sup>291</sup> From early on, there was a strong divergence of opinion on the matter. The United States thought its inclusion in the new Convention was essential. However, many other States were keenly opposed to it.<sup>292</sup> Nevertheless, a draft article for a fifth jurisdiction was produced and provisionally approved by the ICAO Legal Committee at its Thirtieth Session in 1997. Even so, the fifth jurisdiction remained deeply unpopular amongst most of the participating States.<sup>293</sup> However, it became apparent that the United States viewed the fifth jurisdiction as a deal-breaker, and it was clear to all concerned that U.S. ratification without its inclusion would be "highly unlikely."<sup>294</sup> The mindset thus appeared to turn toward finding an acceptable formulation that would allow for its inclu-

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<sup>289</sup> Int'l Civil Aviation Org. [ICAO] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air art. XII, ICAO Doc. 8932, Mar. 8, 1971, 101 I.L.M. 613.

<sup>290</sup> Int'l Civil Aviation Org. [ICAO], *Current Lists of Parties to Multilateral Air Law Treaties: Guatemala City Protocol (1971)*, at 1, ICAO Doc. 8932, [https://www.icao.int/secretariat/legal/lists/current lists of parties/allitems.aspx](https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx) (search "8932" in the "Find an item" field; then select "English" under "Status (EN)") [<https://perma.cc/Z948-DMJM>] (last visited May 27, 2020).

<sup>291</sup> At the first meeting of the SSG in early 1996, the possibility of a fifth jurisdiction was discussed. See ICAO, *Report on the Modernization of the "Warsaw System,"* *supra* note 218, at 1 app. at A-8 to A-9, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 14–15.

<sup>292</sup> ICAO, *Report of the 30th Session of the Legal Committee*, at 4-19 to 4-20, ICAO Doc. 9693-LC/190 (1997), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 145, 177–78.

<sup>293</sup> A good sense of the opposition can be found in the Report of the Thirtieth Session of the Legal Committee. See generally *id.* at i to D-18, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 145–224.

<sup>294</sup> ICAO, *Report of the Third Meeting of the Secretariat Study Group on the Modernization of the "Warsaw System,"* at 6, ICAO Doc. SGMW/1-WP/4 (Mar. 10, 1998), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 303, 310.

sion, with several alternatives being proposed.<sup>295</sup> Eventually, at the Fourth Meeting of the SSG in late January 1999, a recommended wording was adopted and submitted to the SGMW for further consideration.<sup>296</sup>

During the meeting of the SGMW, opposition to the fifth jurisdiction was still in the majority.<sup>297</sup> However, an implicit ultimatum was issued when the United States reiterated that its ratification of a convention was dependent on its inclusion.<sup>298</sup> A compromise proposal was agreed to that was hoped to be universally acceptable and promote uniformity.<sup>299</sup> Satisfied that it had completed its task, the SGMW forwarded its approved draft convention<sup>300</sup> to the ICAO Council, which subsequently took the decision to convene a diplomatic conference.

#### a. Opening Positions

As champion of the fifth jurisdiction, the United States had submitted a comprehensive paper to the Montreal Conference reiterating why its inclusion represented an essential element of any revision to WCS.<sup>301</sup> The U.S. position remained fundamentally premised on the same policy considerations as voiced at

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<sup>295</sup> For instance, at the end of the SSG's Third Session, a document was produced with five alternative proposals for a jurisdiction clause, the wording of which can be found in Attachment E, see *id.* at 14–15, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 318–19.

<sup>296</sup> For the text, see ICAO, *Report of the Fourth Meeting of the Secretariat Study Group on the Modernization of the "Warsaw System,"* at 16, ICAO Doc. SGMW/1-WP/5 (Mar. 10, 1998), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 321, 338.

<sup>297</sup> Five delegations were opposed to its inclusion, whereas only three delegations were in support. *Final Report of the Special Group on the Modernization and Consolidation of the "Warsaw System,"* *supra* note 233, at 2-6 to 2-7, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 242–43.

<sup>298</sup> See *id.* at 2-7, MC99 PREPARATORY MATERIAL, *supra* note 217, at 243.

<sup>299</sup> See *id.* at 2-13 to 2-14, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 249–50. The compromise proposal consisted of refined text of the key articles under consideration. For the text of the articles included in the compromise package, see ICAO, *Revised Draft of Articles 16, 20 and 27,* at 1–2, ICAO Doc. SGMW/1-WP/26 (Apr. 17, 1998), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 385, 385–86.

<sup>300</sup> For the draft text attached as Appendix 5 to the Final Report, see ICAO, *Final Report of the Special Group on the Modernization and Consolidation of the "Warsaw System,"* *supra* note 233, at A5-1 to A5-16, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 271–86.

<sup>301</sup> See generally ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: Article 27–Fifth Jurisdiction (Presented by United States of America),* at 1–9, DCW Doc. No. 12 (May 4, 1999), in MC99 DOCUMENTS, *supra* note 239, at 101, 101–09 [hereinafter ICAO, *Article 27–Fifth Jurisdiction (Presented by United States of America)*].

Guatemala City: first and foremost, that justice and fairness requires that passengers and their heirs should be able to bring a claim to the courts of their home State, provided the carrier conducted business there;<sup>302</sup> second, that a plaintiff's home forum is generally the most appropriate forum (at least for the plaintiff),<sup>303</sup> and third, that developments in the industry since 1929 also make the inclusion of a fifth jurisdiction desirable.<sup>304</sup> Support came from Japan, Colombia, and Panama, which regarded it as desirable ("vital" in the case of Japan) for the promotion of consumer interests.<sup>305</sup> Norway was also in support,<sup>306</sup> as was the Latin American Civil Aviation Commission (LACAC).<sup>307</sup>

Opposition to the fifth jurisdiction was led by France, which presented a paper containing three arguments.<sup>308</sup> The French view was endorsed by India, Korea, and China,<sup>309</sup> as well as the fifty-three African Contracting States<sup>310</sup> and the members of the Arab Civil Aviation Commission (ACAC).<sup>311</sup>

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<sup>302</sup> *Id.* at 2, in MC99 DOCUMENTS, *supra* note 239, at 102.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> See ICAO, *Minutes of the Eighth Meeting of the Commission of the Whole*, *supra* note 212, at 9, in MC99 MINUTES, *supra* note 212, at 106.

<sup>306</sup> Norway had undergone a change of mind; it had been aligned to the French point of view in the past, but it had now come around to the fifth jurisdiction because the current draft included prerequisites to its coming into play that sufficiently protected the interests of carriers. *Id.* at 10, in MC99 MINUTES, *supra* note 212, at 107.

<sup>307</sup> LACAC endorsed the inclusion of a fifth jurisdiction, noting that one of the advantages was that the claimant's home forum would usually be the jurisdiction best placed to determine the amount of compensation. See ICAO, *Comments from the Latin American Civil Aviation Commission (LACAC) on the Draft Convention*, at 2, DCW Doc. No. 14 (May 6, 1999), in MC99 DOCUMENTS, *supra* note 239, at 115, 116. LACAC consists of Argentina, Aruba, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, the Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. *Id.* at 1, in MC99 DOCUMENTS, *supra* note 239, at 115.

<sup>308</sup> See generally ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: Article 27 – Fifth Jurisdiction (Presented by France)*, at 1–4, DCW Doc. No. 33 (May 17, 1999), in MC99 DOCUMENTS, *supra* note 239, at 195, 195–98 [hereinafter ICAO, *Article 27 – Fifth Jurisdiction (Presented by France)*].

<sup>309</sup> ICAO, *Minutes of the Eighth Meeting of the Commission of the Whole*, *supra* note 212, at 8, in MC99 MINUTES, *supra* note 212, at 105.

<sup>310</sup> See ICAO, *Comments on Article 27 – Jurisdiction (Presented by 53 African Contracting States)*, at 1–2, DCW Doc No. 23 (May 12, 1999), in MC99 DOCUMENTS, *supra* note 239, at 143, 143–44.

<sup>311</sup> See ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: Comments on Articles 20 and 27 (Submitted by Member States of the Arab*

The first argument made by France was that the fifth jurisdiction was not necessary to ensure the protection of passengers because the existing four bases would provide satisfactory resolution of the vast majority of cases.<sup>312</sup> Indeed, this point had been made by a number of States at different points during the drafting process.<sup>313</sup>

France's second argument fell within a category of objections that were economic in nature. States were concerned about the financial impact of the fifth jurisdiction, particularly on insurance premiums and the resulting effect on fares.<sup>314</sup> This was thought particularly worrisome for small to medium carriers, especially from developing nations.<sup>315</sup> Another aspect of the economic argument against the fifth jurisdiction was that it would be largely detrimental to the interests of passengers.<sup>316</sup> This was allegedly on account of the fact that the States advocating its inclusion were mostly very high damage awards jurisdictions.<sup>317</sup> The burden of higher fares would fall disproportionately on con-

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*Civil Aviation Commission*), at 2, DCW Doc. No. 29 (May 14, 1999), in MC99 DOCUMENTS, *supra* note 239, at 161, 162.

<sup>312</sup> ICAO, *Article 27 – Fifth Jurisdiction (Presented by France)*, *supra* note 308, at 1, in MC99 DOCUMENTS, *supra* note 239, at 195. In the conclusion to its paper, France declared: “Not desired by international air transport professionals and not conducive to its growth, the creation of a fifth jurisdiction would thus be less favourable than expected for passengers.” *Id.* at 4, in MC99 DOCUMENTS, *supra* note 239, at 198. This was repeated by France during the Conference. See ICAO, *Minutes of the Eighth Meeting of the Commission of the Whole*, *supra* note 212, at 8, in MC99 MINUTES, *supra* note 212, at 105. That the industry (by which the Commission meant IATA) did not want the fifth jurisdiction is hardly surprising. See *id.* at 7, in MC99 MINUTES, *supra* note 212, at 104. IATA represents carriers and not the passengers who were to be the beneficiaries of the fifth jurisdiction.

<sup>313</sup> See ICAO, *Report of the 30th Session of the Legal Committee*, *supra* note 292, at 4-19 to 4-20, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 177-78 (one delegate observing that if the new instrument “was going to provide for unlimited liability, it would not matter where one obtained the compensation.”); see also ICAO, *Report of the Fourth Meeting of the Secretariat Study Group on the Modernization of the “Warsaw System,”* *supra* note 296, at 3, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 325.

<sup>314</sup> See ICAO, *Article 27 – Fifth Jurisdiction (Presented by France)*, *supra* note 308, at 2, in MC99 DOCUMENTS, *supra* note 239, at 196.

<sup>315</sup> This was a view voiced by many States. For example, the Delegate of India stated that inclusion of the fifth jurisdiction would have “far-reaching implications for small and medium sized airlines, especially, of the developing world, which would be extremely serious both from the point of view of logistics as well as financial costs.” ICAO, *Jurisdiction – Article 27 (Presented by India)*, at 2, DCW Doc. No. 20 (May 11, 1999), in MC99 DOCUMENTS, *supra* note 239, at 135, 136.

<sup>316</sup> ICAO, *Article 27 – Fifth Jurisdiction (Presented by France)*, *supra* note 308, at 2, in MC99 DOCUMENTS, *supra* note 239, at 196.

<sup>317</sup> See *id.* at 1, in MC99 DOCUMENTS, *supra* note 239, at 195.



sumers from developing countries, who would, in essence, be subsidizing high awards for plaintiff passengers from developed countries.<sup>318</sup> This is unquestionably a valid concern but one that was totally overblown by France in the context of the fifth jurisdiction. It was based on two erroneous assumptions:<sup>319</sup> first, that the fifth jurisdiction was to be one based on nationality alone (addressed below),<sup>320</sup> and second, leading on from the first, that the fifth jurisdiction would be frequently invoked.<sup>321</sup> Both were wrong. Litigators on both sides recognize that, in practice, the fifth jurisdiction is very seldom invoked,<sup>322</sup> and it has only a very modest impact on the global recoveries for aviation accidents, a fact accepted by aviation insurers.

The third argument was that the fifth jurisdiction would create a regrettable precedent that would be inconsistent with the development of contemporary law because, in France's view, the fifth jurisdiction would expose carriers to litigation in a forum to which they had no real connection.<sup>323</sup> This line of argument was

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<sup>318</sup> See *id.* at 2, in MC99 DOCUMENTS, *supra* note 239, at 196.

<sup>319</sup> France was not alone in this erroneous viewpoint. In its paper, the International Union of Aviation Insurers (IUAI) used the same point to issue grim warnings of increased insurance premiums and inequity to small carriers. See ICAO, *An Aviation Insurance View of the Draft Convention for the Unification of Certain Rules for International Carriage by Air*, at 4, DCW Doc. No. 28 (May 13, 1999), in MC99 DOCUMENTS, *supra* note 239, at 155, 158.

<sup>320</sup> See *infra* notes 324–30 and accompanying text.

<sup>321</sup> The U.S. Delegate had questioned this at the Montreal Conference. ICAO, *Minutes of the Eighth Meeting of the Commission of the Whole*, *supra* note 212, at 11, in MC99 MINUTES, *supra* note 212, at 108. He asked how it was that, "given the small number of instances in which recourse would be made to the fifth jurisdiction, insurance rates would increase." *Id.* In fact, the United States noted the drop in aviation insurance rates during previous years and concluded that the insurance rates argument was overblown. *Id.* However, this was not a view shared by the IUAI, which stated, as a matter of fact, that "[t]he cost of insurance will, in the long run, be determined by the degree of exposure to risk and the level of claims paid." ICAO, *An Aviation Insurance View of the Draft Convention for the Unification of Certain Rules for International Carriage by Air*, at 2, *supra* note 319, in MC99 DOCUMENTS, *supra* note 239, at 156. The IUAI predicted that the proposed Convention would likely result in a larger number of claims and higher level of damages, so an increase in insurance rates, in the long term, was to be expected. *Id.* at 4, in MC99 DOCUMENTS, *supra* note 239, at 158. Time has now proven the United States correct; the feared increases in insurance premiums from the introduction of the fifth jurisdiction did not materialize, and it is widely accepted that the general impact of the fifth jurisdiction has been modest.

<sup>322</sup> For discussion of a small number of cases in which jurisdiction was established on the basis of the fifth jurisdiction, see VII SHAWCROSS & BEAUMONT: AIR LAW, *supra* note 246, § 441.1, at 220–23.

<sup>323</sup> See ICAO, *Article 27 – Fifth Jurisdiction (Presented by France)*, *supra* note 308, at 3, in MC99 DOCUMENTS, *supra* note 239, at 197.

based on the deliberate misperception—made purely for rhetorical effect—that the fifth jurisdiction was nothing more than what France called a “true jurisdiction of nationality.”<sup>324</sup>

This challenge to the legality of the fifth jurisdiction was disingenuous. As argued by the United States, a fifth jurisdiction was a feature of GCP<sup>325</sup> and is provided under the Athens Convention.<sup>326</sup> Even more damning to the French argument is the simple fact that the fifth jurisdiction is not (and never was) based solely on nationality. This misconception had dogged the fifth jurisdiction from the start of the MC99 drafting process. Despite the text of the proposal itself<sup>327</sup> and the clarifications given,<sup>328</sup> the irrational suspicion and fear remained that the fifth jurisdiction was a blatant attempt to bestow a jurisdictional privilege on the “wandering American.”<sup>329</sup> The text of the jurisdiction clause before the MC99 Conference and the comments submitted by

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<sup>324</sup> See *id.*

<sup>325</sup> See ICAO, *Article 27–Fifth Jurisdiction (Presented by United States of America)*, *supra* note 301, at 6, in MC99 DOCUMENTS, *supra* note 239, at 106. Doubts regarding the precedential value of these instruments were raised by some States. The Delegate from Madagascar noted that GCP had only provided for the fifth jurisdiction in the context of an unbreakable limit on liability. See ICAO, *Minutes of the Eighth Meeting of the Commission of the Whole*, *supra* note 212, at 8, in MC99 MINUTES, *supra* note 212, at 105 (speaking on behalf of the fifty-three African Contracting States). In addition, it was noted that GCP had never come into force. *Id.* (comment from France).

<sup>326</sup> ICAO, *Article 27–Fifth Jurisdiction (Presented by United States of America)*, *supra* note 301, at 6, in MC99 DOCUMENTS, *supra* note 239, at 106. The United States invoked the Athens Convention that governs the carriage of passengers and luggage by sea, which also provides for a basis of jurisdiction similar to the fifth jurisdiction. See Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea art. 17(1)(c), Dec. 13, 1974, 1463 U.N.T.S. 19.

<sup>327</sup> The fifth jurisdiction had, at least from the SSG draft of September 1996, required more than mere domicile; it had always required some territorial connection between the carrier and the State of jurisdiction. For the proposed text, see ICAO, *Progress Report on Modernization of the “Warsaw System,”* at 1 app. at A-12, ICAO Doc. C-WP/10470 (Sept. 20, 1996), in MC99 PREPARATORY MATERIAL, *supra* note 217, at 27, 42.

<sup>328</sup> Early on, the United States pointed out that the fifth jurisdiction would be seldom invoked and that it would be limited to situations where the carrier had a place of business in the passenger’s State of domicile or permanent residence. See ICAO, *Report of the 30th Session of the Legal Committee*, *supra* note 292, at 4-19, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 177; see also ICAO, *Article 27–Fifth Jurisdiction (Presented by United States of America)*, *supra* note 301, at 7, in MC99 DOCUMENTS, *supra* note 239, at 107.

<sup>329</sup> Mendelsohn observed this sentiment:

IATA and others seem to say that they will not accept the fifth forum—first because it is illegal, second because it might cost too much money, and third because we do not like to be pushed into

the United States with regard to the fifth jurisdiction clearly evidence that the proposal for a fifth jurisdiction actually on the table was not one based solely on nationality; it accepted that limiting, connecting factors (for both plaintiff and carrier) to the fifth jurisdiction would be required.<sup>330</sup>

The valid underlying objection was not so much a matter of legality as of legitimacy. The real concern was to ensure that there were sufficient connecting factors between the defendant carrier and the fifth jurisdiction to justify exposing the carrier to litigation of claims in that forum. Indeed, a constant issue throughout the drafting history was how to define the necessary connecting factor in sufficiently robust terms.<sup>331</sup> Therefore, the third category of objections should be considered from the point of view of the *legitimacy* of the fifth jurisdiction as a forum for resolution of claims against carriers.

The presentation of opening positions and the discussion thereof took place over the first week of the Conference and then gave way to more intense deliberations on the core package of provisions within the FCG. Initial French opposition to the inclusion of the fifth jurisdiction ended up being a damp squib. By the time the FCG came to discuss the fifth jurisdiction, France had acquiesced to its inclusion and preferred instead to draw battle lines over the applicable conditions to be satisfied before it could be relied upon.<sup>332</sup> The pressing concern was how to allay the fears expressed by a number of States, some of which the Chairman described as being “purely imaginary.”<sup>333</sup>

It is often said that it was the fear of forum shopping that was at the heart of opposition to the fifth jurisdiction. It is submitted that this was not the case and that it is vital to appreciate the

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the fifth forum as its only purpose is to protect the famous “wandering American.”

Allan I. Mendelsohn, *The Warsaw Convention and Where We Are Today*, 62 J. AIR L. & COM. 1071, 1077 (1997).

<sup>330</sup> See ICAO, *Article 27—Fifth Jurisdiction (Presented by United States of America)*, *supra* note 301, at 1, in MC99 DOCUMENTS, *supra* note 239, at 101.

<sup>331</sup> See ICAO, *Final Report of the Special Group on the Modernization and Consolidation of the “Warsaw System,”* *supra* note 233, at 2-7 to 2-8, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 243-44.

<sup>332</sup> See Mercer, *supra* note 237, at 465.

<sup>333</sup> “As in most of the issues raised during the Group’s discussions, it was not sufficient to deal with fears which were real—it was necessary to provide comfort levels even in respect of fears which sometimes were purely imaginary.” ICAO, *Minutes of the Third Meeting of the “Friends of the Chairman” Group*, at 2 (May 19, 1999), in MC99 MINUTES, *supra* note 212, at 147, 148.

nuances involved. The theme of forum shopping arose at numerous points in the discussions of the fifth jurisdiction within the FCG, as well as within the Conference in general. It is curious how the question of forum shopping only emerged with respect to the fifth jurisdiction. In fact, at no point did anyone raise a concern about forum shopping under the existing four jurisdictions. This suggests that it was not forum shopping per se that worried the delegates but rather some other aspect of the fifth jurisdiction. This factor, it is argued, was the purported lack of a sufficient nexus between the carrier and the fifth jurisdiction.

The existing four jurisdictions did not trouble the opponents of the fifth jurisdiction because, as the Chairman noted in his introductory remarks at the third meeting of the FCG, these were accepted by all to be appropriate forums.<sup>334</sup> It was the possibility that the fifth jurisdiction might operate to expose a carrier to litigation in a forum to which it had insufficient connections that scared some delegates. The anxiety surrounding the fifth jurisdiction was based on concerns regarding the basis for its application and the potential negative consequences, foremost amongst which was the exposure to high damage awards and also the practical inconvenience for a carrier being sued in a forum to which it had little (or no) connection. Much of this was rooted in the misperception of the fifth jurisdiction as one of mere nationality or as one in which there was lacking a sufficient nexus to the carrier to render litigation in that forum justifiable. Could a sufficient nexus be defined, then the concerns relating to forum shopping would have dissipated (as indeed they did). It is submitted that it was this uncertainty surrounding the application of fifth jurisdiction that was the paramount concern and not forum shopping. Unfortunately, rather than focusing on defining this nexus, the FCG meetings got sidetracked by the notion of forum shopping and how to control it. A collateral benefit of this was that it provided the opportunity for FNC to emerge *deus ex machina*.

b. FNC: *Deus ex Machina*

In the paper it submitted to the Conference, the United States raised a number of arguments that it expected would allay

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<sup>334</sup> *Id.* (“[F]rom all of the discussions which had taken place, that no view had been expressed that those fora to which an action for damages could be brought at the option of the plaintiff would not be appropriate.”).

the fears expressed by States with respect to forum shopping.<sup>335</sup> One point stressed by the United States was that the control of forum shopping would be facilitated by the inclusion of the fifth jurisdiction because, where a plaintiff sues in the United States but has access to a home forum under the fifth jurisdiction, there would be a greater likelihood of FNC dismissal.<sup>336</sup> Indeed, the United States spoke of FNC as providing “discipline against unwarranted forum shopping.”<sup>337</sup> In addition, the United States provided synopses of two cases illustrating just how FNC was applied by U.S. courts.<sup>338</sup> What is more, the French expressly recognized in their paper that U.S. courts applied FNC in Warsaw Convention cases.<sup>339</sup> From the outset, the drafters of MC99 were fully aware of FNC.

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<sup>335</sup> See generally ICAO, *Article 27—Fifth Jurisdiction (Presented by United States of America)*, *supra* note 301, at 1–9, in MC99 DOCUMENTS, *supra* note 239, at 101–09. The U.S. report first noted that forum shopping was an inevitable consequence of the existing regime with its choice of four jurisdictions. *Id.* at 8, in MC99 DOCUMENTS, *supra* note 239, at 108. Although the addition of a fifth would obviously increase the potential for forum shopping, it was outweighed by the benefit of ensuring that claimants with meager resources could sue in their home forum. The United States also argued that the increased incidence of forum shopping would be slight, given the restrictions that had been agreed on for the fifth jurisdiction. See *id.* Forum shopping in the United States would also be limited because a non-U.S. claimant, granted a home forum by the fifth jurisdiction, would be more likely to elect to sue at home if possible. *Id.*

<sup>336</sup> The U.S. report stated: “Furthermore, U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction.” *Id.* at 8, in MC99, *supra* note 239, at 108.

<sup>337</sup> ICAO, *Minutes of the First Plenary Meeting*, *supra* note 250, at 9, in MC99 MINUTES, *supra* note 212, at 44. Prior to the Conference, during the Fourth Meeting of the SSG in late January 1999, one member (almost certainly the United States) spoke out in strong support of the fifth jurisdiction. See ICAO, *Report of the Fourth Meeting of the Secretariat Study Group on the Modernization of the “Warsaw System,”* *supra* note 296, at 1, 3, in MC99 PREPARATORY MATERIAL, *supra* note 217, at 323, 325. This member attempted to allay fears of increased forum shopping by reminding the other members that the doctrine of FNC would continue to be applied. *Id.* at 3, in MC99 PREPARATORY MATERIAL, *supra* note 216, at 325.

<sup>338</sup> ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: Article 27 – Fifth Jurisdiction: Two Cases Reflecting on United States Law on Forum Non Conveniens (Presented by the United States of America)*, at 1–4, DCW Doc. No. 27 (May 12, 1999), in MC99 DOCUMENTS, *supra* note 239, at 151, 151–54. The two cases are *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and *Nolan v. Boeing Co.*, 762 F. Supp. 680 (E.D. La. 1989), *aff’d*, 919 F.2d 1058 (5th Cir. 1990).

<sup>339</sup> See ICAO, *Article 27 – Fifth Jurisdiction (Presented by France)*, *supra* note 308, at 2, in MC99 DOCUMENTS, *supra* note 239, at 196 (“The creation of a fifth jurisdiction would make it easier to reject claims submitted by foreign citizens in the most generous countries. The judges in those countries would have fewer

Later in the Conference, the Chairman of the FCG proposed codifying the doctrine of FNC (or something similar) within MC99 itself.<sup>340</sup> It was thought that the fears that a fifth jurisdiction would render the carrier subject to litigation in an inappropriate forum could be mitigated by a convention rule of FNC.<sup>341</sup> In response, Australia put forward a proposal based on its own version of the doctrine.<sup>342</sup> A misunderstanding emerged at this point. While the Australian proposal had been intended to apply to all bases of jurisdiction,<sup>343</sup> the Chairman described it as only being applicable to the fifth jurisdiction.<sup>344</sup> The United States was vehemently opposed to such an idea.<sup>345</sup> The U.S. Delegate stated, in defiant terms, that “the doctrine of *forum non conveniens* would be applied to all five jurisdictions in his country whether the Group prescribed that or not.”<sup>346</sup> Indeed, the United States is reported as having “described the doctrine of [FNC] as it was currently applied in the Courts of the United States to the existing four jurisdictions and as it would be applied to a fifth, sixth, seventh or eighth jurisdiction, if such jurisdictions were created.”<sup>347</sup> The United States made its position clear, with no uncertain terms: it was currently applying FNC and would continue to apply FNC to cases where jurisdiction is established on the basis of the two Conventions.

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scruples in using legal means (e.g., the theory of *forum non conveniens*, as set out in Doc No. 27) which enable them to turn down a foreign claimant, on the grounds of the existence of a competent court under the fifth jurisdiction in his country of origin.”).

<sup>340</sup> See ICAO, *Minutes of the Third Meeting of the “Friends of the Chairman” Group*, *supra* note 333, at 2, in MC99 MINUTES, *supra* note 212, at 148.

<sup>341</sup> *Id.* at 2–3, in MC99 MINUTES, *supra* note 212, at 148–49.

<sup>342</sup> ICAO, *Proposal to Amend Article 27 – Jurisdiction (Presented by Australia)*, at 1, DCW Doc. No. 40 (May 20, 1999), in MC99 DOCUMENTS, *supra* note 239, at 213, 213.

<sup>343</sup> The Australian Delegate stated:

The Australian proposal was intended to introduce into the process by which any Court considered the appropriateness of any jurisdiction the issues of whether or not in all the circumstances the jurisdiction selected was fair and whether or not there was an alternative jurisdiction among the five which was fairer.

ICAO, *Minutes of the Fourth Meeting of the “Friends of the Chairman” Group*, at 8 (May 19, 1999), in MC99 MINUTES, *supra* note 212, at 153, 160.

<sup>344</sup> *Id.* at 6, in MC99 MINUTES, *supra* note 212, at 158.

<sup>345</sup> The United States demanded there be equal accessibility to all bases of jurisdiction; in its view, applying the Australian proposal to the fifth jurisdiction would create obstacles above and beyond those applicable to the other four. *See id.* at 7, in MC99 MINUTES, *supra* note 212, at 159.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

The United States also had other concerns about codifying a rule for FNC. The United States worried about the ability of the new Convention to be ratified if it sought to impose the doctrine on those States for which FNC was a foreign concept and that had no desire to adopt it.<sup>348</sup> Additionally, the U.S. Delegate complained that codification of FNC by the FCG Group might result in altering the preexisting jurisprudence in the United States.<sup>349</sup> For these reasons, the United States proposed amending the wording of the final paragraph of the jurisdiction article to read: "Questions of procedure shall be governed by the law of the Court seized of the case[,] . . . including the doctrine of *forum non conveniens* or other similar doctrines."<sup>350</sup> This additional wording was proposed in the name of giving comfort to some States that feared their carriers would be exposed to high U.S. jury awards.<sup>351</sup> What is crucial to note is that the context for the proposal was not to empower courts to apply FNC (or similar doctrines) but just to act as a form of comforting recognition of the doctrine's existing applicability.

The Observer from the International Union of Aviation Insurers (IUAI) referred to, but did not name, an English High Court case (presumably *Milor Slr. v. British Airways Plc.*) that had rendered FNC a "dead letter" in England for Warsaw Convention cases.<sup>352</sup> He also noted that there were no reported cases of a carrier being able to secure dismissal of a case from a U.S. court by way of FNC.<sup>353</sup> The relevance of these observations requires closer inspection and clarification.

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<sup>348</sup> *Id.* This point had been made during the Ninth Meeting of the Commission of the Whole when the Swedish Delegate had recalled some earlier talk of codifying FNC, and he expressed enthusiasm for the idea but only on the proviso that it would not be binding on all States. See ICAO, *Ninth Meeting of the Commission of the Whole*, at 5 (May 19, 1990), in MC99 MINUTES, *supra* note 212, at 140, 144. What the Swedish Delegate had in mind was codifying FNC in such a way that it would prescribe its application by those States which had, or wished to have, the doctrine but would not foist it upon those that did not. *Id.* The Delegate from Chile also opined that his country and several other Latin American countries would have difficulty harmonizing the doctrine of FNC with their countries' legal systems. ICAO, *Minutes of the Fourth Meeting of the "Friends of the Chairman" Group*, *supra* note 343, at 8, in MC99 MINUTES, *supra* note 212, at 160.

<sup>349</sup> ICAO, *Minutes of the Fourth Meeting of the "Friends of the Chairman" Group*, *supra* note 343, at 7, in MC99 MINUTES, *supra* note 212, at 159.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> See *id.* at 9, in MC99 MINUTES, *supra* note 212, at 161 (referring to a "late 1998" English High Court case).

<sup>353</sup> *Id.*

First, the Observer *did not say* that there were “no cases” in which FNC had been *applied* to a Warsaw Convention action.<sup>354</sup> He said there were no “reported cases” in which a carrier had been *able to secure dismissal*, i.e., had been successful in an FNC motion. This is a different proposition. Where a motion is denied, the doctrine is nevertheless applied. In fact, at the time, there were several reported cases in which FNC was applied but no dismissal granted.<sup>355</sup> Furthermore, the Observer was actually wrong. There was at least one reported case in which FNC dismissal was granted in a Warsaw Convention case;<sup>356</sup> there were also two unreported cases.<sup>357</sup>

Second, the Observer enigmatically suggested that the English High Court case might throw light on the reason why FNC dismissals were non-existent in the United States.<sup>358</sup> His implication was that U.S. courts did not dismiss Warsaw actions because they thought, like the English court in *Milor*, that it had no place within that Convention. If this is what he thought, then unless he was reading into the future, he was wrong. Although a U.S. court did eventually come to that position in 2002 with *Hosaka*,<sup>359</sup> at the time of the Montreal Conference, the one U.S. court decision that had specifically made a finding on the issue had actually held that FNC was available.<sup>360</sup>

The Chairman took the comments of the IUAI on board and commented: “It would seem that if [FNC] was to play a role, that

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<sup>354</sup> It appears that the Chairman made this mistake. He is reported as having said, in his summary of the Observer’s point, that “as indicated by the Observer from the IUAL, there were *no cases* in the United States in which the principle of *forum non conveniens* had been *applied* to Convention cases . . .” *Id.* at 10, in MC99 MINUTES, *supra* note 212, at 162 (emphasis added).

<sup>355</sup> See, e.g., *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1168–69 (5th Cir. 1987); *In re Air Crash Off Long Island*, 65 F. Supp. 2d 207, 210, 218 (S.D.N.Y. 1999); *Robert Bosch Corp. v. Air Fr.*, 712 F. Supp. 688, 692 (N.D. Ill. 1989); *Intel Corp. v. Malaysian Airline Sys.*, 652 F. Supp. 1101, 1104–05 (N.D. Cal. 1987); *Harpalani v. Air India, Inc.*, 622 F. Supp. 69, 73–74 (N.D. Ill. 1985); *McLoughlin v. Commercial Airways (Pty) Ltd.*, 602 F. Supp. 29, 33 (E.D.N.Y. 1985); *Recumar, Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795, 799 (S.D.N.Y. 1985).

<sup>356</sup> *In re Disaster at Riyadh Airport*, 540 F. Supp. 1141, 1142–43, 1154 (D.C. Cir. 1982).

<sup>357</sup> *Lu v. Air China Int’l Corp.*, No. CV 92-1254 (RR), 1992 WL 453646, at \*3 (E.D.N.Y. Dec. 16, 1992); *Byrne v. Japan Airlines, Inc.*, No. 83 Civ. 9162 (JFK), 1984 WL 1343, at \*1, \*4 (S.D.N.Y. Dec. 18, 1984).

<sup>358</sup> See ICAO, *Minutes of the Fourth Meeting of the “Friends of the Chairman” Group*, *supra* note 343, at 9, in MC99 MINUTES, *supra* note 212, at 161.

<sup>359</sup> *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1003–04 (9th Cir. 2002).

<sup>360</sup> That case was *In re Air Crash Off Long Island*, 65 F. Supp. 2d at 213–14.



would have to be clearly indicated, having regard to the jurisprudence which might or might not exist in some countries.”<sup>361</sup> This comment has been read as proof that FNC cannot apply unless specifically provided for in MC99.<sup>362</sup> While this is suggested by the immediate context provided by the IUAJ Observer’s comments, the full context shows that the better and clearly intended meaning was otherwise. Let us recall that the Australian proposal was vaguely formed, and it had been noted by some States that they would have difficulty implementing it into their legal systems.<sup>363</sup> In other words, the courts of civil law States would be unable to give effect to it, since they did not have a doctrine of FNC or something akin to it. What the Chairman was recognizing was that if States were going to use FNC, it would have to be explicitly provided for, i.e., courts of those States would need to be empowered directly by the Convention. In other words, this was not a matter to leave to national law to decide, since that would not ensure its application, as evidenced by U.K. jurisprudence and the purported practice of the U.S. courts.

It is not clear that the significance of *Milor* was appreciated by the Chairman or anyone else. Unfortunately, the Delegate of the U.K. did not bring clarity to the issue. The Delegate noted, in reference to the comments made by the IUAJ Observer, that FNC was unavailable in relation to the four Warsaw Convention

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<sup>361</sup> ICAO, *Minutes of the Fourth Meeting of the “Friends of the Chairman” Group*, *supra* note 343, at 10, in MC99 MINUTES, *supra* note 212, at 162. The Chairman had also said:

If, as indicated by the Observer from the IUAJ, there were no cases in the United States in which the principle of *forum non conveniens* had been applied to Convention cases, then it would indicate the importance of dealing with that as an issue, certainly in relation to the fifth jurisdiction.

*Id.*

<sup>362</sup> This argument was raised by the *Pierre-Louis* plaintiffs from *In re West Caribbean Airways* in their appeal brief submitted to the Eleventh Circuit. See Appellant’s Initial Consolidated Brief at 12, 27–28, *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009) (No. 07-15828, No. 07-15830, No. 07-15902) (“[T]he United States proposed amending paragraph 4 of the jurisdiction article (stating that ‘[q]uestions of procedure shall be governed by the law of the Court seised of the case’) by adding the phrase ‘including the doctrine of *forum non conveniens* or other similar doctrines.’ The United States delegate made this proposal in part to give a ‘certain degree of comfort’ to those jurisdictions with the *fnc* doctrine, suggesting that even he believed that without such language [FNC] might not be permitted under the Convention.” (second alteration in original) (emphasis added) (citation omitted)).

<sup>363</sup> See *supra* notes 342–43 and accompanying text.

jurisdictions “as a result of implementing the Warsaw Convention into the national legislation of the [U.K.]”<sup>364</sup> He then went on to say that the Group would not really be “modernizing and consolidating the Warsaw Convention” if it required plaintiffs to fight for their choice of forum by leaving it open for the courts to dismiss on FNC grounds.<sup>365</sup> In his view, this could “introduce litigation at a point where it did not currently exist”—except presumably in those jurisdictions (e.g., the United States) that applied FNC under the Warsaw Convention—and, furthermore, it “could lead to the possible elimination of the plaintiff’s rights.”<sup>366</sup> In so doing, the Delegate of the U.K. was confirming the gist of the *Milor* decision, and he hinted at its *ratio* by mentioning the possible elimination of the plaintiff’s rights.

Had the *ratio* of *Milor* been raised, i.e., the incompatibility of FNC with the substantive right of plaintiffs to choose their forum, it is unthinkable that it would not have provoked comment and debate at the MC99 Conference. It would have offered the civil law States, for which the doctrine is anathema, a gilt-edged opportunity to banish it from this new Convention entirely. The absence of any such debate is the strongest proof that the consistency of FNC with the Convention was never questioned.

Before the Group moved away from the topic of jurisdiction, the Delegate from Singapore (a common law jurisdiction) suggested that the words “at the option of the plaintiff” could be read as providing the plaintiff with the initial choice of forum, but that thereafter, the rules of that chosen forum would apply.<sup>367</sup> Where available, the court would be entitled to apply FNC to dismiss the case, and in such circumstances, the plaintiff could bring the action in one of the other jurisdictions.<sup>368</sup> What is notable is that the Delegate made it very clear that the plaintiff may choose the forum, but that choice may be subject to FNC (where applicable). Yet, no objection was raised!

The Chairman admitted to being in a state of confusion at this point in the discussion.<sup>369</sup> To the Chairman’s way of think-

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<sup>364</sup> ICAO, *Minutes of the Fourth Meeting of the “Friends of the Chairman” Group*, *supra* note 343, at 10, in MC99 MINUTES, *supra* note 212, at 162. Strangely, this suggests that the U.K. Delegate did not wish to make the point that the source of the nonavailability of FNC was the Warsaw Convention itself; rather, it was its implementation into U.K. law.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *See id.* at 10–11, in MC99 MINUTES, *supra* note 212, at 162–63.

<sup>368</sup> *See id.*

<sup>369</sup> *Id.* at 10, in MC99 MINUTES, *supra* note 212, at 162.

ing, the positions discussed were irreconcilable.<sup>370</sup> In the U.K., the plaintiff's choice was treated as final and FNC was not applied, but on the other hand, the U.K. argued that the fifth jurisdiction's application should somehow be circumscribed.<sup>371</sup> The Chairman summarized the two available options: (1) single out the fifth jurisdiction and circumscribe its application in such a way as to address these issues; or (2) recognize that all the jurisdictions would be subject to an FNC-like rule.<sup>372</sup>

The Chairman thought the latter option "would modify even the existing Convention rules."<sup>373</sup> It could be argued that this comment, taken in isolation, might be read as suggesting that to make FNC available under MC99 would require modifying the existing rules of the Warsaw Convention.<sup>374</sup> In other words, the status quo was that FNC was prohibited by the existing Convention. However, the Chairman's words ought to be read in context. First, the discussion centered on the inclusion of express wording on the mandatory application of FNC, which would naturally involve modification of the existing rules.<sup>375</sup> As it stood, FNC was not mandated, but it would be if codified. Second, making FNC applicable to all bases for jurisdiction—rather than just the fifth—would amount to a modification of the Warsaw Convention's rules for certain States, e.g. the U.K., whose position has just been described.<sup>376</sup> Third, aside from the possible reference to the *Milor* case, at no other point had any doubt been raised about the consistency of FNC with the Warsaw Convention or the new Convention.<sup>377</sup> The United States made several references without any opposition to its availability, and discussions had always preceded on the basis. Fifth, in the same excerpt, the Chairman spoke of "the rules being changed or

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<sup>370</sup> *Id.*

<sup>371</sup> *See id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> This argument was also raised by the *Pierre-Louis* plaintiffs from *In re West Caribbean Airways* in their appeal to the Eleventh Circuit. *See* Appellant's Initial Consolidated Brief, *supra* note 362, at 29–30 ("The drafting history thus shows that the drafters debated whether *fnc* should be permitted under the Convention; that they believed that for it to be permitted it needed to be codified in some fashion in the Convention, 'modifying' the Convention's existing rules; and that they explored various means of codifying it, but were unable to secure adequate support for doing so.").

<sup>375</sup> *See* ICAO, *Minutes of the Fourth Meeting of the "Friends of the Chairman" Group*, *supra* note 343, at 7–10, in MC99 MINUTES, *supra* note 212, at 159–62.

<sup>376</sup> *See id.*

<sup>377</sup> *See id.* at 9, in MC99 MINUTES, *supra* note 212, at 161.

*clarified*,”<sup>378</sup> a turn of phrase that demonstrates the Chairman was not speaking authoritatively but speculatively. That he spoke of clarification proves that for those States which did apply FNC, the application of the doctrine by its courts would be clarified by MC99; there would not be a change of rule. The issue came down to whether the new Convention was going to mandate the application of FNC (and if so, whether for the fifth jurisdiction only or for all), or whether it would leave the matter of applying FNC to national law. At no point was there a proposal to prohibit FNC.

The FCG moved ahead with drafting the Consensus Package that was then discussed at its fifth and sixth meetings. Yet again, the fifth jurisdiction dominated the discussion. The draft Consensus Package incorporated into the jurisdiction clause an FNC-like test based on the Australian proposal.<sup>379</sup> It applied only to the fifth jurisdiction and expressly *authorized* the court to decline jurisdiction (in favor of an alternative available forum) in certain specified circumstances.<sup>380</sup> The Chairman explained that a convention rule had become necessary to ensure uniformity because the doctrine did not exist in the legal systems of some States.<sup>381</sup> He did not say that it was necessary because the new Convention would otherwise proscribe the application of FNC by those States which had the doctrine. The FNC-like rule was not mandatory; it was to be a permissive rule.<sup>382</sup>

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<sup>378</sup> *Id.* at 10, in MC99 MINUTES, *supra* note 212, at 162 (emphasis added).

<sup>379</sup> See ICAO, *Draft Consensus Package (Presented by the President of the Conference)*, at 4, DCW-FFG Doc. No. 1, in MC99 DOCUMENTS, *supra* note 239, at 491, 494.

<sup>380</sup> *Id.*

<sup>381</sup> ICAO, *Minutes of the Fifth Meeting of the “Friends of the Chairman” Group*, at 5 (May 20, 1999), in MC99 MINUTES, *supra* note 212, at 167, 171. In introducing the Consensus Package, the Chairman described the FNC paragraph of the jurisdiction article:

Article 27, paragraph 4 now authorized the court to decline jurisdiction in certain specified circumstances, making it a rule of the Convention. It was necessary to make it a rule of the Convention because of the need for uniformity; whereas the doctrine of *forum non conveniens* might well exist in some jurisdictions, it might not exist in others. In much the same way that provision was being made for unique circumstances of liability and a host of other matters in the Convention, so too it became necessary to ensure that these elements would apply in whatever forum.

*Id.*

<sup>382</sup> *Id.* Although permissive, the Chairman did explain that a court “would be obliged to address its mind” to the issues stated under the rule in coming to its conclusion, i.e., it was to be a quasi-permissive rule. *Id.*

The proposed rule perplexed the United States, which remained opposed to anything which would make reliance on the fifth jurisdiction more onerous than the other four.<sup>383</sup> Instead, the United States proposed scrapping the rule and reverting to its former proposal that would have maintained the text of Article 28(2) of the Warsaw Convention (i.e., “questions of procedure shall be governed by the law of the court seised of the case”), and then adding to this the following clarification: “that nothing here was intended to limit the ability of courts, in their discretion, applying the law of the court seised of the case to dismiss cases that more properly belonged in one of the other jurisdictions.”<sup>384</sup> This would maintain the status quo, which the United States understood as meaning that FNC would apply to all five jurisdictions for those States which had the doctrine while leaving it open for other States to follow suit if they so decided.<sup>385</sup>

The Delegate of Sweden voiced support for this proposal (echoed by the Observer from the European Community) and voiced concerns that the Convention FNC rule could block ratification by many States of the civil law tradition.<sup>386</sup> Of the U.S. proposal, he observed: “States who at the moment applied the principle of *forum non conveniens* could continue to do so.”<sup>387</sup> The Delegate of Switzerland thought the problem of FNC was not “a matter of substance, but of procedure,” that the Conference should focus on unifying substantive provisions, and that the proposed FNC rule was “unclear.”<sup>388</sup> Instead, he suggested maintaining the wording from Article 28(2) of the Warsaw Convention and deleting the remainder of the proposed text.<sup>389</sup> This is what was done and how the text appeared in the final draft of the Consensus Package,<sup>390</sup> which was presented to the Commission of the Whole on May 25, 1999, to grand ap-

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<sup>383</sup> ICAO, *Minutes of the Sixth Meeting of the “Friends of the Chairman” Group*, at 6 (May 21, 1999), in MC99 MINUTES, *supra* note 212, at 175, 180.

<sup>384</sup> *Id.*

<sup>385</sup> *See id.*

<sup>386</sup> *Id.* at 7, in MC99 MINUTES, *supra* note 212, at 181.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 8, in MC99 MINUTES, *supra* note 212, at 182.

<sup>389</sup> *Id.*

<sup>390</sup> *See* ICAO, *Consensus Package (Presented by the President of the Conference)*, *supra* note 239, at 3–4, in MC99 DOCUMENTS, *supra* note 239, at 273–74.

plause.<sup>391</sup> Notable by its absence was any provision attempting to codify or affirm the application of FNC.

The Chairman's summation of the sixth meeting of the FCG suggests that the fate of the attempted codification of FNC into the Convention had been defeated by concerns relating to imposing the doctrine on the legal systems of States for which it was foreign, along with consequential issues of ratification.<sup>392</sup> It is also submitted, as already considered above, that the real issue had been ensuring that a sufficient nexus existed between the carrier and the fifth jurisdiction.<sup>393</sup> This had been achieved by requiring certain links to exist between the fifth jurisdiction and both the carrier and the passenger. As a result, the French bogyman of a fifth jurisdiction based on the sole criterion of nationality had been exorcized. That said, there was no longer the need—from the civil law State perspective—to codify a rule of FNC, since the fifth jurisdiction had been so sufficiently circumscribed that it was regarded as an appropriate forum.

It can be argued that the fact that Article 33 of MC99 contains neither the codified version of FNC nor the U.S. proposal affirming the doctrine demonstrates that the drafters did not intend for FNC to play a role in MC99 at all. Insofar as this argument is limited to FNC playing an explicit role, then it is plainly correct and unobjectionable. However, if one wishes to argue that this shows that the drafters thereby sought to proscribe the application of FNC under *le droit commun* (i.e., where available), then it is clearly wrong. The drafting history reveals the availability of FNC under *le droit commun* was frequently affirmed by the drafters from start to finish. Although the *Milor* case was averred to, its full significance was only hinted at but not appreciated. At no point was the proposition explicitly raised that FNC was not available under the Warsaw Convention on the grounds that it was inconsistent with Warsaw's substantive provisions. Yet, this was the conclusion that the plaintiffs in *In re West Caribbean Airways* sought to persuade the court to reach with respect to MC99.

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<sup>391</sup> See ICAO, *Minutes of the Thirteenth Meeting of the Commission of the Whole*, supra note 239, at 1, 7, in MC99 MINUTES, supra note 212, at 199, 205.

<sup>392</sup> See ICAO, *Minutes of the Sixth Meeting of the "Friends of the Chairman" Group*, supra note 383, at 9–10, in MC99 MINUTES, supra note 212, at 183–84 (Chairman's comments).

<sup>393</sup> See supra notes 324–30 and accompanying text.

## C. THE AVAILABILITY OF FNC UNDER MC99

1. *Back to In re West Caribbean Airways*

This brings us back to *In re West Caribbean Airways* and the overarching question of this Article: is the doctrine of FNC available under MC99? Although the author ultimately agrees with the position reached by Judge Ungaro (i.e., that FNC is available under MC99), he disagrees with the *ratio* upon which that determination was made. In addition, there are several issues with the court's opinion that need to be addressed, as they may provide grounds for future challenges. Judge Ungaro's opinion was thorough, and the court's approach to treaty interpretation correct. For that reason, it will be convenient to follow the same structure in this Article as in the opinion.

## a. The Text

Commencing with the text of Article 33, Judge Ungaro found it to be "unambiguous and dispositive" in providing that questions of procedure shall be governed by the law of the forum.<sup>394</sup> Although FNC was not explicitly mentioned in the text, the court held that because FNC was so firmly established as a rule of procedure in the United States at the time of the drafting of MC99, the text "by implication" clearly covered it.<sup>395</sup> Unlike other courts that had addressed the same issue, the court in *In re West Caribbean Airways* based its textual interpretation on the whole text of Article 33 and not simply on the Article 33(1) or 33(4) provisions.<sup>396</sup>

It is glaringly obvious that the court's conclusion that "the text unambiguously permits application of the [FNC] doctrine in Montreal Convention cases"<sup>397</sup> conflicts with the conclusions reached in *Hosaka* and *Milor*. In both of those cases, the courts had regarded the text of Article 28 of the Warsaw Convention to be ambiguous.<sup>398</sup> Naturally, this was something the plaintiffs in *In re West Caribbean Airways* were eager to point out, given that the relevant texts of Article 33 of MC99 and Article 28 of the Warsaw Convention are substantially the same.<sup>399</sup> The key distin-

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<sup>394</sup> *In re W. Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299, 1310 (S.D. Fla. 2007).

<sup>395</sup> *Id.*

<sup>396</sup> *See id.* at 1311.

<sup>397</sup> *Id.*

<sup>398</sup> *See supra* notes 161–72, 176–99 and accompanying text.

<sup>399</sup> *In re W. Caribbean Airways*, 619 F. Supp. 2d at 1308–09.

guishing feature is that in *Hosaka* and *Milor*, the courts had not based their determination of ambiguity solely on a literal interpretation of the text but had reached that view having interpreted the text in its context within the treaty and in light of its purpose.<sup>400</sup> Judge Ungaro’s opinion had begun with a purely literal interpretation.<sup>401</sup> Thankfully, she did not stop there. Despite declaring the text “dispositive,”<sup>402</sup> she accepted that the interpretative task did not end with the text, and she acknowledged that the court had the “responsibility to interpret Article 33 consistently with the shared expectations of the contracting parties” and that this obliged recourse be had to the other means of interpretation.<sup>403</sup>

#### b. Historical Context

While there exists shared textual identity between the Warsaw Convention and MC99 in relation to rules of procedure being governed by the law of the forum, Judge Ungaro was quick to identify the difference in historical context.<sup>404</sup> The decisions in *Milor* and *Hosaka* could be distinguished from *In re West Caribbean Airways* because, in the former cases, the courts had been concerned with the interpretation of a convention concluded in 1929, “at a time when the [FNC] doctrine was rarely utilized, its contours were undeveloped and its ‘procedural’ character was unsettled.”<sup>405</sup> However, by 1999, FNC was firmly established and frequently utilized, so any confusion relating to its doctrinal status as a rule of procedure, rather than one of substance, had been resolved by the U.S. courts.<sup>406</sup> It was also noted that *Hosaka* had not yet been decided and that the only current U.S. authority directly addressing the issue had found FNC to be availa-

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<sup>400</sup> *Id.* at 1309, 1311–12.

<sup>401</sup> *See id.* at 1309.

<sup>402</sup> *Id.* at 1310.

<sup>403</sup> *Id.* at 1311 (citing *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999)).

<sup>404</sup> *Id.* at 1311–14.

<sup>405</sup> *Id.* at 1312.

<sup>406</sup> In *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), the Supreme Court stated:

At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined. But venue is a matter that goes to process rather than substantive rights—determining which among various competent courts will decide the case.



ble.<sup>407</sup> However, Judge Ungaro made no mention of *Milor* in this context.

The consideration of the historical context boiled down to the matter of the interpretation of the words “questions of procedure” in Warsaw Convention Article 28(2) and MC99 Article 33(4).<sup>408</sup> Essentially, did the meaning of those words encompass the doctrine of FNC? For Judge Ungaro, the varying historical context between the Warsaw Convention and that of MC99 did not compel the court to reach the same conclusion.<sup>409</sup> Simply put, Judge Ungaro’s view was that in 1929, the meaning of the term “questions of procedure” could not be interpreted as including FNC, whereas it could be in 1999.<sup>410</sup> This line of argument is open to three criticisms. First, its historical accuracy is questionable. Second, it is fundamentally wrong. Third, it misunderstands the *rationes decidendi* of *Milor* and *Hosaka*.

In terms of its historical accuracy, it is clear from the history of FNC that in 1929, the doctrine was far from firmly established in U.S. or English law; in fact, it was still regarded as an oddity of Scots law.<sup>411</sup> What did exist was a vague doctrinal basis for a general discretionary power of a court to decline otherwise valid jurisdiction.<sup>412</sup> Even so, the relevance of the U.S. legal perspective is weak given that the United States did not actively participate in the drafting of the Warsaw Convention. More relevant is the fact that, at Warsaw, the British Delegate had made a proposal to include wording to provide for a discretionary power to decline jurisdiction, but he had not insisted upon it for reasons unknown.<sup>413</sup> Thus, while the drafters of the Convention may not have known of FNC by name, they certainly knew that something similar was a feature of the common law landscape at the

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<sup>407</sup> *In re W. Caribbean Airways*, 619 F. Supp. 2d at 1312–13 (citing *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1161–62 (5th Cir. 1987)).

<sup>408</sup> *Id.* That this was the court’s viewpoint is clear from its statement that “there is little, if any evidence, reflecting that the drafters of the Warsaw Convention then understood that the inclusion of the language ‘[q]uestions of procedure shall be governed by the law of the court seised of the case’ encompassed *forum non conveniens*.” *Id.* at 1312 (alterations in original).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> For some history of FNC, the reader is directed to David Cluxton, *Getting FNC Back on the Right Track: A Critical Re-Evaluation of the Federal Doctrine of Forum Non Conveniens*, 41 U. HAW. L. REV. 72, 76–86 (2018). See generally RONALD A. BRAND & SCOTT R. JABLONSKI, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (2007).

<sup>412</sup> Cluxton, *supra* note 411, at 87.

<sup>413</sup> See *supra* notes 106–08, 141–46, 189–93 and accompanying text.

time of the Warsaw Convention's drafting. The situation was not as clear-cut as Judge Ungaro's opinion appears to have assumed.

The veracity of the line of argumentation may be challenged on the grounds that it is irrelevant whether the delegates were aware of FNC or whether they did (or would have) regarded it as covered by the term "questions of procedure" in Article 28(2). Such a broad term was deliberately used in order to avoid the need to catalogue or make express provision for each and every rule of procedure. The cardinal purpose of the Warsaw Convention was to achieve uniformity of *certain rules*.<sup>414</sup> Rather than seek the impossible (i.e., exhaustive unification), the scope of unification was limited to essential matters. They intended to leave much to *le droit commun*, with questions of procedure being one such example. All of which is to say, by way of a hypothetical, that if a Contracting Party to the Warsaw Convention had decided to create an entirely new rule of procedure in 1935, the compatibility of such a rule with the Convention could not be challenged solely on the basis that it was not specifically within the contemplation of the drafters in 1929.

The question that can legitimately be posed in the context of the distinctive historical background to the Warsaw Convention and MC99 is not so much a matter of the comparative meaning of Warsaw Convention Article 28(2) and MC99 Article 33(4), but one of Article 28(1) and 33(1), respectively. Did the drafters of Article 28(1) intend to create a substantive right making a plaintiff's choice of forum absolute and exclusive such that the meaning of Article 28(2) had to read as excluding FNC? *Hosaka* and *Milor* had both concluded that this was indeed the case in Warsaw in 1929. This was the *ratio decidendi* in both cases. Judge Ungaro's opinion did not appreciate this. The court asked the wrong question. It is not a question of whether FNC was contemplated by the drafters as one of the rules of procedure under Article 28(2). The real question is whether Article 28(2) had to be read as qualified by Article 28(1), i.e., as only including rules of procedure to the extent that they do not conflict with the substantive provisions of Article 28(1). Had the court addressed itself to this question, then it would have to ask whether the answer given in *Milor* and *Hosaka* held true in the case of Article 33(4) of MC99. This is the biggest failing in *In re West Caribbean Airways*, and we shall return to it in the Conclusion.

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<sup>414</sup> See *supra* part II.A.1.

c. Purpose

Judge Ungaro noted that the reasoning of the court in *Hosaka* was based on the accepted purposes of the Warsaw Convention, and the opinion correctly noted that it could not be assumed that the purposes of MC99 are identical.<sup>415</sup> Nevertheless, Judge Ungaro did not disregard the relevance of the Warsaw Convention to the interpretation of the purposes of MC99. Instead, the analysis in her opinion mostly reveals an appreciation of their interrelationship and the continued relevance of the Warsaw Convention. However, the analysis of the purpose of MC99 raises a number of issues.

As a preliminary observation, the court was not unequivocal in defining the purposes of MC99. To begin with, in the authoritative statement as to the purposes of MC99, they are: (1) to modernize and consolidate WCS; and (2) to ensure the protection of the interests of consumers in international carriage by air and their need for equitable compensation based on the principle of restitution.<sup>416</sup> Judge Ungaro based this on a mere reading of the preamble to MC99 and thereby failed to appreciate that the cardinal goal of MC99 remains, like that of the Warsaw Convention, the pursuit of uniformity of certain rules. However, a couple of paragraphs after this statement of purpose, the opinion conceded that uniformity and predictability were amongst the objectives of the drafters of MC99 but referred to them as mere aspirations.<sup>417</sup> This is simply wrong and substantially downplays the cardinal importance of uniformity within MC99. Ironically, later in the section of the opinion on the purpose of MC99, she referred to “the predominant objectives” of MC99 as being “the creation of a new uniform system of liability governing the international transportation of passengers and cargo, and the balancing of the interests of the air carriers and passengers.”<sup>418</sup> This latter description is actually more accurate, but it

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<sup>415</sup> *In re W. Caribbean Airways*, 619 F. Supp. 2d at 1314–15.

<sup>416</sup> *Id.* at 1314 (“Plaintiff’s argument fails to take account of the fact that the stated purpose of the Montreal Convention was to ‘modernize and consolidate the Warsaw Convention and related instruments,’ and to ‘ensur[e] protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.’” (alterations in original) (footnote omitted) (citing MC99, *supra* note 14, pmbl.)).

<sup>417</sup> *See id.* at 1315. The court accepted “Plaintiffs’ assertion that the drafters of the Montreal Convention, like the drafters of the Warsaw Convention, aspired to uniformity and predictability in the implementation of its liability scheme.” *Id.*

<sup>418</sup> *Id.* at 1316.

was not presented as the authoritative statement like the first aspirational description was. These two “definitions” are not fully consistent, yet the court never attempted to assimilate or reconcile them, nor was one or the other stated in the conclusion to the judgment.<sup>419</sup> The resulting difficulty is that one cannot be sure what the court’s understanding of the purposes of MC99 was and thus how it informed its final decision. In addition to this, Judge Ungaro did not specifically address the question of the object and purpose of the MC99’s jurisdictional scheme.

Moving to the specifics of the court’s argument regarding FNC and the purpose of MC99, as modernization of the Warsaw Convention was one of the goals of MC99, Judge Ungaro surmised that this supported the availability of FNC, as it would accord with modern practice at the time of the drafting of the Convention.<sup>420</sup> At that point in time, in the only U.S. case to address the question under the Warsaw Convention, the court had found the doctrine to be applicable.<sup>421</sup> Curiously, no mention was made of *Milor* in relation to this point, despite it representing countervailing authority for the modern practice of the English courts. In any case, aside from the fact that *In re West Caribbean Airways* exposes a common law bias, since it assumes the drafters intended to modernize the convention in the image of common law practice, Judge Ungaro’s point is unpersuasive for another more fundamental reason. That is, it assumes that the object of modernization was intended to apply extensively. This was clearly not the case and is demonstrated by the twin object of consolidation. The drafters intended to consolidate the Warsaw system; indeed, it might arguably be claimed that this was preeminent in their considerations because they took the text of the Warsaw Convention as their starting point. Having done so, they made adjustments in the name of modernization, e.g., the addition of the fifth jurisdiction. Other than that, the specific jurisdictional provisions in question remained

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<sup>419</sup> See *id.* at 1328.

<sup>420</sup> *Id.* at 1315.

<sup>421</sup> See generally *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1153 (5th Cir. 1987). There were many U.S. cases that had applied the doctrine in the context of the Warsaw Convention, and at least one foreign court decision could be cited in support, such as a judgment of the Singapore Court of Appeal. See *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776, 777, [2]–[5] (CA) (Sing).

largely unchanged. If anything, this suggests consolidation rather than modernization.

Within the context of the second articulation of the purposes of MC99, Judge Ungaro appeared to concede that FNC would, at first glance, appear to be inconsistent with uniformity. However, since MC99 (like the Warsaw Convention) only sought unification of *certain rules* (i.e., not *all rules*), she was not prepared to presume that the goal of uniformity necessarily meant that FNC was inherently incompatible with MC99's jurisdictional scheme.<sup>422</sup> That much is true, but it does not answer the question of the inconsistency between FNC and the goal of uniformity. To do this, Judge Ungaro referred to MC99's *travaux préparatoires* that showed that the delegates were clearly aware that FNC was routinely applied by U.S. courts and that no proposal was ever made to explicitly exclude the doctrine.<sup>423</sup> While proposals of various types were made with respect to codifying FNC,<sup>424</sup> the delegates had ultimately been unable to reach a consensus on the issue for fear that codification would result in mandatory application of the doctrine, even for those States whose legal system did not currently have such a doctrine. Instead, the delegates decided to retain the existing wording for Article 33(4). This suggested to Judge Ungaro that the delegates had intended to maintain the status quo.<sup>425</sup>

Next, it was recognized that one of the predominant objectives of MC99 was to achieve a balance between the interests of the air carrier and the passenger.<sup>426</sup> The reasoning adopted by the courts in *Hosaka* and *Milor* had been to the effect that FNC would interfere with this balance by subverting the substantive right granted to plaintiffs to choose their forum from amongst those available. In *Milor* and *Hosaka*, the courts had placed great

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<sup>422</sup> See *In re W. Caribbean Airways*, 619 F. Supp. 2d at 1315.

<sup>423</sup> *Id.* at 1316.

<sup>424</sup> See *supra* part III.B.2.b.

<sup>425</sup> Judge Ungaro stated:

The absence of language articulating *forum non conveniens* principles in the final document, thus, suggests that the drafters intended to maintain the status quo: that United States courts, as well as the courts of other States recognizing the doctrine, would continue to apply *forum non conveniens* in Montreal Convention and other cases, while others would not.

*In re W. Caribbean Airways*, 619 F. Supp. 2d at 1315.

<sup>426</sup> *Id.* at 1316 ("Like the Warsaw Convention, the predominant objectives of the Montreal Convention were the creation of a new uniform system of liability governing the international transportation of passengers and cargo, and the balancing of the interests of the air carriers and the passengers.").

significance on the consistency of their interpretation of Article 28(2) with the creation of what they viewed as a substantive right of plaintiffs to choose their forum under Article 28(1)—so much so that those courts' determination that the application of FNC was precluded under the Warsaw Convention was fundamentally premised on that understanding of the Convention's jurisdictional scheme. This was critical nuance to the reasoning of those two decisions that was not adequately considered in *In re West Caribbean Airways*. Judge Ungaro failed to appreciate that the essence of the *rationes decidendi* in *Milor* and *Hosaka* rested on the recognition of a substantive right under Article 28(1). In the end, she dismissed them, stating: "The record also does not reflect that drafters of [MC99], assuming they understood [FNC] to be a jurisdictional question, accorded the objective of formulating a 'self-contained jurisdictional code' the primacy ascribed in the *Hosaka* and *Milor* opinions to the drafters of the Warsaw Convention."<sup>427</sup> This is weak judicial reasoning.

Turning to practicalities, Judge Ungaro could not see how the doctrine would undermine the two purposes of MC99, i.e., uniformity and the balance of interests.<sup>428</sup> Focusing on the latter,<sup>429</sup> her opinion explained that the jurisdictional scheme of MC99 ensures that the forum selected by the plaintiff has a significant connection to the carrier.<sup>430</sup> She did not see FNC as being inconsistent with this balance because FNC is not capable of providing grounds for dismissing a case in favor of the courts of a State which does not have jurisdiction under MC99.<sup>431</sup> In one

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<sup>427</sup> *Id.*

<sup>428</sup> *See id.*

<sup>429</sup> When it came to uniformity, Judge Ungaro had very little to say. She opined that FNC actually promotes uniformity because it facilitates the consolidation of multiple claims arising from an air disaster within a single forum State. *See id.* at 1317. FNC may well operate to reduce the multiplicity of claims where those States with the doctrine exercise it uniformly and identify a single forum to which the cases are transferred, but its success in consolidation will likely only be partial in any given case. Regardless, this point is inconsequential. The consolidation of claims in a single State was not a stated objective of MC99 and is arguably inconsistent with a scheme that nominates several possible forums and grants each injured plaintiff the initiative to choose. The more reasonable understanding is that the drafters appreciated that their jurisdictional scheme inherently minimized the number of forums in which a carrier would be sued in respect to a single disaster. They understood perfectly well that the carrier would face claims in a number of different jurisdictions and more than likely saw this as a concession to the convenience of the claimant. Had the drafters wished to ensure consolidation, then they would have expressly provided for it.

<sup>430</sup> *See id.* at 1316.

<sup>431</sup> *See id.*

sense, the worst that FNC can do is require that a plaintiff bring proceedings in one of the other specified forums.<sup>432</sup> In any case, the eventual forum will be one of those envisaged by the drafters. The effect of the operation of FNC would thus not be prejudicial to the balance of interests struck between passengers and carriers.<sup>433</sup> The obvious weakness in this argument is that it depends on ignoring the substantive right argument. If the jurisdictional scheme of MC99 intended to grant plaintiffs a substantive right to choose their forum from amongst those available under the scheme, then FNC undoubtedly interferes with that right and therefore with the balance of interests. In simple terms, FNC takes the initiative away from the plaintiff.

#### d. Drafting History

The drafting history of MC99 provides the strongest support for the conclusion that FNC is available as a procedural tool under Article 33(4), so it is unsurprising a large portion of the judgment in *In re West Caribbean Airways* is taken up with recounting it.<sup>434</sup> As it has been presented in the above subsection, it will suffice for present purposes to note the conclusions reached by the court. The drafting history showed that the delegates were keenly aware of FNC and that it had occupied a good deal of their discussions over the fifth jurisdiction.<sup>435</sup> No proposal was made that would have expressly excluded the application of FNC.<sup>436</sup> On the contrary, various proposals were made with a view to either clarify its applicability or codify a version of it for MC99.<sup>437</sup> Judge Ungaro noted that the United States “actively and persistently opposed the inclusion of any *forum non conveniens* language except to clarify its general applicability, all while making it abundantly clear that United States courts would continue to employ the doctrine in Montreal Convention

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<sup>432</sup> *Id.*

<sup>433</sup> Judge Ungaro’s opinion also stressed that under the U.S. doctrine, a plaintiff’s choice of forum is entitled to deference such that the choice will only be disturbed in circumstances where the alternative forum is shown to be more appropriate. *Id.* at 1316–17. That the U.S. doctrine shows less deference to a foreign plaintiff was only noted in an understated fashion, with Judge Ungaro merely observing that a U.S. citizen or resident is entitled to “somewhat more deference” than foreign plaintiffs. *See id.* at 1317 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.23 (1981)).

<sup>434</sup> *See id.* at 1317–26.

<sup>435</sup> *Id.* at 1317.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 1319.

and other international cases.”<sup>438</sup> These proposals were ultimately not adopted, not because of a desire to exclude FNC but rather to avoid the difficulty of mandating its application by States for which the doctrine (or something similar) was not already a feature of their legal system.<sup>439</sup> Judge Ungaro concluded that the drafting history showed that “the delegates determined to maintain the status quo.”<sup>440</sup> States that employed the doctrine would continue to do so.

#### e. Post-Ratification Understanding

Given how recently MC99 had been concluded, the parties had little to work with in terms of post-ratification understanding.<sup>441</sup> However, the court had the benefit of a Statement of Interest (submitted as an amicus curiae brief) outlining the position of the U.S. Executive Branch.<sup>442</sup> It was the opinion of the U.S. government that Article 33(4) meant that MC99 “defers to the forum’s law on all questions of procedure and manifests an intent by the drafters not to alter the judicial system of any country on questions of procedure.”<sup>443</sup> This position was seen as being compliant with U.S. interests, especially in utilizing FNC as a means of controlling forum shopping and managing docket congestion.<sup>444</sup> *Breard v. Greene* was cited in support of this viewpoint, thereby invoking the principle that, absent express provi-

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<sup>438</sup> *Id.* at 1326.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* Nevertheless, the plaintiffs managed to argue that the Executive Branch had made some representations supporting the view that ensuring the availability of FNC was *not* a central concern and that the jurisdictional provisions of the Convention gave the claimant an absolute right to pursue a claim in the chosen forum. *See id.* at 1327. On examination, the sources quoted by the plaintiffs did not support their contention and could not be understood as meaning that the U.S. Delegation had dispensed with FNC during the Montreal negotiations. *See id.* at 1326–27. Plaintiffs’ argument was based on ridiculously narrow inferences from points made by certain members of U.S. governmental departments. *See* Plaintiffs’ Joint Memorandum in Opposition to Defendants’ Motion to Dismiss on Grounds of *Forum Non Conveniens* at 25, *In re W. Caribbean Airways*, 619 F. Supp. 2d 1299 (No. 06–22748–CIV). Judge Ungaro quickly dispensed with these implausible arguments. *See In re W. Caribbean Airways*, 619 F. Supp. 2d at 1327.

<sup>442</sup> The brief was prepared by the U.S. Department of Justice with the assistance of the Department of State and Department of Transportation. Statement of Interest of the United States at 1, 5, *In re W. Caribbean Airways*, 619 F. Supp. 2d 1299 (No. 06–22748–CIV).

<sup>443</sup> *Id.* at 3.

<sup>444</sup> *Id.* at 1. The United States declared its interests to be: (1) the “proper interpretation and operation of the Convention”; (2) its status as a third-party defen-



sion to the contrary, the procedural rules of the State shall apply.<sup>445</sup> In other words, if MC99 does not expressly prohibit FNC then it, as a well-established rule of procedure, is applicable in MC99 cases.

The U.S. government's Statement of Interest emphasized that at the time of MC99's drafting and negotiation, the *Hosaka* decision had not been issued, and U.S. courts were uniformly applying FNC under the Warsaw Convention.<sup>446</sup> The delegates at the MC99 Conference were aware of this fact and had been encouraged by the U.S. Delegation to expect this to remain the case. If one overlooks the fly in the ointment that is *Milor*, it is exceedingly difficult to challenge this factual conclusion. Although Judge Ungaro only summarized the views of the U.S. government and did not state the degree of weight or deference actually afforded to them, it is clear that the arguments put forth were received sympathetically.<sup>447</sup> Given the binding authority of *Sumitomo Shoji America, Inc. v. Avagliano*, it can safely be assumed that the court gave "great weight" to the views of the U.S. government in interpreting MC99.<sup>448</sup>

## 2. Appellate Review and Subsequent Decisions

The court's decision in *In re West Caribbean Airways* was reviewed by the court of appeals under the name *Pierre-Louis v. Newvac Corp.*<sup>449</sup> The appeal raised nothing of striking significance with respect to the availability of FNC under MC99; instead it briefly reviewed and affirmed the district court's reasoning.<sup>450</sup> While Judge Ungaro's opinion had been lengthy and comprehensive in its approach to treaty interpretation, the Eleventh Circuit's opinion was sparse and patchy. It claimed to have considered the drafting history,<sup>451</sup> but this is simply not in evidence. Although obliged to consider the object and purpose

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dant in aviation litigation cases; and (3) avoidance of "congestion and forum shopping." *Id.*

<sup>445</sup> *See id.* at 3 n.3 (citing *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

<sup>446</sup> *Id.* at 2.

<sup>447</sup> *In re W. Caribbean Airways*, 619 F. Supp. 2d at 1328.

<sup>448</sup> *See id.* Under the Supreme Court authority of *Avagliano*, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

<sup>449</sup> 584 F.3d 1052 (11th Cir. 2009).

<sup>450</sup> *Id.* at 1061-62.

<sup>451</sup> *Id.* at 1058 & n.8.

of the treaty when interpreting its terms, the court gave only sparse consideration to this means of interpretation.<sup>452</sup> The light touch adopted by the Eleventh Circuit is no doubt credit to the quality of Judge Ungaro's opinion to which the appellate court showed great deference. However, in the few areas in which it did venture to do more than merely affirm, it committed new errors.

Although Judge Ungaro's opinion had begun with a literal interpretation that it had described as dispositive, it had nonetheless taken the process of treaty interpretation much further than this. The Eleventh Circuit focused on the constrained, literal approach. It found "no ambiguity or limitation in the express language of Article 33(4),"<sup>453</sup> and it endorsed the conclusion that this covered all rules of procedure of the forum State, including FNC.<sup>454</sup> It is a requirement of customary international law that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in light of its object and purpose*."<sup>455</sup> The Eleventh Circuit did not do this. Unlike the district court, it took only the literal text of Article 33(4) and interpreted it without considering its meaning in the context of Article 33(1).<sup>456</sup> To find the

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<sup>452</sup> The court of appeals affirmed the district court's decision on the grounds of countering the plaintiffs' argument that FNC was inconsistent with the purposes of MC99. *See id.* at 1060 n.9. The plaintiffs' brief shows two strands to this argument, corresponding to the two purposes of MC99, i.e., uniformity and balance of interests. *See* Appellant's Initial Consolidated Brief, *supra* note 362, at 20–24. The court of appeals acknowledged the plaintiffs' concerns but opined that the doctrine provided sufficient safeguards for its application under MC99 because in all cases of dismissal, the alternative forum would not only be deemed more appropriate but would also have to be one of the forums specified under Article 33(4). *Pierre-Louis*, 584 F.3d at 1058. The court did not specify whether its point went to the question of uniformity, balance of interests, or both, and the lack of further elaboration makes it difficult to surmise the details of its rationale.

<sup>453</sup> *Pierre-Louis*, 584 F.3d at 1058 ("We therefore find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure—which can only reasonably be read to include *all* questions of procedure—are governed by the rules of the forum state.").

<sup>454</sup> *Id.* at 1057–58 ("The district court reasoned that because the doctrine of forum non conveniens is part of United States civil procedure, the Convention unambiguously permits its application in accordance with the law of the forum. The district court also concluded that the shared expectation of the states party to the Convention was that those states which recognized the doctrine could continue to apply it. We find no error in these conclusions.").

<sup>455</sup> Vienna Convention, *supra* note 116, art. 31(1) (emphasis added); *see* sources cited *supra* note 208.

<sup>456</sup> This is clear from the court's statement: "We therefore find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain

text of Article 33(4) unambiguous is only tenable by neglecting to consider it in its proper context.

Like the district court, the court of appeals undervalued the persuasive value of *Milor* and *Hosaka* by excluding them on the grounds that those cases involved interpretation of the Warsaw Convention (rather than MC99) and because the status of FNC had changed between 1929 and 1999.<sup>457</sup> These are valid observations that ought to be taken into account, but with respect to *Milor* and *Hosaka*, the courts' decisions in those cases did not hinge on the status of FNC in 1929 (although it was a factor). The truth seems to be that the Eleventh Circuit did not understand what the *rationes decidendi* actually were in *Milor* or *Hosaka*.

This failure to appreciate the *ratio decidendi* of *Hosaka* was also evidenced in *In re Air Crash Over the Mid-Atlantic*, one of the few other cases to consider the availability of FNC under MC99.<sup>458</sup> Again, the plaintiffs sought to rely on *Hosaka* to avoid FNC dismissal of their MC99 claim.<sup>459</sup> The U.S. District Court for the Northern District of California distinguished *Hosaka*, explaining that it did not compel the conclusion that FNC is not available under MC99 for two primary reasons.

The court's first primary reason boiled down to distinguishing *Hosaka* on the basis of the change in status of FNC between 1929 and 1999,<sup>460</sup> i.e., the same argument put forth in *Pierre-Louis*.<sup>461</sup>

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terms that questions of procedure—which can only reasonably be read to include all questions of procedure—are governed by the rules of the forum state.” *Pierre-Louis*, 584 F.3d at 1058. This is even more clearly suggested by the footnote accompanying this statement, wherein the court, speaking of *Milor* and *Hosaka*, stated that those two cases “do not, as Plaintiffs suggest, create an ambiguity in Article 33(4).” *See id.* at 1058 n.7.

<sup>457</sup> “Among other distinguishing factors, both cases involved interpretation of the Warsaw Convention, a predecessor to the Montreal Convention drafted in 1929, at which time forum non conveniens, in its current form, was not recognized under U.S. law.” *Id.* The court made reference to the uncertain status of FNC in 1929 and distinguished this from the shared expectations of the parties to MC99 that FNC would continue to be applied by those States which recognize the doctrine. *Id.* at 1057–58, 1058 n.7.

<sup>458</sup> *See In re Air Crash Over the Mid-Atlantic*, 760 F. Supp. 2d 832 (N.D. Cal. 2010).

<sup>459</sup> *Id.* at 839.

<sup>460</sup> *Id.* at 840. The second “primary reason” amounted to nothing more than an invocation of the authority of the *Pierre-Louis* and *Khan* cases. *Id.* at 841 (citing *Pierre-Louis*, 584 F.3d at 1058; *Khan v. Delta Airlines, Inc.*, No. 10-CV-2080, 2010 WL 3210717, at \*2 (E.D.N.Y. Aug. 12, 2010)) (“Second, the courts that have addressed this issue in the context of [MC99] have held that *forum non conveniens* is available.”).

<sup>461</sup> *See id.* at 840–41.

However, the district court's summary of *Hosaka* was at times misleading<sup>462</sup> and inaccurate.<sup>463</sup> It suggested that at the time of the drafting of the Warsaw Convention, the doctrine of FNC was relatively new; therefore, it would have required some express provision in the treaty to authorize its application.<sup>464</sup> Since the Warsaw Convention was silent on the availability of FNC, it was not available.<sup>465</sup> However, the court found this logic did not apply to MC99 because when it was drafted, the status of FNC was substantially different.<sup>466</sup> Against this "changed backdrop," the court deduced that express provision was no longer required to authorize its application, ergo, it is available under MC99.<sup>467</sup> This was not the reasoning of *Hosaka*. The court in *In re Air*

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<sup>462</sup> The court stated that the *Hosaka* court had "recognized that the Warsaw Convention incorporated the forum state's procedural law, which as a general matter in this country includes the doctrine of *forum non conveniens*." *Id.* at 839 (citing *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 995 (9th Cir. 2002)). This statement is misleading because it suggests that the court in *Hosaka* had accepted that FNC was incorporated into the Warsaw Convention by Article 28(2). Judge Fisher's opinion concluded that the existence of two plausible interpretations demonstrated ambiguity, and it ultimately held that FNC was not expressly incorporated into the Warsaw Convention. *See Hosaka*, 305 F.3d at 1002.

<sup>463</sup> The district court stated: "[T]he [*Hosaka*] court noted that the doctrine of *forum non conveniens* conflicted with the purpose of the Warsaw Convention—allowing plaintiffs flexibility in choice of forum—and 'would undermine the goal[s] of uniformity [and balance].'" *In re Air Crash Over the Mid-Atlantic*, 760 F. Supp. 2d at 839–40 (third and fourth alterations in original) (quoting *Hosaka*, 305 F.3d at 996–97). This is an inaccurate reproduction of the *Hosaka* statement on the purpose of the Warsaw Convention. It stated very clearly the view that the Warsaw Convention had the dual purpose of uniformity and balance; there is no mention of the Convention having the purpose of "allowing plaintiff's flexibility in choice of forum." *See id.* at 840. What the court did note in *Hosaka* (referring to *Tseng* and *Milor*) was that in limiting the potential forums available and giving the plaintiff the initiative to choose, the delegates were striking a balance between the interests of carriers and passengers, which would be undermined by FNC. *See Hosaka*, 305 F.3d at 997. However, this was clearly stated in subordinate relation to the broader context of the second purpose of the Warsaw Convention, i.e., balance of interests, whereas in *In re Air Crash Over the Mid-Atlantic*, the district court elevated it to the level of the purpose of the Warsaw Convention *per se*. In so doing, the district court was exaggerating the importance of the claimant's choice of forum.

<sup>464</sup> *In re Air Crash Over the Mid-Atlantic*, 760 F. Supp. 2d at 840 (citing *Hosaka*, 305 F.3d at 1002) ("At the time of the Warsaw Convention's drafting in 1929, the doctrine of *forum non conveniens* was relatively new. Thus, the Warsaw Convention's silence on the availability of *forum non conveniens* dismissal meant that it was not available absent a clear statement to the contrary.")

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.* ("Against this changed backdrop, reaffirming (as the MC did) that a state's procedural law applies suggests that *forum non conveniens* dismissals are

*Crash Over the Mid-Atlantic* either failed to realize this or chose to ignore it.

That the court entirely missed the point of *Hosaka* is also clear from its dismissal of the plaintiffs' second line of argument. Plaintiffs argued that FNC was inconsistent with the purpose of the fifth jurisdiction, which they claimed was to provide passengers with a forum in their home State.<sup>468</sup> The court understood this as essentially arguing that FNC would render a plaintiff's right to choose the fifth jurisdiction "meaningless."<sup>469</sup> Taken at such a blunt level, the court was right to regard such a bald proposition as objectionable.<sup>470</sup> However, just as Lord Justice Phillips in *Milor* had not intended his statement that to give a plaintiff a choice is to give him nothing, so too did the plaintiffs in *In re Air Crash Over the Mid-Atlantic* not intend to be taken so literally. It seems abundantly clear that they were invoking the line of argument first raised in *Milor* and then endorsed by *Hosaka*, that FNC was inconsistent with the purpose of MC99 to achieve an equitable balance of interests. The court dodged this argument, but it shall be addressed in the Conclusion.

In *Khan v. Delta Airlines, Inc.*, the U.S. District Court for the Eastern District of New York came close to examining the true *ratio* of *Hosaka* in the context of MC99.<sup>471</sup> The court initially determined that the literal text of Article 33(4) of MC99 "clearly, and without limitation" provides that questions of procedure are governed by the court seized of the case and that this unambiguously includes FNC.<sup>472</sup> It based this finding solely on the text of Article 33(4), but the plaintiff was able to persuade the court that the *Hosaka* decision had not been limited to the text of Article 28(2) of the Warsaw Convention; that court had interpreted

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available."). The court cited the U.S. government's Statement of Interest, submitted in *In re West Caribbean Airways*, and *Breard* as support. *Id.* at 840 & n.5.

<sup>468</sup> *Id.* at 839.

<sup>469</sup> *Id.* at 841.

<sup>470</sup> *See id.* The court explained that the fact that a plaintiff's choice of the fifth jurisdiction should remain subject to the procedural law of the forum State in the form of FNC merely demonstrates the operation of the scheme of Article 33 and reflects the delegates' intention to leave the choice of forum subject to the procedural law of the forum. *Id.*

<sup>471</sup> *Khan v. Delta Airlines, Inc.*, No. 10-CV-2080, 2010 WL 3210717, at \*2 (E.D.N.Y. Aug. 12, 2010).

<sup>472</sup> *Id.* The court explained that it "needs only to look to the text of the treaty itself to conclude that the Montreal Convention unambiguously provides for a district court to employ its own procedural rules, which include the doctrine of forum non conveniens." *Id.* (citing *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1058 (11th Cir. 2009)).

it in light of Article 28(1), and this court should hold likewise for MC99 and Article 33.<sup>473</sup> This allowed the court to acknowledge the core reasoning of *Hosaka*, i.e., that reading Article 28(2) as including FNC would conflict with the substantive right to choose one's forum under Article 28(1).<sup>474</sup> Nevertheless, the court distinguished *Hosaka* on the basis that it decided the issue for the Warsaw Convention, while also noting that the changed status of FNC between 1929 and 1999 did not mandate the same conclusion for MC99.<sup>475</sup> The laziness of the court's distinction is unfortunate because there is substance there that will be fleshed out in the Conclusion.

### 3. *The French Connection*

It will be recalled from the Introduction that directly after Judge Ungaro's FNC order was granted in January of 2009, the plaintiffs had commenced proceedings in Martinique whereby they petitioned the Tribunal de Grande Instance (TGI) of Fort-de-France to declare itself without jurisdiction to hear the claim.<sup>476</sup> The plaintiffs maintained that they had not chosen the TGI as their forum and only appeared before it because they were forced to do so by the FNC dismissal of the U.S. district court. It was their view that, under Article 33(1) and Article 46 of MC99, jurisdiction could only vest in a court by act of the plaintiff's choice, and regardless of Article 33(4), this choice of forum cannot be checked by a rule of internal procedural law.<sup>477</sup> Since they had chosen the U.S. district court and not the TGI, the latter thus had no power to assume jurisdiction over the dispute itself. The TGI rejected the plaintiffs' request, which was then affirmed by the cour d'appel.<sup>478</sup> As a last cast of the dice,

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<sup>473</sup> See *id.* at \*3.

<sup>474</sup> Cf. *id.*

<sup>475</sup> *Id.* (citing *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1001 n.17, 1003 (9th Cir. 2002)) ("However, at the time the Warsaw Convention was drafted in 1929, unlike today, the doctrine of forum non conveniens was not firmly established as a procedural doctrine in the majority of the signatory countries. This was a key factor in the *Hosaka* court finding an ambiguity in the treaty and reaching the conclusion that it did.").

<sup>476</sup> See *supra* notes 30–35 and accompanying text.

<sup>477</sup> See Declaration of Casati-Ollier, *supra* note 32, at 8.

<sup>478</sup> The cour d'appel held:

[G]iven that among the fora competent under the Montreal Convention is the court of the place of destination of carriage, namely that of Fort-de-France, the court can only record that the [TGI], the competency of which could not be disputed under cover of lack

the plaintiffs requested review of the decision by the Cour de Cassation in Paris, France.

On December 7, 2011, the Cour de Cassation found in favor of the plaintiffs and quashed the decision of the cour d'appel.<sup>479</sup> The Cour de Cassation's holding with respect to Article 33(1) and Article 46 of MC99 is as follows:

Whereas the choice of jurisdiction raised by the appellant through the abovementioned text is contrary to a dispute being decided by an equally competent jurisdiction other than the one that it has chosen; whereas, in fact, this choice, which has been accompanied by a restrictive list of competent forums in order to reconcile the different interests present, implies, in order to satisfy the objective of foreseeability, security and standardization sought by the Convention of Montreal; whereas the plaintiff, and he alone, has the choice of deciding before which jurisdiction the dispute will in fact be decided, without an internal rule of procedure leading to contradicting his imperative choice being able to be enforced on him.<sup>480</sup>

The thrust of the judgment of the Cour de Cassation was that the scheme of Article 33(1) and Article 46 provides a limited list of forums from which the plaintiff has the right to choose in which to have the dispute decided, and it would be inconsistent with this choice, once made, if another court were to hear the dispute.<sup>481</sup> This scheme was adopted in order to satisfy the purposes of predictability, certainty, and uniformity. Interestingly, the Cour de Cassation did not hold that the Martinique court lacked jurisdiction but rather that it was "currently unavailable" given the plaintiffs' choice of a U.S. forum.<sup>482</sup> By assuming juris-

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of jurisdictional power, is then the sole court with jurisdiction of the dispute between the plaintiffs and the air carriers.

Cour d'appel [CA] [regional court of appeal] Fort-de-France–Martinique, June 25, 2009, 10/239 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. F, at 9.

<sup>479</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. H, at 5.

<sup>480</sup> *Id.* Ex. H, at 4.

<sup>481</sup> See Adeline, *supra* note 44, at 317–18. One French commentator summarized the holding as follows: "The plaintiff has absolute freedom to select the court of his or her choice, as the Montreal Convention ousts the *forum non conveniens* defence. It grants the plaintiff a mandatory and exclusive choice that may not be challenged." *Id.* at 320.

<sup>482</sup> Cour de cassation, 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201 ("DECLARE l'indisponibilité actuelle du for français"), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. H, at 5, 15 (first quoting the English translation and then quoting the original French text) ("DECLARES the current unavailability of the

diction under the circumstances, the court of Martinique violated the terms of MC99.<sup>483</sup>

The Cour de Cassation judgment was made with express reference to Articles 33(1) and 46 of MC99; while Article 33(4) was cited as part of the plaintiffs' grounds for appeal,<sup>484</sup> it is not clear if it featured in the Court's reasoning. It is nowhere referenced directly. If one were being charitable, it could be suggested that consideration of Article 33(4) was implicit in the Court's reference to an "internal rule of procedure."<sup>485</sup> However, in these circumstances, the decision of the Court must be

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French venue"). Adeline observed the unusual concept of "currently unavailable," stating:

"Current non-availability" is an unusual concept, enshrined here for the first time by the Cour de cassation, on an equal footing with the concepts of lack of jurisdiction and authority. It suggests that a French jurisdiction will have to deal with the case if US courts insist on their staying a case, thereby avoiding the denial of justice and securing the sovereignty of foreign courts. No doubt that the phrase "non-availability" was selected to refer to the "available forum" principle, which is a prerequisite to the granting of a *forum non conveniens* motion. Except for situations where another foreign forum is "more convenient," the only option left to US courts about to be removed from a case will be to proceed with it.

Adeline, *supra* note 44, at 322. The affidavit submitted by the defendants containing the declaration of a French legal expert suggested that the French forum remained a viable forum for the litigation in circumstances where no alternative forum exists anywhere else in the world. See Declaration of Casati-Ollier, *supra* note 32, at 12–13. In such circumstances, a French court may accept jurisdiction (even where it would not otherwise have jurisdiction) in order to prevent the risk of a denial of justice. See *id.* at 12. This supports the view that the French Court may have intended "currently unavailable" to keep the door open in case the U.S. court refused to change its mind.

<sup>483</sup> Cour de cassation, 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201, *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. H, at 4.

<sup>484</sup> See Observations à l'appui du pourvoi n° Q 10-30.919 [Remarks in Support of Appeal No. Q 10-30.919] (Bapte Plaintiffs Brief Cour de Cassation), 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. G, at 8.

<sup>485</sup> See Cour de cassation, 1e civ., Dec. 7, 2011, Bull. civ. I, No. 1201 (Fr.), *translated in* Declaration of Casati-Ollier, *supra* note 32, Ex. H, at 4. One commentator, very much on the French side of the debate, holds to this interpretation:

In order to satisfy the foreseeability, certainty, and uniformity objectives pursued by the Montreal Convention, the option implies that the plaintiff alone has a right to decide which court will hear the dispute, and no domestic procedural rule should be invoked that might frustrate his mandatory choice. Here, the Court clearly rejects the reasoning based on Article 33, paragraph 4, of the Montreal Convention.

Adeline, *supra* note 44, at 318.



taken at face value as having been based solely on Article 33(1). In so doing, the Court failed to interpret Article 33(1) in the context of Article 33(4), and this is contrary to the general rule of treaty interpretation laid down by the Vienna Convention.

A further problem with the Cour de Cassation's decision is that it was given without any consideration of the drafting history (*travaux préparatoires*) of MC99; this is not surprising, given the brevity of the Court's judgment.<sup>486</sup> While not mandatory under customary international law—unless the general rule of interpretation does not resolve the ambiguity—the *travaux* may still be referred to in order to confirm the meaning arrived at from application of the general rule.<sup>487</sup> Even where convinced of its interpretation, one would have hoped that in such contentious and perilous circumstances, the Court would exercise its common sense and at least refer to the *travaux* for confirmation. Its refusal to do so, along with its error in failing to consider Article 33(4), leaves the decision open to doubt.

#### IV. CONCLUSION

Although the Cour de Cassation's intervention has given U.S. courts some food for thought about how FNC might operate in a case where the alternative forum is France, the position adopted by U.S. courts on the fundamental issue of the availability of the doctrine under MC99 still takes its lead from Judge Ungaro's opinion in *In re West Caribbean Airways*. It was cited approvingly in 2016 by an Indiana district court in *Dordieski v. Austrian Airlines*<sup>488</sup> and in 2018 by an Illinois district court in *Garcia*

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<sup>486</sup> Mendelsohn and Ruiz levelled heavy criticism at the Cour de Cassation for not carefully examining nor even mentioning the *travaux*, implying that this amounted to an example of judicial irresponsibility. See Allan I. Mendelsohn & Carlos J. Ruiz, *US Court Rebuffs French High Court's Attack on Forum Non-Conveniens Doctrine*, 37 AIR & SPACE L. 325, 330–31 (2012). It should not go without note that Allan I. Mendelsohn was named among counsel for the defendants in *In re West Caribbean Airways*. See *In re W. Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299, 1301 (S.D. Fla. 2007). For similar criticism, see George N. Tompkins, Jr., *The Continuing Development of the Montreal Convention 1999 Jurisprudence*, 37 AIR & SPACE L. 259, 261–62 (2012).

<sup>487</sup> See Vienna Convention, *supra* note 116, art. 32.

<sup>488</sup> *Dordieski v. Austrian Airlines, AG*, No 2:15CV180-PDS/PRC, 2016 WL 4437958, at \*2 (N.D. Ind. Aug. 23, 2016) (“The doctrine of *forum non conveniens* applies equally to claims under the Montreal Convention brought in U.S. courts as it does to cases brought in U.S. courts under U.S. laws.” (citing *In re W. Caribbean Airways*, 619 F. Supp. 2d at 1316–17)).

*v. Aerovias de Mexico*.<sup>489</sup>

It was noted above that Judge Ungaro asked the wrong question in *In re West Caribbean Airways*.<sup>490</sup> Instead of asking whether the reference in Article 33(4) of MC99 to “questions of procedure” was intended by the drafters to include the doctrine of FNC, the question should be whether Articles 33(1) and 33(2) of MC99 were intended to create a substantive right granting plaintiffs the absolute and exclusive option to choose their forum from those available under MC99. If the answer to this question is in the affirmative, then Article 33(4) must be read in a manner consistent with that substantive right, i.e., as only including rules of procedure to the extent that they do not conflict with the substantive provisions of Articles 33(1) and 33(2). With regard to the Warsaw Convention, the courts in *Milor* and *Hosaka* correctly determined that this was the correct understanding of the relationship between Article 28(1) and 28(2). The question now is whether it remains the correct understanding in the case of MC99.

Starting with the text of Article 33 of MC99, we have to conclude that the text is ambiguous because it is capable of yielding two plausible interpretations. The option given to the plaintiff to choose in which of the forums provided in Articles 33(1) and 33(2) to bring an action for damages is either to be regarded as an absolute right of choice—such that the Article 33(4) must be read as precluding the application of a rule of procedure (such as FNC)—or, the option given is not an absolute right of choice but is subject to the application of rules of procedure of the chosen forum, even where they interfere with that right of choice (e.g., FNC). While a purely literal reading of Article 33(4) would indicate the latter interpretation,<sup>491</sup> this would not be a legitimate interpretative approach under customary international law (as codified by the Vienna Convention).

Article 31(1) of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

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<sup>489</sup> *Garcia v. Aerovias de Mex., S.A.*, No. 18 C 5517, 2018 WL 6570461, at \*2 (N.D. Ill. Dec. 13, 2018) (“Article 33 does not provide . . . a selection mechanism powerful enough to trump domestic rules of jurisdiction and procedure.” (citing *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1058 (11th Cir. 2009)) (affirming the district court’s decision in *In re West Caribbean Airways*)).

<sup>490</sup> See *supra* part III.C.1.c.

<sup>491</sup> See MC99, *supra* note 14, art. 33(4).

context and in the light of its object and purpose.”<sup>492</sup> In terms of purpose, it is established above that there is great commonality between MC99 and the Warsaw Convention.<sup>493</sup> MC99 maintains the twofold structure of the Warsaw Convention. Its cardinal purpose remains that of avoiding conflict of laws through the unification of certain rules relating to travel documentation and air carrier liability. We have emphasized throughout this Article that the purpose of uniformity is not all-encompassing but limited to certain (but not all) rules. These rules include the matter of jurisdiction but do not extend, as shown by the language of Article 33(4), to questions of procedure; these are left to *le droit commun*. Yet, in pursuing a line of argument based on the purpose of uniformity, all we really do is rehash the same points that were raised with respect to the Warsaw Convention, which are analyzed in Part II. In the end, it just leads to the same question: Would the drafters have considered FNC as inconsistent with the substantive right granted? If a different answer is going to be found, then it will have to be found where MC99 differs from the Warsaw Convention.

While the cardinal purpose of MC99 may be the same, this Article concludes that the supplementary purpose has evolved substantially from that of the Warsaw Convention.<sup>494</sup> This Article defines the supplementary purpose of the Warsaw Convention as being furtherance of the public interest in the development of air transport whilst striking an equitable balance of interests between carriers, users, and plaintiffs.<sup>495</sup> The balance of interests was fundamentally altered by MC99, most dramatically by its recalibration in light of the interests of plaintiffs-qua-consumers. Now, under MC99, this Article defines its complementary purpose as assurance of an equitable balance between the interests of consumers in international carriage by air, the need for equitable compensation based on the principle of restitution, and the orderly development of international air transport.<sup>496</sup> This change is most strongly reflected in the alterations made to the core liability regime, but it also impacted the jurisdictional regime.

Like the Warsaw Convention, the key features of MC99’s jurisdictional regime reflect two core policy considerations: (1) the

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<sup>492</sup> Vienna Convention, *supra* note 116, art. 31(1).

<sup>493</sup> *See supra* part III.A.2.a.

<sup>494</sup> *See supra* part III.A.2.b.

<sup>495</sup> *See supra* part II.A.3.

<sup>496</sup> *See supra* part III.A.2.b.

need to ensure legal certainty and predictability; and (2) the desire to accommodate the interests and convenience of the parties.<sup>497</sup> Both policies were in evidence with respect to the addition of the fifth jurisdiction. While certainly a concession to the interests of the plaintiff passengers, it was the need to balance those interests against the interests of carriers and consumers in general that received most attention throughout the drafting history.<sup>498</sup> The fifth jurisdiction was fenced in so as to ensure that it would be a predictable forum for carriers and to minimize the risk of forum shopping, which was regarded as synonymous with increased cost to the industry and ultimately to the consumer.<sup>499</sup> It would be wrong to suppose that MC99's jurisdictional regime was recast with the interests of the consumer-qua-plaintiff as king. Although FNC is undoubtedly inimical to the interests of plaintiffs, it can be seen as promoting the orderly development of air transport and the interests of consumers generally (i.e., as distinguished from consumers-qua-plaintiffs). For a time, a codified version of FNC was the favored solution. The truth is that FNC falls on both sides of the plaintiff-carrier scales, and trying to divine the relative weight the drafters would have assigned to its dual manifestation is likely an impossible task. Thankfully, such a task is unnecessary given another significant change between the Warsaw Convention and MC99, i.e., that MC99 has its own drafting history.

As detailed above, in adding the fifth jurisdiction, the drafters specifically turned their minds to the jurisdictional regime of MC99.<sup>500</sup> They engaged in lengthy and in-depth discussion during which the reality of FNC was repeatedly acknowledged and accepted. There was repeated insistence from the United States—the most significant State in terms of aviation litigation—that it applied FNC to WCS cases and would continue to do so under MC99. This was even recognized by other States (including civil law States). When we consider what understanding the drafters would have had of the substantive right granted to plaintiffs to choose their forum under Articles 33(1) and 33(2) of MC99, then an inescapable conclusion imposes itself. Not only was the exercise of the doctrine of FNC *not inconsistent* with that right, it was plainly and openly contemplated by the

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<sup>497</sup> The reader is referred to the discussion of the purpose of the Warsaw Convention's jurisdictional regime, see *supra* part II.B.1.

<sup>498</sup> See *supra* part III.B.2.a.

<sup>499</sup> See *supra* part III.B.2.b.

<sup>500</sup> See *supra* part III.B.2.

drafters. This is the key distinction between MC99 and the Warsaw Convention. With MC99, FNC was clearly within the contemplation of the drafters; therefore, the substantive right granted to the plaintiff under Article 33 was not regarded as absolute in the sense that it would have been by the drafters of the Warsaw Convention. Whatever the precise balance struck between competing interests, it was one struck on the shared understanding of the drafters that FNC may be applied.

By reframing the core interpretational question concerning the applicability of FNC under MC99 onto the nature and extent of the substantive right granted to plaintiffs to choose their forum, rather than on whether the term “questions of procedure” referred to in Article 33(4) was intended to include FNC, this Article reaches the following conclusion. The substantive right under Articles 33(1) and 33(2) of MC99 grants the plaintiff the choice of forum (from those identified) in which to bring an action for damages. In the case of MC99, the plaintiff’s right to choose a forum is not inviolable and absolute. As per Article 33(4), this right is subject to the procedural rules of the court seized of the case, including, where available, a rule of procedure that permits the court to reasonably exercise discretion to decline jurisdiction in favor of one of the alternative forums. FNC is not *prima facie* inconsistent with that right.

Although the reasoning upon which that conclusion is reached is different than that put forth in *In re West Caribbean Airways*, it is essentially in agreement with respect to the outcome. When it comes to the decision reached by the Cour de Cassation, its failure to consider Article 33(1) in its context, specifically Article 33(4), is reason enough to discount it. Furthermore, it would beggar belief if the Cour de Cassation could maintain its position in the light of full consideration of the drafting history. The Cour de Cassation is, as a matter of law, wrong.

Contracting States to MC99 undertook the obligation to make their courts available to claims brought before them in accordance with the jurisdictional regime of Article 33. We have established that FNC is not *prima facie* inconsistent with that regime. That being so, it is submitted that where a court declines to exercise jurisdiction on grounds of FNC and that action is then brought to one of the other forums permitted under MC99, then that other forum cannot invoke the exercise of FNC by the original court as justification for refusal to hear the case itself. To do so, it is suggested, would amount to a

breach by that State of its duty of good faith under customary international law, unless of course that State could justify such action on some other basis. For instance, it could be argued that the application of the particular doctrine of FNC was in violation of MC99 or some other binding norm of international law. Indeed, there is room to argue that certain versions of the doctrine in the United States discriminate between foreign and domestic plaintiffs in a manner inconsistent with MC99.<sup>501</sup>

Even if—as has been proved—FNC is not the interloper to MC99 that it is accused of being, there is still much wrong with it, and we still stand in need for a better solution. Although beyond the scope of this Article, a number of points must be noted about FNC that have been addressed by the author elsewhere or will be addressed in articles to be published in the near future. First, FNC is characterized by a lack of doctrinal uniformity on an international level amongst States that apply it and even at national levels within some of those States (e.g., the United States). Second, FNC drives divisiveness between common law and civil law systems due to the essential differences between those systems with respect to jurisdiction; civilian lawyers' contempt for FNC should not be underestimated. It is unlikely civilian States will find the resolution of the doctrinal conundrum regarding the availability of FNC within MC99 to be a sufficient reason to acquiesce to the employment of FNC by the courts of common law States. Third, because the doctrine has become liberalized in the past fifty years, the consequence is that litigation over where to sue has become more and more prevalent, with resulting social and economic costs. These do not portend a happy future.

FNC and MC99, *quo vadis?* Before we attempt to answer this question, we should first reflect further about where it is we think we are. Things would have been so much easier had this Article reached the conclusion that FNC is not available under MC99. The issues noted in the previous paragraph would seemingly disappear. So, is the answer simply to jettison FNC from MC99 altogether? Whether this be done by amendment or by judicial fiat, the express exclusion of the possibility for a court to decline to exercise jurisdiction properly vested in it by MC99 is certainly an option to consider. FNC is, after all, only a common

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<sup>501</sup> See generally Cluxton, *supra* note 411, at 73–91 (on the potential for certain doctrines of FNC to discriminate against foreign claimants).

law doctrine, and so many of the world's legal systems appear to do just fine without it.

Attractive as this solution might be, it fails to consider at least one crucial factor. At this particular point in time, it is the common law courts, specifically those of the United States, which are the primary locations for aviation litigation. That being so, FNC plays an important role in keeping down the cost of aviation accidents. This is clearly advantageous to the aviation industry, the benefit of which is ultimately felt by the fare-paying public, albeit at the expense of plaintiffs. However, do plaintiffs really suffer by having their compensation assessed by the court with the closest connection to, and greatest interest in, the accident and its litigation? In the case of *In re West Caribbean Airways*, was it not more equitable for all concerned that the courts of the plaintiffs' domicile (i.e., Martinique) assess the level of damages rather than a foreign court?

The truth is that while FNC is a problem within MC99 litigation, it is not *the* problem. In truth, FNC is itself an attempted cure to an underlying illness. In essence, it is just a doctrinal mechanism for resolving a dispute between the parties to litigation over choice of forum. While it is plaintiffs who have the initiative in choosing their forum under MC99, the defendant can inject itself into the process through the use of FNC. FNC just provides a litigational battleground for the parties' disputes over choice of forum. This is the real problem, i.e., choice of forum. If we hope to find a solution to the manner in which choice of forum is regulated by MC99, then we must conduct a closer analysis of the competing interests involved, those of the plaintiff passenger and defendant carrier. This is a subject for another day, but it is submitted that when this interests analysis is done, it reveals a bigger picture that goes far beyond WCS or MC99 and far beyond the apparent two-party paradigm of plaintiff passenger versus defendant carrier upon which these Conventions are built. WCS and MC99 are not hermetically sealed systems insulated and protected from outside influence; they are just parts of a larger aviation accident passenger compensation system. Indeed, it is the very failure of MC99 to adapt itself to the reality of its place within this larger system that is a prime contributor to the discontent felt with respect to choice of forum. Successful solutions will only be found by engaging with this bigger picture.