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Wise Up! Why It's Time to Dump *Reed v. Wisser* and Get Real about Third-Party Actions

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WISE UP! WHY IT'S TIME TO DUMP *REED V. WISER* AND GET REAL ABOUT THIRD-PARTY ACTIONS

DAVID CLUXTON*

ABSTRACT

The Warsaw Convention of 1929 and the Montreal Convention of 1999 (Conventions) are international treaties governing the liability of the air carrier for damage arising during international carriage by air, e.g., passenger death or bodily injury. The foundation for the applicability of these Conventions is the contract of carriage. However, given the nature of the air transport operations and their technological complexity, a given accident can result from several causes attributable to different parties. The plaintiff (e.g., the passenger) may have the option of suing, not only the carrier based on the contract of carriage, but, alternatively, an airframe or component manufacturer, or an aviation service provider (e.g., airport or air traffic service provider), or even an employee or agent of the air carrier. These alternative defendants are third parties to the contract of carriage; as such, the Conventions do not apply to these claims. Where a plaintiff opts to sue a third party to the contract of carriage, that third party will often bring a third-party action for contribution or indemnification against the air carrier. The dilemma raised by such actions is whether the Conventions apply to them. If not, the risk arises that the provisions of those Conventions

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(e.g., monetary limitations of liability) will not apply, although they would have had the plaintiff to the main action sued the carrier directly. This would mean that the Conventions may be effectively circumvented and their purposes defeated.

There is judicial division on the matter, both within the United States and internationally. This Article aims to identify and critically evaluate the doctrinal foundations of the competing arguments for and against the applicability of the Conventions to third-party actions and to establish which is doctrinally correct. It starts by examining how courts (and the international community) have treated the applicability of the Warsaw Convention to actions brought against employees and agents of the air carrier. Attention then turns to the related matter of the applicability of the Conventions to third-party actions for contribution or indemnification taken against air carriers; it identifies two distinct approaches taken by courts: the orthodox approach and the alternative approach. The thesis of this Article is that the favoring by U.S. courts of the alternative approach is the result of a doctrinal misstep traceable to the Second Circuit's decision in *Reed v. Wiser*. This Article exposes the weakness of the Second Circuit's reasoning and reveals the true policy justifications for the decision. This Article proves that these policies, although compelling at the time, no longer hold water and that, instead, the more doctrinally sound doctrine of the orthodox approach should be followed—a conclusion supported by recent decisions of some U.S. courts, as well as decisions from Australia and the United Kingdom. Although this would give rise to some invidious problems, this Article argues that only by freeing ourselves of the baneful influence of *Reed v. Wiser* and thereby setting ourselves back on a sound doctrinal footing can we hope to get real about third-party actions and find a solution to the problems posed by them.

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I. INTRODUCTION

ON MAY 2, 2006, ARMAVIA AIRLINES (Armavia) Flight 967 was flying at night over the Black Sea close to its destination of Sochi, Russia, having earlier departed from Yerevan in Armenia.¹ The aircraft was an Airbus A320, registered in Armenia, operated by an Armenian airline, but owned by a Cayman Islands legal entity.² The flight crew decided earlier in the flight to return to Yerevan because of poor weather conditions that were causing low visibility at Sochi, but they changed their mind upon receiving an updated weather report.³ However, on approach to land at Sochi, the visibility dropped below established minima, and the controller instructed the crew to abandon the landing and ascend to 600 meters.⁴ In attempting to perform the climbing-out maneuver, the aircraft collided with the water, killing all 113 people on board.⁵

The Air Accident Investigation Commission of the Interstate Aviation Committee (IAC) conducted an accident investigation.⁶ While not produced for the purpose of apportioning

¹ For an account of the facts, see INTERSTATE AVIATION COMM., AIR ACCIDENT INVESTIGATION COMM'N, FINAL REPORT ON THE INVESTIGATION INTO THE ACCIDENT INVOLVING THE ARMAVIA A320 NEAR SOCHI AIRPORT ON 3 MAY 2006, at 7–8 (2006) [hereinafter FINAL REPORT: ARMAVIA], <https://www.bea.aero/docs/2006/ek-9060502/pdf/ek-9060502.pdf> [<https://perma.cc/FNV2-E8NK>].

² *Id.* at 10–11.

³ *Id.* at 7.

⁴ *Id.* at 7–8.

⁵ *Id.* at 8.

⁶ The Interstate Aviation Committee (IAC) is an executive body established under a treaty between twelve States and whose responsibilities include accident investigation. *Id.* at 2, 6; *About IAC: Interstate Aviation Committee*, INTERSTATE AVIATION COMM., <https://mak-iac.org/en/o-mak/> [<https://perma.cc/9SRQ-HAMH>]. The current membership of the IAC includes Armenia, Azerbaijan, Be-

blame or liability, the IAC accident report noted several shortcomings with the crew's performance and the airline's management.⁷ It is worthwhile noting that the report addressed several recommendations to the aircraft manufacturer, Airbus.⁸

As a qualifying international flight, the liability of the airline for the carriage of passengers by air came under the terms of an international treaty from 1929, the Convention for the Unification of Certain Rules Relating to International Carriage by Air, better known as the Warsaw Convention.⁹ It may be surprising that a convention from 1929 should govern an accident occurring in 2006, especially since a successor convention had been concluded in 1999, i.e., the Montreal Convention 1999 (MC99).¹⁰ However, at the time of the accident, neither the Russian Federation nor Armenia was party to MC99, but they were both signatories to the Warsaw Convention, and hence it was the applicable instrument.

While the Warsaw Convention operates on the basis of a presumption of fault of the carrier,¹¹ it has a notoriously low monetary limitation on liability for passenger death and injury

larus, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. *Member Countries of Agreement*, INTERSTATE AVIATION COMM., <https://mak-iac.org/en/> [<https://perma.cc/FDW4-U7ME>].

⁷ See FINAL REPORT: ARMAVIA, *supra* note 1, at 52–53.

⁸ The text reads,

To Airbus:

- To eliminate the discrepancies in the documentation describing the logic of the binary signals recorded by the FDR.
- To introduce in the A320 FCOM information clarifying specific features of activation of the OPEN CLIMB mode in various flight conditions.
- To introduce in the A320 FCOM a warning about possible activation of the LOW ENERGY WARNING, when the aircraft performs manoeuvres in the landing configuration with considerable changes in pitch and roll angles.
- To review the expediency of alteration of the type and/or priority of the EGPWS warning to ensure more reliable pilots' response to its activation.

Id. at 55.

⁹ See generally 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].

¹⁰ See Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. No. 13,083, 2242 U.N.T.S. 309 [hereinafter MC99].

¹¹ See Warsaw Convention, *supra* note 9, art. 17.

claims—it provides only 125,000 Franc Poincaré,¹² equivalent in 1934 to approximately U.S. \$8,300.¹³ This figure was doubled in 1955 by the Hague Protocol to the Warsaw Convention,¹⁴ rising to 250,000 Franc Poincaré, equivalent to approximately U.S. \$16,600.¹⁵ However, this higher—although still woefully inadequate—limit is only applicable where the flight in question is between States that have both ratified the Hague Protocol.¹⁶ At the time of Armavia Flight 967, Russia had ratified the Hague Protocol, but Armenia had not;¹⁷ hence, only the unamended Warsaw Convention applied.

The Warsaw Convention's monetary limitations can only be broken in exceptional circumstances, e.g., where the plaintiff can prove the carrier was guilty of willful misconduct.¹⁸ Thus, in the *Armavia* case, the plaintiffs would likely have struggled to recover in excess of the Warsaw limits. Nevertheless, Armavia's insurers agreed to settle passenger claims based on the limits provided under the Hague Protocol.¹⁹ Those passengers who chose to settle on these terms acknowledged their full indemnification and released the airline *and* Airbus from any future claims.²⁰ However, some plaintiffs elected not to settle and instead brought proceedings in products liability against Airbus

¹² *Id.* art. 22(4). The Franc Poincaré was named after French Prime Minister Raymond Poincaré and is a unit of account (originally identical to the French franc) defined as 65.5 milligrams of gold at the standard of fineness of nine hundred thousandths. *See id.* For a short account of the conversion of the monetary limitations of the Warsaw Convention and subsequent instruments in that system, see LAWRENCE B. GOLDBIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 123–25 (2d ed. 2000).

¹³ GOLDBIRSCH, *supra* note 12, at 125.

¹⁴ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, art. XI, Sept. 28, 1955, 478 U.N.T.S. 373 [hereinafter Hague Protocol].

¹⁵ GOLDBIRSCH, *supra* note 12, at 124.

¹⁶ *See, e.g.*, *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307–10 (2d Cir. 2000).

¹⁷ Int'l Civ. Aviation Org. [ICAO], *Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at the Hague on 28 September 1955*, https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf [<https://perma.cc/RC9Z-TDTN>].

¹⁸ *See* Warsaw Convention, *supra* note 9, art. 25(1).

¹⁹ P.M.J. Mendes de Leon, *Jurisdiction Under and Exclusivity of Private International Air Law Agreements on Air Carrier Liability: The Case of Airbus versus Armavia Airlines (2013)*, in *FROM LOWLANDS TO HIGH SKIES – A MULTILEVEL JURISDICTIONAL APPROACH TOWARDS AIR LAW* 261, 263 (P.M.J. Mendes de Leon ed., 2013).

²⁰ *Id.*

before the courts of Toulouse, France.²¹ From the plaintiffs' perspective, a claim against Airbus was preferable in the circumstances because it provided the possibility of recovering under broad heads of damage without the monetary limits of the Warsaw Convention.²² In addition, a products liability claim against Airbus would permit the plaintiffs to sue in France, as opposed to being restricted to sue in either Russia or Armenia by the jurisdictional scheme of the Warsaw Convention.²³

Airbus sought to join Armavia to the litigation brought against it in France by bringing a third-party action against the airline for indemnification.²⁴ Armavia challenged the jurisdiction of the French court, essentially arguing that Armavia could not be made a party to the litigation of passengers' claims before the court of a jurisdiction not provided for under the Warsaw Convention.²⁵ Airbus maintained the view that the Warsaw Convention applied only to claims between the airline and passengers,

²¹ Laurent Chassot, *Le Domaine de la Responsabilité du Transporteur Aérien International à la Lumière de Deux Décisions Récentes* [The Field of the Liability of the International Air Carrier in Light of Two Recent Decisions], 227 REVUE FRANÇAISE DE DROIT AÉRIEN ET SPATIAL [R.F.D.A.S.] 5, 22 (2016) (Fr.).

²² *Id.*

²³ *See id.* The Warsaw Convention prescribes the places in whose courts an action under the Warsaw Convention can be taken. Warsaw Convention, *supra* note 9, art. 28(1) ("An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.").

²⁴ This action was tort-based. *See* Mendes de Leon, *supra* note 19, at 265. Airbus apparently did not have a contractual indemnity from Armavia. *Id.* It is not clear why Airbus did not seek to rely upon the contractual indemnity it had from the purchaser of the aircraft. In some cases, such a situation may arise where the same insurer covers the purchaser and manufacturer, thus being in their interest to transfer some liability to a different insurer. For some discussion on the strategies employed by defendants via third-party actions, see David Cluxton, *Choice of Forum in Passenger Claims Under the Montreal Convention 1999: A Two-Dimensional Solution to a Three-Dimensional Problem*, 49 SYRACUSE J. INT'L L. & COM. (forthcoming 2022) (on file with author).

²⁵ Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Toulouse, 4e ch., civ., May 31, 2011, 08/01762 (Fr.); Cour d'appel [CA] [regional court of appeal] Toulouse, civ., Mar. 12, 2013, 11/03207 (Fr.); *see also* Chassot, *supra* note 21, at 22. France was not one of the four jurisdictions available under the Warsaw Convention. *See* Warsaw Convention, *supra* note 9, art. 28(1). Armavia's place of incorporation and its principal place of business were Yerevan, Armenia. *Armavia Airlines*, SKYBRARY, <https://skybrary.aero/operator/armavia-airlines> [<https://perma.cc/NH76-K2UR>]. The place of contract through which the contract would have been made was, in most cases, Armenia; in no case was it in France. The place of destination was dependent on the ticket of the

that it did not apply to its third-party action against the carrier, and as such, that the French courts had jurisdiction under national law.²⁶

In essence, Armavia was imploring the courts not to allow Airbus to separate the third-party action from the underlying passenger tort action against the carrier. In so doing, Armavia maintained that the former was derivative of the latter. Furthermore, Armavia argued that if it were added to the litigation as a third-party defendant, then the plaintiffs would effectively be able to circumvent the application of the Warsaw Convention.²⁷ How so? Because the plaintiffs would indirectly establish jurisdiction over Armavia before the courts of France with the possibility being that if the result of the litigation were that Armavia had to indemnify Airbus, then the carrier would be made liable to the passenger (albeit indirectly) in a manner not in accordance with the provisions of the Warsaw Convention.²⁸ It was submitted that this would be contrary to the express language of Article 24 of the Warsaw Convention, which provides that “any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.”²⁹ The implication being that the plaintiffs were taking advantage

passenger in question, but in most cases, it would have been either Sochi or Yerevan. See FINAL REPORT: ARMAVIA, *supra* note 1, at 6.

²⁶ See Mendes de Leon, *supra* note 19, at 264. The French court’s jurisdiction was founded on Article 333 of the Code de Procédure Civile, which provides: “*Le tiers mis en cause est tenu de procéder devant la juridiction saisie de la demande originaire, sans qu’il puisse décliner la compétence territoriale de cette juridiction, même en invoquant une clause attributive de compétence.*” [The third party summoned is bound to act before the court to which the original claim is brought without being able to challenge the territorial jurisdiction of the court even by relying upon a jurisdiction clause.] Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 333 (Fr.).

²⁷ See Mendes de Leon, *supra* note 19, at 266.

²⁸ See *id.*

²⁹ Warsaw Convention, *supra* note 9, art. 24; see Mendes de Leon, *supra* note 19, at 272 (“Airbus did not exercise a personal cause of action against Armavia Airlines as its claim for indemnification is designed to involve the liability of the airline with the damages caused to the passengers. Indeed, neither Article 24—as to which see the words ‘however founded’—nor Article 28 of the Warsaw Convention distinguish between the causes of action pursuant to which the passenger or their relatives make claims for damages engaging the liability of the air carrier. Hence, the convention applies to *all* claims made against the carrier, whoever the claimant is and whatever cause of action it chooses for its claim.”). Mendes de Leon submitted an affidavit to the French courts in support of Armavia Airlines and is not, therefore, an entirely disinterested party. See Cour d’appel [CA] [regional court of appeal] Toulouse, civ., Mar. 12, 2013, 11/03207 (Fr.).

of a procedural loophole to deprive the carrier of the protections accorded it under the Warsaw Convention.

Armavia was successful at first instance and also on appeal.³⁰ These courts considered Airbus's third-party action as an attempt to engage the liability of the carrier for damages caused to passengers.³¹ The Toulouse Court of Appeal claimed that, contrary to Airbus's argument, Airbus does "not exercise a personal right of action against Armavia Airlines since its recourse in warranty aims to engage the liability of Armavia Airlines, an air carrier, for the damage caused to passengers."³² In essence, these courts read the Warsaw Convention as making no distinction between the capacity in which a carrier may be sued or the identity of the party suing, and therefore, the Warsaw Convention must be regarded as governing all claims against a carrier.³³

³⁰ Chassot, *supra* note 21, at 22–23; see Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Toulouse, 4e ch., civ., May 31, 2011, 08/01762 (Fr.); Cour d'appel [CA] [regional court of appeal] Toulouse, civ., Mar. 12, 2013, 11/03207 (Fr.).

³¹ Some commentary and extracts of the initial decisions can be found in Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Toulouse, 4e ch. civ., May 31, 2011, 08/01762 (Fr.) and Cour d'appel [CA] [regional court of appeal] Toulouse, civ., Mar. 12, 2013, 11/03207 (Fr.). See also Mendes de Leon, *supra* note 19, at 272. The Toulouse Court of Appeal also supported its decision by reference to the purpose of the Warsaw Convention as achieving uniformity of law. Cour d'appel [CA] [regional court of appeal] Toulouse, civ., Mar. 12, 2013, 11/03207 (Fr.) ("*Enfin l'objet de la convention de Varsovie (pour l'unification de certaines règles relatives au transport aérien international) était notamment de formuler une règle internationale uniforme en matière de compétence juridictionnelle.*" [Finally, the purpose of the Warsaw Convention (for the unification of certain rules relating to international air transport) was, among other things, to formulate a uniform international rule on the matter of jurisdiction.]).

³² Cour d'appel [CA] [regional court of appeal] Toulouse, civ., Mar. 12, 2013, 11/03207 (Fr.) ("*Cependant, contrairement à ce que la SAS AIRBUS prétend, elle n'exerce pas un droit d'action personnel à l'encontre de la Compagnie Armavia Airlines puisque son recours en garantie vise à engager la responsabilité de la Compagnie Armavia Airlines, transporteur aérien, pour les dommages causés aux passagers.*" [Nevertheless, contrary to what Airbus SAS claims, it does not exercise a personal right of action against Armavia Airlines since its recourse in warranty aims to engage the liability of Armavia Airlines, an air carrier, for damage caused to passengers]).

³³ The Toulouse Court of Appeal held:

Or ni l'article 24 ni l'article 28 [de la Convention de Varsovie] ne font de distinction selon le titre auquel le transporteur aérien se trouve assigné ni selon la personne qui recherche la responsabilité du transporteur.

Il y a lieu dès lors de considérer que les dispositions de la convention doivent régir toute action contre le transporteur, quelles que soient les personnes qui mettent en cause cette responsabilité et le titre auquel elles prétendent agir.

[However, neither Article 24 nor Article 28 [of the Warsaw Convention] makes a distinction according to the capacity in which the air

However, Airbus appealed to the *Cour de Cassation* (the supreme court for judicial matters in France).

Parsimonious as ever, the judgment of the *Cour de Cassation* reads: “Attendu que l’appel en garantie du constructeur d’aéronefs contre le transporteur aérien ne relève pas du champ d’application de la Convention de Varsovie et, partant, échappe aux règles de compétence juridictionnelle posées en son article 28.” [Whereas the warranty claim by the aircraft manufacturer against the air carrier does not fall within the scope of the Warsaw Convention and, therefore, falls outside the jurisdictional rules laid down in its Article 28.]³⁴ In essence, the *Cour de Cassation* held that the Warsaw Convention’s jurisdictional provisions did not apply to the third-party action.³⁵ Consequently, Armavia could not contest the jurisdiction of the French courts to hear Airbus’s third-party action.³⁶ As is so often the case in international aviation litigation, resolution of the choice of forum was likely outcome-determinative in the Armavia case. Once it was clear that the jurisdiction of the French courts could not be disturbed, it is likely that Armavia—in reality, its insurers—opted to settle at that point.

This issue is not limited to the Warsaw Convention; it also arose in litigation taken under MC99. *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, concerned claims brought by the representatives of decedent passengers of Air France Flight 447.³⁷ The majority of the plaintiffs were non-U.S. domiciliaries, for whom jurisdiction against the airline did not exist in the United States.³⁸ Instead, these plaintiffs brought tort actions in U.S. courts against several U.S. component manufacturers, and these actions were consolidated before the District Court for the Central District of California.³⁹ The defendant manufacturers

carrier may be sued, nor according to the person who seeks the liability of the carrier.

It should therefore be considered that the provisions of the Convention must govern any action against the carrier, regardless of the persons who maintain the action for liability and the capacity in which they claim to act.].

Id.

³⁴ *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., Mar. 4, 2015, Bull. civ. I, No. 48 (Fr.).

³⁵ *Id.*

³⁶ *See id.*

³⁷ 760 F. Supp. 2d 832, 835 (N.D. Cal. 2010).

³⁸ *See id.* at 836.

³⁹ *See id.* at 841.

brought third-party actions against Air France for indemnification or contribution.⁴⁰ In considering a motion to dismiss the case on the grounds of forum non conveniens (FNC), the court noted that a potential tension with MC99 would arise if it held that MC99 did not cover the third-party claims against the carrier.⁴¹ The cause of this potential tension was twofold: first, the airline would not be presumptively liable to the plaintiffs, as contemplated by MC99; second, it would undermine the jurisdictional provisions of MC99 by forcing Air France to indirectly answer the passengers' claims in a forum not provided by the Warsaw Convention.⁴² The court determined that an FNC dismissal could avoid this "tension."⁴³ Therefore, the court did not have to rule on the applicability of MC99 to third-party actions. However, other U.S. courts have reached decisions on this question, and those decisions are not all of one voice. Most have held that the Warsaw Convention or MC99 does apply, but a smaller number have concluded that it does not.⁴⁴ When we add to the mix that the courts of Canada and Australia have reached the view that the Warsaw Convention or MC99 do not apply to third-party actions,⁴⁵ we can see the lack of uniformity posed in such a state of affairs—something one would think is inimical to conventions whose very titles refer to the unification of certain rules.

This Article aims to identify and critically evaluate the doctrinal foundations of the competing arguments for and against the applicability of the Warsaw Convention and MC99 to third-party actions and to establish which is doctrinally correct.

A. OVERVIEW

Including this Introduction, this Article is divided into four parts. Part II begins by tackling the question of the applicability of the Warsaw Convention to third-party actions. The Warsaw Convention was agreed upon in 1929 and was subsequently the subject of various amending protocols, a supplementary conven-

⁴⁰ *Id.* at 844–45, 847.

⁴¹ *Id.* at 846–47.

⁴² *Id.*

⁴³ An FNC dismissal would avoid this tension because jurisdiction would exist against Air France in France for all claims. *Id.* at 846 (“This avoids potential tension with the MC created by the Manufacturing Defendants’ attempts to sue Air France as a third-party Defendant in the foreign Plaintiffs’ actions.”).

⁴⁴ See cases discussed *infra* Sections II.B, III.A.

⁴⁵ See cases discussed *infra* Sections II.B, III.A.

tion, and various inter-carrier agreements—all collectively referred to as the Warsaw Convention System (WCS).⁴⁶ Although WCS has now been modernized and consolidated by MC99, attention to the predecessor system is essential for at least two reasons. First, it remains in force, as exemplified by the *Armavia* case. Second, although MC99 is a new treaty neither supplemental to nor an amendment of WCS, there is a great deal of commonality between them. Many of MC99's provisions were taken with little or no alteration from WCS. It is clear that the drafters intended to hold onto the valuable jurisprudence built up around WCS and where the texts are “substantively the same, courts rely upon WCS jurisprudence to interpret MC99.”⁴⁷ The provisions of MC99 relevant to the issues explored in this Article

⁴⁶ The term Warsaw Convention System (WCS) refers to the general body of instruments built around the Warsaw Convention, including the following: Warsaw Convention, *supra* note 9; Hague Protocol, *supra* note 14; 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 [hereinafter Guadalajara Convention]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as Amended, Mar. 8, 1971, 10 I.L.M. 613 [hereinafter Guatemala City Protocol]; Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2097 U.N.T.S. 23 [hereinafter MAP1]; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2097 U.N.T.S. 64 [hereinafter MAP2]; Additional Protocol No. 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, ICAO Doc. 9147 [hereinafter MAP3]; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2145 U.N.T.S. 31 [hereinafter MAP4]. WCS also includes several intercarrier agreements, including the Montreal Agreement of 1966 and the IATA inter-carrier agreements of 1992–1995; the text of these and others is available in Int'l Air Transp. Ass'n [IATA], *Essential Documents on International Air Carrier Liability* (3d ed. 2012).

⁴⁷ DAVID CLUXTON, AVIATION LAW CAUSE OF ACTION EXCLUSIVITY IN THE WARSAW AND MONTREAL CONVENTIONS 132–33 (2022) (citing *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 205 (E.D.N.Y. 2012) (“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.”); *Baah v. Virgin Atl. Airways Ltd.*, 473 F. Supp. 2d 591, 596 (S.D.N.Y. 2007) (“[T]his Court has previously relied on cases interpreting a provision of the Warsaw Convention where the equivalent provision in the Montreal Convention was substantively the same.”); *Thibodeau v. Air Can.*, [2014] 3 S.C.R. 340, para. 31 (Can.) (“The purposes of the *Warsaw Convention* and of the *Montreal Convention* were the same and decisions and commentary respecting the *Warsaw Convention* are therefore helpful in understanding those purposes.”).

are no exception; they too are consolidated from WCS. For these reasons, the emphasis placed on the applicability of the Warsaw Convention to third-party actions in Part II is entirely justified.

To determine what place, if any, third-party actions have within WCS and MC99, Part II begins by looking at the question of the applicability of these regimes to actions brought against agents, servants, employees, etc. of the carrier, whom we shall hereinafter refer to as *préposés*—for reasons explained below. Such actions are actions against third parties, insofar as the defendant is a third party vis-à-vis the contract of carriage between the passenger and carrier. The distinction involved here is critical. When a passenger sues the agent of the carrier, they are suing a third party, although it is not a third-party action. However, a third-party action may well arise from such litigation, e.g., where the third party (to the contract of carriage) decides to seek contribution or indemnification from a third party (to the main action), e.g., the carrier.

We begin with the question of the applicability of WCS to actions against a carrier's *préposé* because it was in the context of these that the issue of third-party actions first arose. Another reason for starting with actions taken against a carrier's *préposés* is because this was the specific issue at play in the case of *Reed v. Wiser*, the study of which is key to this Article. In that case, opposing views were reached on this matter by the trial court in *Reed v. Wiser*, 414 F. Supp. 863 (S.D.N.Y. 1976), *rev'd* 555 F.2d 1079 (2d Cir. 1977) (*Reed I*) and the U.S. Court of Appeals for the Second Circuit in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), *rev'g* 414 F. Supp. 863 (S.D.N.Y. 1976) (*Reed II*).

Actions against *préposés* posed a problem for the Warsaw Convention. Simply put, if a plaintiff sues a *préposé*, instead of the carrier, then in all likelihood the *préposé* will bring a third-party action against the carrier. The problem raised by such actions was that if the Warsaw Convention was not applied to actions against the *préposé*, then the plaintiff could effectively circumvent the Warsaw Convention's provisions, including its monetary limitations. In order to avoid undermining the goals of the Warsaw Convention, this *préposé* problem necessitated action, and the responses taken by the international community, on the one hand, and by the U.S. courts, on the other hand, are presented in the first two subsections of Section II.A. The third subsection of Section II.A is subsidiary in purpose; it provides a brief sum-

mary of the position adopted under MC99 with respect to actions taken against *préposés*.

With the background issue of the applicability of the Warsaw Convention to *préposés* presented, Section II.B directly addresses the applicability of the Warsaw Convention to third-party actions. It describes two approaches to the issue: the orthodox approach that maintains that the Warsaw Convention *does not apply* to third-party actions, and the alternative approach that holds the opposite, i.e., that the Warsaw Convention *applies* to third-party actions. Greater attention is devoted to the latter approach, as it has predominantly been the approach adopted by U.S. courts. This Article's thesis is that the alternative approach is predicated on the rationale established by the Second Circuit in *Reed II*. This Article conducts a thorough critique of the U.S. case law, with special attention being paid to one case in particular which attempted to buck the trend (i.e., *Mitchell, Shackleton & Co. v. Air Express International, Inc.*).⁴⁸ Thereafter, two outlier decisions of two U.S. District Courts are analyzed; they are described as outliers because they clearly do not fit within the alternative approach, but neither can they simply be subsumed within the orthodox approach; aspects of these decisions require bespoke attention be paid to them, and this is provided in Section II.B.3. These two cases also merit separate attention because they demonstrate that the U.S. courts are not of one mind on the applicability of the Warsaw Convention to third-party actions.

Part III turns attention to MC99 and the question of its applicability to third-party actions. To begin, the U.S. courts went with the flow and continued to apply the alternative approach that they had applied to the majority of Warsaw Convention cases. Indeed, this was the position adopted by the U.S. District Court for the Central District of California in *Chubb Insurance Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*⁴⁹ (*Chubb I*). However, the proverbial cat would be set amongst the pigeons in 2011 when *Chubb I* reached the U.S. Court of Appeals for the Ninth Circuit.⁵⁰ Section III.A examines the *Chubb* case closely, especially the Ninth Circuit's decision to reverse the U.S. courts'

⁴⁸ 704 F. Supp. 524 (S.D.N.Y. 1989).

⁴⁹ No. CV 06-7267, 2008 WL 11357925 (C.D. Cal. Jan. 14, 2008), *rev'd*, 634 F.3d 1023 (9th Cir. 2011).

⁵⁰ *Chubb Ins. Co. of Eur. S.A. v. Menlo Worldwide Forwarding, Inc. (Chubb II)*, 634 F.3d 1023 (9th Cir. 2011), *rev'g* No. CV 06-7267, 2008 WL 11357925 (C.D. Cal. Jan. 14, 2008).

long-held commitment to the alternative approach to third-party actions. It is no secret that the Author views the Ninth Circuit's position to be the correct one, however, there are a number of critical observations and caveats that must be made in respect of the decision. In this context, reference will be made to a 2012 decision of the Court of Appeal for New South Wales, Australia, in the case of *United Airlines Inc v Sercel Australia Pty Ltd*.⁵¹ This case provides additional support for the correctness of the Ninth Circuit's approach. In addition, although not yet the subject of a judicial decision in the United Kingdom (U.K.), we might divine something of how the U.K. courts would treat the question of the applicability of the Warsaw Convention and MC99 to third-party actions by examining how the English Court of Appeal dealt with that question in the context of a very similar convention, i.e., the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea,⁵² in the case of *Feest v. South West Strategic Health Authority*.⁵³

Part IV of this Article summarizes the analysis conducted in this Article and present its conclusions on the question of the applicability of WCS and MC99 to third-party actions. In so doing, it will be necessary to engage with some policy considerations. However, the Author wishes to stress that this Article's goal is to reveal and critically assess the doctrinal issues at play and, only where it is expedient to do so, to broach questions of policy. In other words, the concern herein is determining if WCS or MC99 applies to third-party actions, not whether they should apply.

⁵¹ [2012] NSWCA 24 (Austl.).

⁵² Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Dec. 13, 1974, 1463 U.N.T.S. 19 [hereinafter Athens Convention].

⁵³ [2015] EWCA (Civ) 708 [15]–[21], [2016] QB 503 (Eng.).

II. THE APPLICABILITY OF WCS TO THIRD-PARTY ACTIONS

A. THE *PRÉPOSÉ* PROBLEM

Both common law⁵⁴ and civil law⁵⁵ systems provide for vicarious liability of the master for their auxiliary.⁵⁶ But, one impor-

⁵⁴ John Salmond stated in his work *Jurisprudence*: “In general only those acts of the agent are imputed by the law to the principal, which are within the limits of the agent’s authority as thus created and circumscribed.” JOHN SALMOND, JURISPRUDENCE 332 (Glanville L. Williams ed., 10th ed. 1947). However, vicarious liability can also arise without authorization (whether express or implied) and even where the master has expressly forbidden the wrongful act. *See id.* at 413. The principle of vicarious liability is often identified with the Latin maxim *qui facit per alium facit per se*, or by its simpler cognate, *respondeat superior*. *See id.* at 414. Whatever one calls it, the principle (at least for present purposes) was described in plain terms by Salmond: “[M]asters are responsible for the acts of their servants done in the course of their employment.” *Id.* at 413. Regarding the justification for vicarious liability, see generally Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161 (1954). *See also* Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 120–21 (1916).

⁵⁵ The generalized civilian law position is that the master is liable for the acts or omissions the *préposé* committed within the scope of the *préposé*’s employment. The civil law approach to vicarious liability can be illustrated by the use of the French Civil Code (first promulgated in 1804). Article 1242 (formerly Article 1384) of the French Civil Code is of specific relevance since it contemplates the circumstances in which a person may be held liable for the acts of another. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1242 (Fr.). The first paragraph (*alinéa*) of Article 1242 provides: “*On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde.*” [One is liable not only for the harm which one causes by one’s own action, but also for that which is caused by the action of persons for whom one is responsible, or of things which one has in one’s keeping.] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1242 (Fr.), translated in French Civil Code 2016, TRANS-LEX (Feb. 10, 2016), https://www.trans-lex.org/601101/_/french-civil-code-2016/ [<https://perma.cc/PG5X-R34U>]. Some specific instances are then provided. The fifth paragraph of Article 1242 is of particular note in the present context: “*Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.*” [Masters and employers, for harm caused by their servants [*domestiques*] and employees [*préposés*] within the functions for which they employed them.] *Id.* This is a form of strict liability of the master for the negligence of the master’s *domestiques* and *préposés*, i.e., vicarious liability. Under French law, the *préposé* is only open to personal liability to the injured party in *delict* (i.e., because of the *préposé*’s wrongful conduct or lack of action) in accordance with Articles 1240 and 1241 (formerly Articles 1382 and 1383) of the French Civil Code. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1240, 1241 (Fr.). To hold the master vicariously liable, it is thus necessary that the plaintiff prove the fault of the *préposé*. *See id.* arts. 1240–42.

⁵⁶ The term *auxiliary* is used only as a means of collectively referring to agents, employees, servants, contractors, *préposés*, etc. It is not intended to convey a specific juridical meaning. *See* RENÉ H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 45 (1981).

tant distinction between the two systems has created some controversy within the context of WCS. The authentic French text of the Warsaw Convention employs the term *préposé*, translated as *agent* in the U.S. and U.K. translations of the Warsaw Convention,⁵⁷ and as *servant and agent* in the Hague Protocol.⁵⁸ However, neither of the English translations are adequate to describe the full meaning of the term *préposé*. The general position in civilian legal systems is that a *préposé* may be an independent contractor,⁵⁹ whereas “vicarious liability in English law does not generally extend to the acts of independent contractors.”⁶⁰ *Préposé* is thus a broader concept than the common law one of servant or agent.⁶¹ In light of this divergence, and because French is the only authentic version of the Warsaw Convention, the term *préposé* shall be used throughout this Article.

Inevitably, doubt arose as to whether the provisions of the unamended Warsaw Convention applied to an action brought by a passenger against a carrier’s *préposé*, as opposed to directly against the carrier. While the Warsaw Convention does refer to *préposés* on several occasions, it is always in the context of the liability of the carrier.⁶² The Warsaw Convention does not address itself to the question of the personal liability of *préposés*. Aside from being of academic concern, this lacuna was exploited by plaintiff lawyers as a means of attempting to avoid the Warsaw Convention’s provisions. The theory was that if the Warsaw Convention does not cover such actions, then an action against a *préposé* could be brought under *le droit commun*, free from the restrictions of the Warsaw Convention.⁶³ The advantages of such would be that it may allow for a forum not speci-

⁵⁷ See, e.g., Warsaw Convention, *supra* note 9, art. 20.

⁵⁸ See, e.g., Hague Protocol, *supra* note 14, art. XIV.

⁵⁹ See MANKIEWICZ, *supra* note 56, at 45 (“According to legal doctrine and case law in civil law countries, the ‘*préposé*’ may be an employee of the carrier or an independent carrier.”). See also *id.* at 45–46 (“[T]he carrier is liable for the acts and omissions of [its *préposé*] whether he be an employee or is considered to be an independent contractor who is acting for the carrier, according to general or specific instructions *i.e.* ‘within the scope of his employment’, in the performance of the contract of carriage.”).

⁶⁰ SALMOND, *supra* note 54, at 414 n.(k). See generally James, *supra* note 54, at 193–207.

⁶¹ Rene H. Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions: The Warsaw Convention’s Days in Court*, 21 INT’L & COMP L.Q. 718, 740 (1972); see also H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 159 (1954).

⁶² See Warsaw Convention, *supra* note 9, arts. 16(1), 20(1), 20(2), 25(2).

⁶³ See, e.g., Chassot, *supra* note 21, at 5, 23.

fied under Article 28, a more generous period of limitation for bringing an action, or, most importantly, it might yield unlimited liability without having to prove willful misconduct. Aside from the obvious inequity involved in a *préposé* facing unlimited liability while their employer could limit its liability, the more pernicious effect of this strategy was that it was the carrier who would eventually end up paying the bill for its *préposé's* liability.⁶⁴ This would arise either out of practical necessity or some legal duty, e.g., from an indemnity given by the carrier to the *préposé* in the employment contract or by means of a right to contribution or indemnification (non-contractual) of *préposé* against the carrier. This Article will return to the distinction between contractual and non-contractual forms in its conclusion.

That the carrier could end up footing the bill for its *préposés'* personal liability toward a passenger without being able to rely on the provisions of the Warsaw Convention was viewed as a loophole by carriers, who argued that it led to the circumvention of the Warsaw Convention's rules.⁶⁵ The risk of circumvention of the Warsaw Convention posed by contribution and indemnification actions raised two critical questions. Does the Warsaw Convention apply to actions brought by plaintiffs against *préposés*? If not, does the Warsaw Convention apply to claims brought by *préposés* against the carrier?

The Warsaw Convention embodies a basic rule by which the carrier is *prima facie* liable for the acts and omissions of its *préposés*.⁶⁶ At no point does the unamended Warsaw Convention

⁶⁴ See, e.g., *id.* at 5.

⁶⁵ See, e.g., *Reed II*, 555 F.2d 1079, 1082 (2d Cir. 1977) (“Should employees not be covered by the provisions of the Convention, the entire character of international air disaster litigation involving planes owned and operated by American airlines, would be radically changed. The liability limitations of the Convention could then be circumvented by the simple device of a suit against the pilot and/or other employees, which would force the American employer, if it had not already done so, to provide indemnity for higher recoveries as the price for service by employees who are essential to the continued operation of its airline.”).

⁶⁶ This is nowhere explicitly stated but is clearly envisaged by the Warsaw Convention's regime of presumed fault. Articles 17, 18, and 19 all impose liability on the carrier for damage arising from certain events during qualifying carriage by air. Warsaw Convention, *supra* note 9, arts. 17–19. In other words, there is a presumption of liability on the carrier in the event of such damage. Those articles do not require that it be proved that the carrier caused the damage—issues of causation only emerge in the provisions providing for exoneration. See *id.* For instance, under Article 16, a shipper who fails to supply the necessary documentation and information for customs and other purposes must bear liability for any damage resulting therefrom unless the damage is due to the fault of the carrier or the carrier's agents (i.e., *préposés*). See *id.* art. 16. Clearly, the carrier can be liable even

address the personal liability of the *préposé*. The drafting history and background to the Warsaw Convention demonstrate that the drafters' exclusive focus was on the liability of the carrier; the drafters were not at all concerned with the personal liability of *préposés* or any third party.⁶⁷ In fact, the only liability angle concerning *préposés* contained in the Warsaw Convention is the liability of the carrier for the acts of its *préposés*, i.e., vicarious liability.⁶⁸ On the face of it, this means that actions brought by passengers/shippers against *préposés* fall outside the Convention and are thus governed by *le droit commun*, thereby creating the so-called loophole by which the carrier, via the *préposé*, can be exposed to liability outside the terms of the Warsaw Convention.

Faced with this dilemma, two alternative responses were taken. The first was to accept that this loophole existed and close it by amending the Warsaw Convention. This was the response taken by the international community at the Hague Conference in 1955.⁶⁹ The second response, adopted by the U.S. courts, was to interpret the unamended Warsaw Convention in such a way as to prevent the loophole from arising in the first place.

1. *The Hague Protocol*

In 1955, at The Hague, the reality was acknowledged that the indemnification of *préposés* by the carrier meant that an action taken directly against a *préposé* could subsequently result in cir-

when it is personally blameless, where the fault lies solely with its *préposé*. *See id.* The same conclusion can be reached from the other three Articles.

⁶⁷ The report (prepared by Henri de Vos in the name of the *Comité International Technique d'Experts Juridiques Aériens* (CITEJA)) to the Warsaw Conference on the draft convention submitted to the Conference stated:

Before examining the articles of the preliminary draft, it is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. The text applies, therefore, only to the contract of carriage in its formal appearances first of all, and in the legal relationships which arise between the carrier and the persons carried or the people who ship. It regulates no other question that transport operations could give rise to.

SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCT. 4–12, 1929, WARSAW: MINUTES 246 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter *WARSAW MINUTES ENGLISH*]; *see* Hague Protocol, *supra* note 14, at 373.

⁶⁸ *See* Warsaw Convention, *supra* note 9, arts. 17–30.

⁶⁹ *See* Hague Protocol, *supra* note 14, art. XIV.

cumvention of the Warsaw Convention's limits of liability.⁷⁰ The solution adopted by the Conference was the adoption of the Hague Protocol, the effect of which was to amend the Warsaw Convention to include a new provision (i.e., Article 25A) that extends the limits of liability to *préposés* of the carrier.⁷¹ It must be noted that only the monetary limitation of liability is extended to *préposés*, in all other respects, e.g., conditions of liability, the Warsaw Convention remains inapplicable to the action against the carrier's *préposé*.⁷² This changed with MC99.⁷³

One might imagine the mere fact that the international community took the step in 1955 to amend the Warsaw Convention is proof positive of the recognition of a gap in the Warsaw Convention and an acknowledgment that its original text did not extend to *préposés*. In fact, only Antonio Ambrosini, as Delegate of Italy at the Hague Conference in 1955, voiced any view to the

⁷⁰ At the Hague Conference, the delegate from Mexico "pointed out that many plaintiffs tried to obtain compensation in excess of that provided by the [Warsaw] Convention, by suing the servants or agents of the carrier." 1 INT'L CIV. AVIATION ORG. [ICAO], *Eighteenth Meeting, 17 September 1955*, in INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW: MINUTES, 209, 216, ICAO Doc. 7686-LC/140 (1956) [hereinafter HAGUE MINUTES]. The Greek delegate added: "If the plaintiff were given the possibility of obtaining higher liability in the case where he chose to sue the servant or agent of the carrier, that would very often increase the liability which the carrier would assume pursuant to the contract of employment to compensate his employee." *Id.* at 218. The Belgian delegate affirmed this by stating: "In principle, it was not the servants or agents who would pay compensation, but the employers. And, without [amendment], the whole benefit of the Convention could be put aside." *Id.* The Canadian delegate remarked: "[T]he absence of such a clause would permit a complete evasion of the provisions of the [Warsaw] Convention in regard to the limits of liability of the carriers." *Id.*

⁷¹ Article 25A of the Warsaw Convention was added therein by Article XIV of the Hague Protocol. Hague Protocol, *supra* note 14, art. XIV. This amendment entitles agents/servants to rely on the limit of liability of the Warsaw Convention in actions brought against them within the scope of the Warsaw Convention's regime, provided the action relates to damage covered by the Warsaw Convention and they can prove they acted within the scope of their employment and without willful misconduct. *Id.*

⁷² The only provision of the Warsaw Convention extended by Article 25A to *préposés* is regarding the limits of liability. *See id.* The words used in Article 25A(1) are "limits of liability," and it expressly refers to those as being contained in Article 22, which lays down the monetary limits of liability. *Id.* This is confirmed by Article 25A(2), which refers to the aggregate amount recoverable from the carrier and *préposés*, providing that it "shall not exceed the said limits." *Id.* Therefore, there can be no doubt that the Hague Protocol only intended the monetary limit of liability to be applied to actions against *préposés* and *not* in the other provisions of the Warsaw Convention, such as time limitation or jurisdiction. *See id.*

⁷³ Under MC99, the servant or agent may rely on the "conditions and limits of liability." MC99, *supra* note 10, art. 30(1).

contrary, and even this was made in the context of acquiescence to the inclusion of Article 25A, rather than in defense of the Warsaw Convention.⁷⁴ Ambrosini is reported as having said that he always thought that “the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents, and especially for the simple reason that, in his opinion, the carrier and his servants or agents were, from the legal point of view, the same person.”⁷⁵

As one of the drafters of the Warsaw Convention, Ambrosini’s comments do carry weight. However, by far the stronger position is that Article 25A was not a mere clarification but a substantive addition. So, while it cannot be stated with utter conclusiveness, the minutes of the Hague Conference and the adoption of Article 25A provide powerful support for the view that the unamended Warsaw Convention does not govern the personal liability of *préposés*.⁷⁶ After adopting the Hague Protocol, the issue was settled for Contracting States, at least insofar as *préposés* and the limit of liability was concerned. The fly in the ointment would be that the United States refused to ratify the Hague Protocol (it did not do so until 2003).⁷⁷ Instead, the United States opted—through its courts—for an alternative response to the unforeseen problem of *préposés*. This response came in the form of a judicial decision by the U.S. Court of Appeals for the Second Circuit in *Reed II*.⁷⁸

⁷⁴ See HAGUE MINUTES, *supra* note 70, at 220.

⁷⁵ *Id.* The minutes of the Guadalajara Conference demonstrate some continued doubt regarding the interpretation of the unamended Warsaw Convention, with Ambrosini repeating his point from The Hague Conference. See 1 INT’L CIV. AVIATION ORG. [ICAO], *Sixteenth Meeting, 7 September 1961*, in INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, GUADALAJARA, AUGUST-SEPTEMBER 1961: MINUTES 133, 134, ICAO Doc. 8301-LC/149-1 (1963) [hereinafter GUADALAJARA MINUTES]. Other delegates, namely Germany, Mexico, the United Kingdom, and Japan, supported the opposite viewpoint. See *id.* at 134, 136–37; *Twenty-Third Meeting, 11 September 1961*, in GUADALAJARA MINUTES, *supra*, at 197.

⁷⁶ See *supra* notes 72, 75 and accompanying text.

⁷⁷ In ratifying MAP4 on July 31, 2003, the United States acceded to the Hague Protocol. See 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 5 (2010) (citing *Avero Belg. Ins. v. Am. Airlines, Inc.*, 423 F.3d 73 (2d Cir. 2005)).

⁷⁸ 555 F.2d 1079 (2d Cir. 1977).

2. *The Lamentable Authority of Reed II*

On September 8, 1974, TWA Flight 841 departed from Tel Aviv for New York.⁷⁹ It made a scheduled stop in Athens and was making its way to its next stop in Rome when a bomb in the cargo hold exploded, causing the aircraft to crash into the Ionian Sea, close to Cephalonia, Greece.⁸⁰ All seventy-nine passengers and nine crew members on board lost their lives.⁸¹ Almost certainly seeking to avoid the limitation of liability, relatives of some decedent passengers brought claims against members of the senior management of the carrier for their alleged negligence in failing to prevent the planting of the bomb.⁸² Desiring to rely on the Warsaw Convention's limitation of liability, the defendants argued that, for the purposes of the Warsaw Convention, the term carrier was not limited to the corporate entity but also included employees and agents acting on its behalf (i.e., *préposés*).⁸³

Judge Frankel of the U.S. District Court for the Southern District of New York heard the case first (*Reed I*).⁸⁴ Although Judge Frankel accepted that there were strong policy reasons supporting the defendant's position, he determined for the court that the correct interpretation of the Warsaw Convention was that it did not apply to an action against *préposés*.⁸⁵ Critical to the court's decision was its observation that the liability of a wrongdoing agent is "a separate and clear source of redress, distinct from and logically prior to that of the principal."⁸⁶ Judge Frankel was correct. The drafting history confirms that the delegates regarded the carrier and *préposé* as distinct legal entities, in line with general principles of law.⁸⁷ The court found additional sup-

⁷⁹ *Reed I*, 414 F. Supp. 863, 863 & n.1 (S.D.N.Y. 1976).

⁸⁰ *Id.* at 863–64; *Reed II*, 555 F.2d at 1081.

⁸¹ *Reed II*, 555 F.2d at 1081.

⁸² *See Reed I*, 414 F. Supp. at 863–64.

⁸³ *Id.* at 864–65.

⁸⁴ *Id.* at 863.

⁸⁵ *Id.* at 865–66.

⁸⁶ *Id.* at 866.

⁸⁷ *See WARSAW MINUTES ENGLISH*, *supra* note 67, at 252–53, 269, 304 (the delegates discussing the extent to which a carrier is liable for the acts of its *préposés*, clearly distinguishing between the personal liability of the carrier, the personal liability of the *préposés*, and the vicarious liability of the carrier for certain acts of its *préposés*).

Indeed, the only indication given in the entire drafting history of the Warsaw Convention to suggest that the drafters regarded the carrier and *préposé* to be one and the same is to be found in Article 22 of the CITEJA Final Draft, the version

port in the wording of Article 25A of the Hague Protocol and also in the fact of U.S. non-adherence to that instrument.⁸⁸

submitted by CITEJA for consideration to the Diplomatic Conference in Warsaw, 1929. The original French provided:

Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris les mesures raisonnables pour éviter le dommage ou qu'il leur était impossible de les prendre, à moins que le dommage provienne d'un vice propre de l'appareil.

Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable des fautes de pilotage, de conduite de l'aéronef ou de navigation s'il prouve qu'il a lui-même pris les mesures raisonnables pour éviter le dommage.

[The carrier shall not be liable if he proves that he and his servants have taken the reasonable measures to avoid the damage or that it was impossible for them to take them, unless the damage arises out of an inherent defect in the aircraft.

In the carriage of goods and baggage, the carrier shall not be liable for errors of piloting, of flying of the aircraft, or of navigation, if he proves that he himself took reasonable measures to avoid the damage.]

DEUXIÈME CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN (4–12 OCTOBRE 1929) VARSOVIE 172 (1930), *translated in* WARSAW MINUTES ENGLISH, *supra* note 67, at 265.

In the second paragraph of Article 22 above, it refers to proof that *the carrier itself* (*s'il prouve qu'il a lui-même*) took all reasonable measures. Whereas in a previous draft, the reference had been to *the carrier and its préposés* (*s'il prouve que lui et ses préposés*). See COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS (C.I.T.E.J.A.), COMPTE RENDU DE LA TROISIÈME SESSION 47 (1928) (text of arts. 23 and 24 being merged to form art. 22 of the CITEJA Final Draft). The change in terminology was the consequence of the adoption of a proposal made by the German Delegate, but it appears to have been purely incidental and not reflective of any change in policy in respect of the liability of the carrier for the acts of its *préposés*, or, more importantly, any fundamental change of mind regarding the concept of the carrier. The proposal was made in the context of the implications for passengers of exempting the carrier from liability for negligent pilotage, with the resulting debate centered solely on this issue. See *id.* at 47–50. No apparent significance was attached to the change in terminology (i.e., *lui-même* instead of *lui et ses préposés*). It is submitted that *himself* was intended to refer to the carrier and its *préposés*. This is supported by the fact that at the Warsaw Conference, the reference to “the carrier and its *préposés*” was reinstated on the proposal of the United Kingdom and appears in the text of Article 20(2) of the Warsaw Convention. See WARSAW MINUTES ENGLISH, *supra* note 67, at 297; Warsaw Convention *supra* note 9, art. 20(2).

⁸⁸ *Reed I*, 414 F. Supp. at 867–68. Judge Frankel acknowledged that these two points could be argued pro and con. *Id.* at 867. For instance, the inclusion of wording in Article 25A that expressly extended the Warsaw Convention’s protections to servants and agents could, on the one hand, be viewed as merely affirming the existing position. *Id.* at 867. Alternatively, and the view that Judge Frankel regarded as the stronger, it could be argued that it sought to provide the wording that the drafters of the Warsaw Convention had omitted to include. *Id.* at 867–68.

Judge Frankel also cited the U.S. Supreme Court's decision in *Robert C. Herd & Co., v. Krawill Machinery Corp.* as support.⁸⁹ In that case, the Supreme Court had refused to extend the Carriage of Goods by Seas Act (COGSA) limitations to defendant stevedores, holding that COGSA applied to the carrier but not to its stevedores or agents.⁹⁰

However, it was an entirely different story on appeal in *Reed II*. The U.S. Court of Appeals for the Second Circuit had no doubt as to the adverse effects of not permitting *préposés* to rely on the protections of the Warsaw Convention:

Should employees not be covered by the provisions of the Convention, the entire character of international air disaster litigation involving planes owned and operated by American airlines, would be radically changed. The liability limitations of the Convention could then be circumvented by the simple device of a suit against the pilot and/or other employees, which would force the American employer, if it had not already done so, to provide indemnity for higher recoveries as the price for service by employees who are essential to the continued operation of its airline. The increased cost would, of course, be passed on to passengers.⁹¹

One should not be in the least bit perturbed if, on reading this excerpt, one's impression is of a court preparing the way for a purely policy-driven conclusion because that is precisely what transpired. What reference there was to legal principle in the court's holding served only to lend the thinnest doctrinal gloss to a blatant example of judicial legislating.

The context to the litigation provides some guidance as to why the court was willing to bend over backward to reach a conclusion in support of the defendants. The Second Circuit referred to the quantum involved in the case, noting that the plaintiffs were demanding U.S. \$8.6 million and that the nine plaintiffs involved were only a fraction of the total possible plaintiffs—indeed, the court noted that “the case on appeal is the test case for the remainder of the suits consolidated with it below.”⁹² The court even referred to the then-recent Tenerife disaster (involving the U.S. airline Pan American Airways) and the ensuing litigation in which one plaintiff had taken inspiration from the

⁸⁹ *Id.* at 866 (citing *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959)).

⁹⁰ *Krawill Machinery Corp.*, 359 U.S. at 302–03.

⁹¹ *Reed II*, 555 F.2d 1079, 1082 (2d Cir. 1977).

⁹² *Id.* at 1090 n.15.

district court's judgment in *Reed I* and added the pilot as a defendant in an action for U.S. \$4.5 million.⁹³ Bearing in mind that there were 583 fatalities in the Tenerife disaster,⁹⁴ the court was clearly cognizant of the potentially crushing liability that might befall airlines if the Warsaw Convention could be circumvented by simply suing *préposés*. It must be noted that the airline industry was in dire straits at that time,⁹⁵ so significant political pressure must surely have been felt to safeguard the financially crippled airlines. Non-adherence to the Hague Protocol must also have played a role because, had the district court's judgment stood, the U.S. government would have been under far greater pressure to secure U.S. adherence to the Hague Protocol, something it was opposed to as a matter of principle.⁹⁶

⁹³ *Id.* at 1092 ("Indeed, in one lawsuit just commenced in New York seeking \$4.5 million for the death of a passenger killed in the recent collision of two Boeing 747 planes in the Canary Islands, the plaintiffs have taken the cue from the district court's decision here and joined one of the pilots as a co-defendant. If this method of circumventing the Convention's liability limitation is accepted, not only will the purpose of defining the limits of the carrier's obligations be circumvented, but in the process the Convention's most fundamental objective of providing a uniform system of liability and litigation rules for international air disasters will be abandoned as well.").

⁹⁴ *Tenerife: Remembering the World's Deadliest Aviation Disaster*, CBS NEWS, <https://www.cbsnews.com/news/tenerife-remembering-the-worlds-deadliest-aviation-disaster/> [<https://perma.cc/74JN-ZNUL>] (Mar. 27, 2017, 9:32 AM).

⁹⁵ One commentator summed up the global state of affairs of the air transport industry in the 1970s as follows:

As we all know now, the world economy did not develop according to the optimistic extrapolations of the 1960s. And the airlines were hard hit by the economic recession, inflation, currency fluctuations, and energy crises of the 1970s. . . .

The inevitable result was unprecedented overcapacity on key routes, especially the critical North Atlantic routes. In 1975 unused capacity on the North Atlantic alone was equivalent to 15,000 empty Boeing 747 round trips. The overcapacity problem was aggravated by rapidly accelerating cost pressures. The impact of the energy crisis on airlines was particularly great. In just a few years the fuel share of total operating costs rocketed from 10 to 25 percent.

Christer Jönsson, *Sphere of Flying: The Politics of International Aviation*, 35 INT'L ORG. 273, 286 (1981) (footnote omitted); see also Werner Guldemann, *Bilateral Agreements as Regulatory Instruments in International Commercial Aviation*, in INTERNATIONAL AIR TRANSPORT: LAW, ORGANIZATION AND POLICIES FOR THE FUTURE: PROCEEDINGS OF THE INSTITUTE OF AIR AND SPACE LAW 25TH ANNIVERSARY CONFERENCE, NOVEMBER 17–19, 1976, at 113, 115–16 (Nicolas Mateesco Matte ed., 1976) (giving a contemporary account of the situation of the airline industry in the mid-1970s).

⁹⁶ See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 532–33 (1967).

Evidence that the true motivation for the decision was purely political is further evidenced by the fact that the court never clearly established a clear *ratio decidendi*. Instead, it hedged its bets by providing two half-baked efforts at a ratio, neither of which did it follow through on to completion.

In its first effort, the court asked itself if the term *carrier* was intended to cover just the corporate entity or whether it “was intended to embrace the group or community of persons actually performing the corporate entity’s function.”⁹⁷ While the answer under the common law would be in the negative, the U.S. court was—some might say—surprisingly open to considering what the views of other jurisdictions might be.⁹⁸ Without any firm authoritative basis,⁹⁹ the court determined that in some civil law systems, the employer and employee are treated as one and that this could have been the intention of the drafters of the Warsaw Convention.¹⁰⁰ This is not the case.¹⁰¹ Rather than follow through on this line of argument, the court just left the matter hanging, declaring that it could not deem a common law reading as controlling.¹⁰²

For its second effort at a *ratio*, the court looked to Article 24, indulging itself in an expansive reading of that article based on a dubious premise. The court read Article 24, specifically the part, “any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention,”¹⁰³ as meaning that any action for damages arising out of the events anticipated by Articles 17, 18, and 19 is governed

⁹⁷ *Reed II*, 555 F.2d at 1083.

⁹⁸ See GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS 281 (1977) (“The [*Reed II*] court . . . displayed a remarkable willingness to consider what was the position of the civil law.”).

⁹⁹ See *Reed II*, 555 F.2d at 1083–84 (referring to the comments of Ambrosini raised during the Hague Conference in 1955 and repeated at the Guadalajara Conference in 1961); *supra* note 75 and accompanying text.

¹⁰⁰ *Reed II*, 555 F.2d at 1088 (stating that the interpretation “reflect[s] the legal principles of many civil law states, which treat the corporation and its employees as one.”).

¹⁰¹ See MILLER, *supra* note 98, at 281 (“[T]he court fell victim of two of the dangers inherent in any enquiry into foreign law, i.e., an incomplete access to proper sources of information and a misunderstanding of foreign law material taken out of context.”).

¹⁰² *Reed II*, 555 F.2d at 1084.

¹⁰³ In full, Article 24 of the Warsaw Convention provides:

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

by the provisions of the Warsaw Convention.¹⁰⁴ On application to the facts of the case, the court explained that since the action was one for damages, and because it arose out of the death of a passenger during international carriage by air, it was covered by the Warsaw Convention and subject to its monetary limitation.¹⁰⁵ The implicit reasoning of the Second Circuit was that the scope application of the Warsaw Convention is effectively determined by Article 24, i.e., that the plaintiff's action is one for damages arising out of an event covered by the Warsaw Convention.¹⁰⁶

This second *ratio* rested on a highly questionable point of interpretation concerning the translation of the French word *cas* in Articles 17 and 24 of the Warsaw Convention (translated as *event* and *case*, respectively). The court thought the plural of *cas* had been inaccurately translated as *cases* in Article 24, because it thought the word *cas* did not, in French, ordinarily refer to a lawsuit, i.e., a *case* in the juridical sense.¹⁰⁷ The court thought the word *event* was the more accurate translation for the purposes of Article 24 and, crucially, that the word *event* was more expansive in meaning than *case*.¹⁰⁸ However, there is nothing to suggest that the translation of *cas* in Article 24 as *cases* was intended to be understood as *case* in the juridical sense; it is more likely that the two words, i.e., *case* and *event*, were regarded as synonymous.¹⁰⁹ One can strongly suspect that the court solely

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, *supra* note 9, art. 24.

¹⁰⁴ *Reed II*, 555 F.2d at 1084–85.

¹⁰⁵ *Id.* Based on its belief that “a construction of the language of Article 22(1) and 24 which extends the Convention’s liability limitation to passenger claims against employees not only reflects the plain meaning and purpose of the French text of these articles but accomplishes all of the Convention’s objectives,” the court held, “plaintiffs may not recover from an air carrier’s employees or from the carrier and its employees together a sum greater than that recoverable in a suit against the carrier itself as limited by the Warsaw Convention with its applicable agreements and protocols.” *Id.* at 1092–93.

¹⁰⁶ *Id.* at 1084.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ The word *cas* in the authentic French text of Article 17 of the Warsaw Convention was translated into the word *event* in the English version. *See, e.g.*, Warsaw Convention, *supra* note 9, art. 17 (“*Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l’accident qui a causé le dommage s’est produit à bord de l’aéronef ou au cours de*

seized on the word *cas* to inject ambiguity into the text and thereby justify a purposive interpretation.

The court failed to follow through on its reasoning and elected—yet again—to leave the ratio half-baked. What is missing from the equation are the identities of the parties to the litigation. If one follows through on the court’s logic, the Warsaw Convention would apply to all actions for damages arising during international carriage from an event described in Articles 17, 18, or 19, regardless of the identity of the defendant or plaintiff.¹¹⁰ An action by a passenger against a manufacturer would be covered, as would the third-party action by that manufacturer against the carrier. Of course, not even the Second Circuit thought an action against a manufacturer was covered.¹¹¹ It took for granted that the defendant must be a carrier, but this would not explain why the *préposé* should be covered. Why should one third party (i.e., the manufacturer) be outside the Convention, but another (i.e., the *préposé*) be within it? Ultimately, this line of argument simply reverts to the original question of whether the definition of *the carrier* was intended to include its *préposés*; the second ratio reverts to the first. Thus, on closer inspection, the court’s second attempt at a ratio also fails to pass muster.

The doctrinal basis for the court’s ultimate decision was decidedly patchy and left deliberately vague. On the one hand, its interpretation of *carrier* was dubious given the court’s assessment of civilian law. On the other hand, its unjustly expansive interpretation of Article 24 and the purported scope of the Warsaw Convention was misleading. In the Author’s view, it was not the intention of the court to resolve the matter through doctrinal reasoning. Instead, the court was satisfied with fumbling around in the text of the Warsaw Convention until it could rustle up some ambiguity to act as the shakiest of pegs upon which to hang its purely policy-driven decision. One wonders if by fling-

toutes opérations d'embarquement et de débarquement. . . . The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.) (emphasis added).

¹¹⁰ *Reed II*, 555 F.2d at 1084–85.

¹¹¹ *See id.* at 1091 (“A good example of the ‘judicial nightmare,’ . . . that could result is *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), involving 203 suits by 337 decedents primarily against the aircraft manufacturer for defective design, arising out of the crash of an American-built plane owned by Turkish Air Lines shortly after takeoff in France.”) (citation omitted).

ing these two *rationes* together, the court had its fingers crossed that it might magically result in a sufficiently convincing *ratio decidendi*; no such luck!

While the doctrinal basis was feeble, the court could, in contrast, rely on several powerful policy considerations that justified extending the protections of the Warsaw Convention to *préposés*. Foremost, it would ensure that the protection provided by the Warsaw Convention to the carrier could not be circumvented by plaintiffs bringing actions against the carrier's *préposés*, thus safeguarding the objects of the Warsaw Convention.¹¹² The court explained that "To permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits."¹¹³

The Second Circuit's holding in *Reed II*, though well-intentioned, was nonetheless a thinly veiled example of judicial amendment of an international treaty. Simply put, the United States did not wish to adhere to the Hague Protocol, so instead, through its courts, it attempted to cherry-pick what it liked about the Hague Protocol, i.e., the extension of the limits of liability to *préposés*. At its base, *Reed II* is just a judicial ratification of part of the Hague Protocol. For that reason and its lack of doctrinal cogency, it is an awful decision that should be expunged.

Fortunately, the baleful influence of *Reed II* has now been curtailed by U.S. adherence to the Hague Protocol (via Montreal Additional Protocol No. 4) in 2003 and then to MC99. However, *Reed II* committed two major errors that have been hugely troublesome for the question of third-party actions under both WCS and MC99. For this reason, we ought not to allow *Reed II* to fade away into obscurity; it must be recognized as bad law and expressly overruled.

The first error committed by the court was that, although it had limited its decision to the specific issue before it, i.e., the applicability of the Warsaw Convention's monetary limitation, once the court did this, it was inevitable that subsequent decisions¹¹⁴ would extend the coverage to the remainder of the War-

¹¹² *Id.* at 1089.

¹¹³ *Id.*

¹¹⁴ See cases discussed *infra* Section II.B.

saw Convention (e.g., time limits and jurisdiction) to actions against *préposés*. Not even the Hague Protocol had done that.

The second error was that the court fostered the notion that the identity of the plaintiff is not of critical importance to determine the application of the Warsaw Convention.¹¹⁵ This was not particularly mischievous on the facts of *Reed v. Wiser* because the plaintiffs were the representatives of the decedent passengers.¹¹⁶ However, subsequent cases¹¹⁷ would take *Reed II* to mean that the identity of the plaintiff is irrelevant so long as the action is against a carrier for loss covered by the Warsaw Convention. This meant the Warsaw Convention might apply to a third-party action taken against a carrier, which is the question that directly concerns this Article.

3. MC99 and Préposés

It would be remiss at this point not to briefly mention the state of play under MC99 with respect to *préposés*. Thankfully, the provisions introduced by the Hague Protocol of 1955 and the Guadalajara Convention of 1961 are replicated almost verbatim in MC99.¹¹⁸ For instance, Article 30 of MC99 provides:

¹¹⁵ See *Reed II*, 555 F.2d at 1079–80.

¹¹⁶ The plaintiffs were referred to as “[p]ersonal representatives, heirs and next of kin of nine airline passengers killed” and as “administrators and executors.” *Id.* Although it is not expressly stated in the opinion, the plaintiffs were most likely exercising the decedent passengers’ cause of action against the defendant; they were not suing in their own personal right (e.g., as occurs with a wrongful death action).

¹¹⁷ See cases discussed *infra* Section II.B.

¹¹⁸ See generally Guadalajara Convention, *supra* note 46. The Guadalajara Convention was introduced to deal with a specific type of *préposé*, i.e., the actual carrier. *Id.* at 34. Normally, the party assuming the obligation toward the passenger (or shipper) to provide international carriage by air is also the party performing the carriage. See *id.* at 32, 34. However, there are situations in which these two parties are different persons. In such circumstances, who is the carrier for the Warsaw Convention? Is the carrier the party who contracts with the passenger? Or is it the carrier party who provides the actual carriage? The possibility that the contracting carrier might not be the same party actually performing the carriage in question created a potential loophole in the Warsaw Convention. If one believes that the Warsaw Convention applies only to the contracting carrier, then it will be inapplicable to any action brought against another party who is performing the carriage. As such, not only will the de facto carrier be unable to rely upon the conditions and limits of liability provided by the Warsaw Convention, the passenger will not benefit from the provisions of the Warsaw Convention either, e.g., the presumption of fault. The Guadalajara Convention’s solution was to adopt a distinction between the contractual carrier and the actual carrier and to make the actual carrier subject to the rules of Warsaw/Hague. *Id.* at 34. The Guadalajara Convention is a supplementary convention to the Warsaw Conven-

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.
2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.
3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.¹¹⁹

Articles 30 and 43¹²⁰ of MC99 were modeled on Article 25A of the Warsaw Convention (as amended by the Hague Protocol) and Article V of the Guadalajara Convention, respectively.¹²¹ Thus, under MC99, a *Reed v. Wiser*-type scenario involving an action against a *préposé* will be covered. However, in the context of MC99, the reality, insofar as the limits of liability are concerned, is that there is almost no incentive for a plaintiff to pursue a *préposé* because unlimited recovery against an insured carrier without the need to prove fault is guaranteed in most cases.¹²²

tion (as amended by the Hague Protocol) and is reasonably well ratified (86 State Parties at present). See Int'l Civ. Aviation Org. [ICAO], *Current Lists of Parties to Multilateral Air Law Treaties*, https://www.icao.int/secretariat/legal/lists/current_lists_of_parties/allitems.aspx [<https://perma.cc/JP4L-P55Q>] (search "8181" in the "Find an item" field; then select "English" under "Status (EN)"). However, the United States never acceded to it. See *id.*

¹¹⁹ MC99, *supra* note 10, art. 30.

¹²⁰ *Id.* art. 43 ("In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.").

¹²¹ Article 25A had also been incorporated into the Warsaw Convention System by Montreal Additional Protocol No. 4. MAP4, *supra* note 46, art. X.

¹²² Regarding the liability regime for passenger death and bodily injury, MC99 consists of a two-tier system. Tier one provides for strict liability of the carrier up to the defined limit. MC99, *supra* note 10, art. 21(1). The limit was originally SDR 100,000, but this figure was raised in 2009 to SDR 113,100 and then again in 2019 to SDR 128,821, pursuant to Article 24 of MC99. See *id.* art. 24; Int'l Civ. Aviation Org. [ICAO], *2019 Revised Limits of Liability Under the Montreal Convention of 1999*, https://www.icao.int/secretariat/legal/Pages/2019_Re-

B. THIRD-PARTY ACTIONS AND WCS

One of the peculiarities of *Reed v. Wiser* is that there was no third-party action directly involved. The action was one taken by the relatives of the passengers against the carrier's *préposés*, and these *préposés* had not in fact taken a third-party action against the carrier. Nevertheless, it was always understood by the court and all concerned that indemnification of the *préposé* by the carrier was inevitable. Indeed, it was the abstract potential for, rather than the actual existence of, third-party actions that drove, more than anything, the court's decision. Even so, it is ironic that *Reed II* never had to deal directly with the applicability of the Warsaw Convention to third-party actions. What *Reed II* certainly did do was leave the door open for courts to conclude that the Warsaw Convention applied to third-party actions taken against carriers. Unsurprisingly, some courts would take this opportunity, whereas others would not. This Section examines these two positions and attempts to divine which is correct. For convenience, they shall be referred to as the orthodox approach and the alternative approach.

1. *The Orthodox Approach*

The Warsaw Convention does not mention recourse actions or third-party actions for contribution or indemnification.¹²³ This is not the glaring omission that it might seem. At the time of the Warsaw Convention's drafting, the availability of a right to noncontractual contribution indemnification was not yet a feature of the common law, and its availability within the civilian legal systems was mostly theoretical.¹²⁴ As such, the drafters were

vised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx [https://perma.cc/UQ5W-WTDH]. For liability beyond that limit, tier two provides for unlimited recovery from the carrier based on the presumption of fault. MC99, *supra* note 10, art. 20. Regarding both tiers, the carrier can invoke the defense of contributory negligence. *Id.* For tier-two liability only, the carrier can exonerate itself on proof of the absence of fault of the carrier or its *préposés*, or that the damage was solely due to the negligence or wrongful act or omission of a third party. *Id.* art. 21(2).

¹²³ Even the minutes of the Warsaw Conference reveal little. *See generally* WARSAW MINUTES ENGLISH, *supra* note 67. The delegates were aware of the possibility of the carrier possibly seeking recourse against the aircraft manufacturer but regarded them as unlikely to arise in practice given the tendency of manufacturers to agree to express warranties against defects and other far-reaching provisions aimed at insulating them from any liability. *See id.* at 48. In any case, such recourse actions were predicated on the contract of sale, not common law.

¹²⁴ *See generally* Cluxton, *supra* note 24.

vindicated in adopting a two-party paradigm of plaintiff-passenger/shipper versus defendant carrier. However, developments in the law, e.g., the general doctrine of negligence and strict products liability, created the real possibility of noncontractual recourse actions.¹²⁵

The topic of recourse actions emerged during the Diplomatic Conference of 1961 in Guadalajara, Mexico, at which the Guadalajara Convention was adopted.¹²⁶ The Guadalajara Convention sought to ensure that the Warsaw Convention would apply to qualifying carriage performed by a carrier other than the contracting carrier, i.e., the actual carrier.¹²⁷ In relation to carriage performed by the actual carrier, the Guadalajara Convention makes the contracting carrier and actual carrier jointly and severally liable;¹²⁸ thus, permitting the plaintiff to choose whether to sue one or the other, or both.¹²⁹ Joint and several liability means, for example, that the contracting carrier might be held liable for the entire damage arising during the carriage performed by the actual carrier. Therefore, the delegates regarded it essential that recourse between the carriers be supported.¹³⁰ Even so, the extent to which the drafters intended the Guadalajara Convention to regulate the right of recourse was minimal; it only applied to the case of actual and contracting carriers, and the full extent of its application was only to ensure that a prima facie right of joinder existed.¹³¹ The minutes of the Conference

¹²⁵ See *id.* at 32–34 (Section II.C.4).

¹²⁶ Guadalajara Convention, *supra* note 46.

¹²⁷ The actual carrier is defined as “a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph *b*) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention.” *Id.* art. I. For a summary of the main aims of the Guadalajara Convention, see *supra* note 118.

¹²⁸ See Guadalajara Convention, *supra* note 46, art. III.

¹²⁹ See *id.* art. VII.

¹³⁰ See *Twelfth Meeting, 5 September 1961, in GUADALAJARA MINUTES, supra* note 75, at 109 (comments of the Delegate from Spain); see also *Fourteenth Meeting, 6 September 1961, in GUADALAJARA MINUTES, supra* note 75, at 120–21 (comments of the Delegate of Japan).

¹³¹ This was clear from the draft version of the Guadalajara Convention, where the commentary on the draft convention explained: “The second sentence of Article VII permits the carrier against whom an action is brought to have the other carrier joined in the proceedings as a party.” 2 INT’L CIV. AVIATION ORG. [ICAO], *Secretariat Commentary on the Draft Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, in INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW: GUADALAJARA, AUGUST-SEPTEMBER 1961: DOCUMENTS* 23, 32, ICAO Doc. 8301-LC/149-2

show a remarkable amount of debate on the issue and it is undoubtedly the case that the delegates intended the reach of the Warsaw Convention to stretch no further.¹³² In fact, they were pedantic in ensuring that the procedure and effects of such joinder should be left to the applicable national law.¹³³ The Guadalajara Convention neither creates nor presumes the existence of a right of recourse between actual carriers and contracting carriers; it limits itself to merely facilitating recourse actions where they exist under *le droit commun* by ensuring a right of joinder for each carrier against the other.¹³⁴

The first *explicit* reference within WCS to a right of recourse came in 1971 with the Guatemala City Protocol (GCP).¹³⁵ However, this reference was only made “in order to remove any doubts.”¹³⁶ Such rights were already enforced in the context of

(1963) [hereinafter GUADALAJARA DOCUMENTS]. The explanation continued: “In such case the national law would determine the consequences of the joinder and these consequences may vary in different States.” *Id.*

¹³² See, e.g., *Twenty-Fourth Meeting, 12 September 1961, in GUADALAJARA MINUTES, supra* note 75, at 204–11 (delegates debating Article VII of the Guadalajara Convention).

¹³³ See, for example, the German Delegate’s concerns regarding the English term *party* and the ensuing debate. *Eighteenth Meeting, 8 September 1961, in GUADALAJARA MINUTES, supra* note 75, at 153. As a result of these concerns, Article VII of the Guadalajara Convention provides: “If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.” Guadalajara Convention, *supra* note 46, art. VII. Compare this with the draft proposal for the second sentence of Article VII submitted to the Conference, which stated: “If the action is brought against only one of those carriers, that carrier shall have the right to have the other made a party to the proceedings.” *Draft Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, in GUADALAJARA DOCUMENTS, supra* note 131, at 20.

¹³⁴ The purpose of Article VII was to facilitate two things: first, it ensured that the carrier who was sued could rely on the participation of the other carrier (in whose possession the majority of evidence might be); second, it facilitated the distribution of liability between the carriers. See *Nineteenth Meeting, 8 September 1961, in GUADALAJARA MINUTES, supra* note 75, at 157 (comments of the Delegate of Spain). Depending on national law, the latter purpose could be served by joinder of the carrier, by either making the other carrier a co-defendant, or by allowing the carrier being sued by the plaintiff to seek a recourse action against the other carrier in the same proceedings. See *id.*

¹³⁵ Guatemala City Protocol, *supra* note 46, art. XIII. Article XIII would have inserted a new Article 30A to the Warsaw Convention.

¹³⁶ I INT’L CIV. AVIATION ORG. [ICAO], *Nineteenth Meeting of the Commission of the Whole, in INTERNATIONAL CONFERENCE ON AIR LAW: GUATEMALA CITY, FEBRUARY–MARCH 1971: MINUTES* 191, 197, ICAO Doc. 9040-LC/167-1 (1972) (per the reported comments of the Dutch Delegate).

WCS, not in the sense that it was recognized that a right of recourse existed under the Warsaw Convention, but that such rights, however founded, were not incompatible with the Warsaw Convention. GCP never entered into force, but the right of recourse provision contained therein was included in the 1975 Montreal Additional Protocol No. 4 (MAP4),¹³⁷ which entered into force in 1998.¹³⁸ All this shows is that it was understood that WCS (with the exception of the right of joinder under the Guadalajara Convention) does not regulate recourse actions.

This is reflected in the orthodox approach adopted by some courts. For example, in the 1978 Canadian case of *Connaught Laboratories Ltd. v. Air Canada*,¹³⁹ Connaught Laboratories contracted, through Air Canada, for the carriage of a cargo of polio vaccines from Ontario, Canada, to Quito, Ecuador.¹⁴⁰ Under the air waybill, the cargo was to be carried by Air Canada to Miami, Florida, and then by Andes Airlines onward to Quito;¹⁴¹ it was thus a case of successive carriage. Due to Andes Airlines' failure to take the necessary precautions to ensure that the vaccines remained frozen, the vaccines had thawed by the time they were delivered to the consignee, thus rendering them worthless.¹⁴² Connaught sued Air Canada, which in turn brought a third-party action for indemnification or contribution against Andes Airlines.¹⁴³ As it happened, the main action against Air Canada had been commenced within the two-year window provided by the Warsaw Convention, but the third-party action by Air Canada against Andes Airlines had commenced after the two-year window expired.¹⁴⁴ Andes Airlines sought to rely on the time limitation contained in the Warsaw Convention (i.e., Article 29) to defeat the third-party action.¹⁴⁵ The Supreme Court of Ontario addressed the issue by asking itself whether the Warsaw Con-

¹³⁷ See MAP4, *supra* note 46, art. XI.

¹³⁸ *Id.* at 31.

¹³⁹ (1978) 94 D.L.R. 3d 586 (Can. Ont. Sup. Ct. J.).

¹⁴⁰ *Id.* at 587. For the court's summary of the facts of the case, see *id.* at 587–88.

¹⁴¹ *Id.* at 588.

¹⁴² See *id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 593.

¹⁴⁵ *Id.* Although Judge Robins found that Air Canada was liable to the plaintiff in the main action, he was in no doubt that Andes Airlines was truly to blame. *Id.* at 593 (“In effect, Andes Airlines’ position is that Air Canada must be denied its remedy because of art. 29 even though it is conceded that it is entitled on the merits of the matter to be indemnified.”).

vention applied to claims between carriers, reaching the view that it does not:

In short, while the Convention deals with the claims of passengers, consignors and consignees, and the liability of carriers therefor, it does not deal with the claim of carriers *inter se*. Consequently, it is my view that art. 29 does not apply to the action of Air Canada against Andes Airlines and does not constitute the statutory bar it is said to represent.¹⁴⁶

The manifest common sense of the ruling in *Connaught* seems indisputable. Indeed, if Article 29 were to apply in such cases, then, where the plaintiff commenced the main action against the carrier at the eleventh hour, the carrier would, in practical terms, be deprived of the opportunity to seek recourse from other carriers since the two-year limitation would expire before it had the chance. This is something that third-party defendants in other cases have exploited.¹⁴⁷

Connaught stands for the position that the Warsaw Convention only governs the action between the passenger (or shipper) against the carrier (although we shall have cause to question this view in Part IV of this Article).¹⁴⁸ The plaintiff's cause of action is founded upon the relationship of carriage established between the parties, so if the action is not one between the proper parties, then it is, by definition, not covered by the Warsaw Convention.¹⁴⁹ The identity of the parties to the cause of action is thus crucial to determining the question of its applicability. Therefore, actions taken by one carrier against another, or by a carrier's *préposé* against a carrier, or by a passenger against a manufacturer, and so on, are not governed by the Warsaw Convention.

¹⁴⁶ *Id.* at 593–94.

¹⁴⁷ *See, e.g.,* Allianz Glob. Corp. & Specialty v. EMO Trans Cal., Inc., No. C 09-4893, 2010 WL 2594360, at *5 (N.D. Cal. June 22, 2010). In this case, the plaintiff in the main action had brought the action against the defendant just before the expiration of the Warsaw Convention's two-year limitation period. *Id.* at *1. This meant that when the defendant subsequently brought a third-party action for contribution, the third-party defendant was able to argue that the Warsaw Convention's time limit had expired. *Id.* at *2. The court held the defendant to the time limit, even though it recognized the inequity involved in depriving the defendant of a remedy "due to no fault of its own." *Id.* at *5.

¹⁴⁸ *See Connaught*, 94 D.L.R. 3d at 593–94.

¹⁴⁹ For more on the cause of action in the Warsaw Convention and MC99, *see generally* CLUXTON, *supra* note 47.

2. *The Alternative Approach*

The alternative approach is grounded in the same reasoning as that applied by the Second Circuit in *Reed II*; that is, that the meaning of the term *carrier* includes *préposés* and that any action against a carrier, coming within a broad interpretation of Article 24, is governed by the Warsaw Convention, regardless of who the plaintiff is.¹⁵⁰

In the 1985 case of *L.B. Smith, Inc. v. Circle Air Freight Corp.*,¹⁵¹ the Supreme Court of Onondaga County, New York, applied the Warsaw Convention's two-year limitation to a third-party action brought by the contracting carrier against the actual carrier.¹⁵² In the court's view, this was supported by the wording of Article 24(1), which it construed liberally to mean that "an action 'however founded' would include an action for contribution."¹⁵³ While *Reed II* was not cited as authority for this point, the reasoning is based on the same reading of Article 24 as that of the Second Circuit.¹⁵⁴ The court's understanding was that the contribution claim arose out of a factual scenario of damage to cargo during qualifying carriage, and as such, that it was an ac-

¹⁵⁰ 555 F.2d 1079, 1092 (2d Cir. 1977); *see also, e.g.,* DRION, *supra* note 61, at 104 ("It is submitted that nothing prevents the carrier from invoking the limits of Article 22 in case of recourse actions arising from the death or injuries of passengers, or loss or damage of baggage or goods, or in case of delay, provided these occurrences fall within the scope of Articles 17, 18 or 19."). Drion took the view that the phrase "however founded" in Article 24 of the Warsaw Convention, "clearly brings delictual recourse actions under the limits and conditions of the Convention." *Id.*

¹⁵¹ 488 N.Y.S.2d 547 (N.Y. Sup. Ct. 1985). Unfortunately, the facts of the dispute were not presented in the report, but what is clear is that the plaintiff had brought an action against Circle Air Freight (the contracting carrier), who had brought third-party actions against Banco de Santander and Iberia (the actual carrier). *See id.* at 548. Iberia claimed the third-party action was time-barred, whereas Circle Air Freight maintained that WCS did not apply to its claim for contribution. *Id.*

¹⁵² *Id.* at 550 ("[T]he two-year period of limitation set forth in Article 29 of the Warsaw Convention is applicable to actions for contribution.").

¹⁵³ *Id.* at 549. Article 24(1) provides: "In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Warsaw Convention, *supra* note 9, art. 24(1) (emphasis added). Article 24(2) applies 24(1) to Article 17. *See id.* art. 24(2) ("In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.").

¹⁵⁴ *See L.B. Smith*, 488 N.Y.S.2d at 549; *Reed II*, 555 F.2d at 1092.

tion for damages covered by Article 18; therefore, the Warsaw Convention applied.¹⁵⁵

A key distinguishing feature between this alternative approach, as presented in *L.B. Smith*, and the orthodox approach of *Connaught* is that the alternative approach does not attend to the question of the identity of the plaintiff. The orthodox view would read Articles 17, 18, and 19 as envisaging a claim by a passenger or shipper against a carrier.¹⁵⁶ Indeed, the very premise of the Warsaw Convention is to regulate the relationship between the passenger or shipper and the carrier with regard to the latter's liability toward the former, certainly not the liability between carriers.¹⁵⁷ The terms and conditions of the Warsaw Convention referred to in Article 24 apply to the liability of the carrier toward the passenger or shipper, not to another carrier.¹⁵⁸ While the contribution action in *L.B. Smith* was an action against a carrier relating to damage to cargo, it was not taken by a shipper.¹⁵⁹

In a series of cases decided in the late 1980s, i.e., *Split End Ltd. v. Dimerco Express (Phils) Inc.*,¹⁶⁰ *Data General Corp. v. Air Express International Co.*,¹⁶¹ and *Mitchell, Shackleton & Co., Ltd. v. Air Ex-*

¹⁵⁵ Warsaw Convention, *supra* note 9, art. 24(2).

¹⁵⁶ See *Connaught Labs. Ltd. v. Air Can.* (1978), 94 D.L.R. 3d 586, 593-94 (Can. Ont. Sup. Ct. J.).

¹⁵⁷ Warsaw Convention, *supra* note 9, arts. 17-30.

¹⁵⁸ *Id.* at 3020.

¹⁵⁹ *L.B. Smith*, 488 N.Y.S.2d at 548.

¹⁶⁰ No. 85 Civ. 1506, 1986 WL 2199 (S.D.N.Y. Feb. 11, 1986). The plaintiff, Split End Ltd. (Split End), purchased women's clothing from a company in the Philippines, Sampaguita Garment Corp. (SGC), who contracted with Dimerco Express (Phils) Inc. (Dimerco), to ship them from Manila to New York for delivery to plaintiff consignee, Manufacturer's Hanover Trust Co., who would then notify Split End. *Id.* at *1. Dimerco issued an air waybill to SGC, naming SGC as shipper. *Id.* Therefore, it is assumed that Dimerco did this as principal and thus assumed the obligation of carriage. See Lawrence Goldhirsch, Note, *Prescription Period for Third-Party Actions Under the Warsaw Convention*, 12 AIR L. 94, 96 (1987) (the author taking the view that Dimerco was the carrier and that the main action against Dimerco was subject to the Warsaw Convention). Dimerco contracted under a separate air waybill with Kuwait Airways Corp. to transport the goods by air and to deliver them to Dimerco's U.S. affiliate. See *Split End*, 1986 WL 2199, at *1. The goods were stored in New York by Kuwait Airways' ground handling agent, Aer Lingus Airlines (Aer Lingus). *Id.* The goods were damaged, and Split End sued Dimerco, who in turn brought third-party actions against Kuwait Airways Corp. and Aer Lingus. *Id.* The third-party defendants argued that the action had been brought against them outside the two-year time limit. *Id.* at *4.

¹⁶¹ 676 F. Supp. 538 (S.D.N.Y. 1988). The plaintiff, Data General Corp. (Data General), contracted with Air Express International Co. (Air Express) to transport computer components from New York to Madrid, and the plaintiff alleged

press International, Inc.,¹⁶² the District Court for the Southern District of New York approved the proposition of *L.B. Smith* that the Warsaw Convention applies to third-party actions taken against carriers (as defined in *Reed II* to include préposés).¹⁶³ In all three cases, the shippers had contracted with the defendant air freight companies for the carriage of goods by air and then sued the defendants for damages.¹⁶⁴ In turn, the carriers brought third-party actions for contribution or indemnification against sub-contracted carriers or ground handling agents (GHAs), or both.¹⁶⁵ In each case, the third-party action commenced after the two-year limitation provided under Article 29 of the Warsaw Convention, upon which the third-party defendants sought to rely as grounds for dismissal.¹⁶⁶ In all of these cases, there was no dispute about the applicability of the Warsaw Convention to the main action, i.e., the action taken by the shipper against the contracting carrier.¹⁶⁷ The question of the Warsaw Convention's applicability only emerged in relation to the third-party actions.

that they were in damaged condition on delivery in Madrid. *See id.* at 538–39 (“*Air Express had agreed to transport the computer parts from New York to Madrid, Spain.*” (emphasis added)); *see also* *Motorola, Inc. v. MSAS Cargo Int'l, Inc.*, 42 F. Supp. 2d 952, 956 (N.D. Cal. 1998) (wherein the *Data General* case is referred to as a case between carriers). Air Express had subcontracted Iberia, Lineas Aereas de España (Iberia), to perform the carriage aboard one of its flights and placed the blame solely on its shoulders. *Data Gen.*, 676 F. Supp. at 539. Air Express brought a third-party action against Iberia for indemnification. *Id.* Iberia sought dismissal on the grounds that it was time-barred by the Warsaw Convention. *Id.* Air Express complained that the plaintiff had only served it less than three weeks before the expiration of the two-year time limitation and therefore was unable to bring its suit against Iberia on time. *Id.* at 540 n.1.

¹⁶² 704 F. Supp. 524 (S.D.N.Y. 1989). Plaintiff shipper contracted Air Express Int'l, Inc. (Air Express) to transport a crankshaft from London to New York. *Id.* at 525. In New York, the carrier's ground handler, Triangle Aviation Services, Inc. (Triangle), damaged the crankshaft in the process of off-loading it. *Id.* The plaintiff sued Air Express one day shy of the two-year limitation period. *Id.* The defendant then promptly filed a third-party action against Triangle, albeit outside the two-year limitation of the Warsaw Convention. *Id.* Triangle sought dismissal on the grounds that the time limitation of the Warsaw Convention applied to the third-party action. *Id.* at 525–26.

¹⁶³ *Id.* at 527; *Data Gen.*, 676 F. Supp. at 540; *Split End*, 1986 WL 2199, at *4.

¹⁶⁴ *Split End*, 1986 WL 2199, at *1; *Mitchell*, 704 F. Supp. at 525; *Data Gen.*, 676 F. Supp. at 538.

¹⁶⁵ *Split End*, 1986 WL 2199, at *1; *Mitchell*, 704 F. Supp. at 525; *Data Gen.*, 676 F. Supp. at 538.

¹⁶⁶ *Split End*, 1986 WL 2199, at *1, 4; *Mitchell*, 704 F. Supp. at 525; *Data Gen.*, 676 F. Supp. at 538.

¹⁶⁷ *See, e.g., Split End*, 1986 WL 2199, at *1 n.2 (“No party argues that this case involves an area to which the convention does not apply.”).

In *Split End* and *Data General*, the court decided that the Warsaw Convention did apply to the third-party action in question, but, disappointingly, the opinions do not reveal any doctrinal basis for the holdings; instead, the court just followed precedent.¹⁶⁸ The most probable—if not only—explanation is that the court in *Split End* and *Data General* applied the Warsaw Convention because it understood *Reed II* as holding that the Warsaw Convention governs any action for damages against a carrier (as including its *préposés*) arising out of an event covered by the Warsaw Convention irrespective of who the plaintiff is. In addition, the court also reached the inevitable construction—implicit in *Reed II*—that the Warsaw Convention’s provisions (specifically the time limitation) generally applied to third-party actions, not just its monetary limitations.¹⁶⁹ Similar decisions were reached in subsequent cases.¹⁷⁰ But what of the *Mitchell* case?

¹⁶⁸ See *id.* at *4 (citing *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 488 N.Y.S.2d 547 (N.Y. Sup. Ct. 1985)); *Data Gen.*, 676 F. Supp. at 540.

¹⁶⁹ In most cases, the provision at issue was the time limitation for commencing suit. See, e.g., *Motorola, Inc. v. MSAS Cargo Int’l, Inc.*, 42 F. Supp. 2d 952, 954 (N.D. Cal. 1998); *Mitchell*, 704 F. Supp. at 525–26; *Data Gen.*, 676 F. Supp. at 540–41; *Split End*, 1986 WL 2199, at *6; *L.B. Smith*, 488 N.Y.S.2d at 549. Article 29(1) of the Warsaw Convention provides: “The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.” Warsaw Convention, *supra* note 9, art. 29(1).

¹⁷⁰ See *Royal Ins. Co. v. Emery Air Freight Corp.*, 834 F. Supp. 633, 636 (S.D.N.Y. 1993); *Motorola*, 42 F. Supp. 2d at 956. In *Royal Insurance*, the plaintiff (as subrogee of Corning, Inc.’s cause of action) sued the defendant for damaging a shipment sent by Corning from the United States to South Korea. 834 F. Supp. at 633. In turn, Emery brought a third-party action against Singapore Airlines that it claimed, relying on *Connaught*, was not governed by WCS. *Id.* at 634. The court, relying on precedent and noting that no language in the treaty supported Emery’s position, held that the time limits of WCS applied. *Id.* at 635 (citing *Data Gen.*, 676 F. Supp. at 539; *L.B. Smith*, 488 N.Y.S.2d at 547). In *Motorola*, the plaintiff (Motorola, Inc.) had contracted MSAS Cargo to transport computer equipment from San Francisco to Tokyo; in turn, MSAS arranged for the airline (Asiana) to transport the cargo. 42 F. Supp. 2d at 953. When the cargo was collected by the consignee (Nippon Motorola), damage was noted on the air waybill, for which Motorola sued MSAS. *Id.* MSAS then brought a third-party action for contribution or indemnification against Asiana. *Id.* Motorola later amended its complaint to list Asiana as a defendant. *Id.* Asiana sought summary judgment against all claims, arguing that notice and filing of claim were not brought in accordance with the provisions of WCS. *Id.* at 954. MSAS sought to argue (relying on *Connaught*) that WCS did not apply to its third-party action against Asiana because it was an action by one carrier against another. *Id.* at 956. The court

a. Searching for a *Ratio* in *Mitchell*

In *Mitchell*, the plaintiff shipper contracted with Air Express International, Inc. (Air Express) to transport a crankshaft from London to New York.¹⁷¹ In New York, the carrier's ground handler, Triangle Aviation Services, Inc. (Triangle), damaged the crankshaft in the process of off-loading it.¹⁷² The plaintiff sued Air Express "one day shy" of the Warsaw Convention's two-year limitation period, and the defendant then promptly filed a third-party action against Triangle, albeit outside the two-year limit of the Warsaw Convention.¹⁷³ Triangle sought dismissal on the grounds that the time limitation of the Warsaw Convention applied to the third-party action.¹⁷⁴

Mitchell is—to put it mildly—something of an oddity. While agreeing with *Split End* and *Data General*, which had all applied the Warsaw Convention to third-party actions, Judge Kram essentially tried to do the impossible. She simultaneously decided *not to apply* the Warsaw Convention to the third-party action involved in her case.¹⁷⁵ In addition, she sought to accept *Connaught*, but only on very limited grounds.¹⁷⁶

disagreed, rejecting the contention that "indemnity actions between carriers are not subject to the two-year limitations period under the Warsaw Convention." *Id.*

¹⁷¹ *Mitchell*, 704 F. Supp. at 525.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 525–26. Judge Kram summarized the issue as: "[W]hether the two-year limitation of the Convention also governs an action by a carrier for indemnification against its agent, an independent contractor, when the agent is not a carrier." *Id.* at 525.

¹⁷⁵ *Id.* at 526, 528.

¹⁷⁶ *Id.* at 527. Judge Kram accepted *Connaught*, but only insofar as it held that the Warsaw Convention did not apply to *claims between contracting carriers*. *Id.* On this narrow reading, the *Split End* decision was not in conflict because it had not applied the Warsaw Convention to a claim between contracting carriers; *Split End* involved third-party actions between a contracting carrier and an actual carrier and its GHA. *Split End Ltd. v. Dimerco Express (Phils) Inc.*, No. 85 Civ. 1506, 1986 WL 2199, at *1 (S.D.N.Y. Feb. 11, 1986). Nor was *Connaught* applicable to the facts of *Mitchell* because *Mitchell* involved a third-party action between a carrier and its ground handling agent (i.e., it was not a claim between contracting carriers). *Mitchell*, 704 F. Supp. at 525. Judge Kram was thus able to distinguish *Connaught*. *Id.* at 527. However, the problem with this approach is that Judge Kram tries to accept the holding of *Connaught* without its *ratio*. On the narrowest reading of *Connaught*, Judge Kram is right—the Warsaw Convention does not apply between *contracting carriers*. *Connaught* involved a case of successive carriage, so the court was not asked to rule on the applicability of the Warsaw Convention on a claim between a contracting carrier and a *préposé*. *Connaught Labs. Ltd. v. Air Can.* (1978), 94 D.L.R. 3d 586, 586 (Can. Ont. Sup. Ct. J.). However, the *Connaught* court based its holding on a broader reasoning that regarded the War-

Judge Kram justified her approach by simply distinguishing the cases; in essence, she made a special exception.¹⁷⁷ Although premised on a false distinction, Judge Kram inadvertently revealed the truth behind them all in attempting to distinguish between the cases. Unlike *Split End* and *Data General*, the court in *Mitchell* attempted to establish something approaching a *ratio decidendi*, albeit one that proved utterly unsatisfactory but is nonetheless revealing.¹⁷⁸ Unfortunately, Judge Kram's opinion in *Mitchell* places several hurdles in the path to substantiating its *ratio*; not only does it contain several errors, but it also employs a confusing looseness in terminology.¹⁷⁹

In *Mitchell*, Judge Kram quoted from *Reed II* and noted that the Second Circuit had applied the Warsaw Convention's limitations to avoid the circumvention of the Warsaw Convention's liability limit and prevent the undermining of the Warsaw Con-

saw Convention as *only* applying to claims between passengers (or shippers) and carriers. *Id.* at 593–94. In other words, the court held that the Warsaw Convention does not apply to any other actions, including third-party actions. *Id.* This broader holding would conflict with the precedent of the New York courts, where the Warsaw Convention had been applied to actions between contracting carriers and actual carriers, and between contracting carriers and the GHA of an actual carrier, such as *Split End* and *Data General*. *Split End*, 1986 WL 2199, at *1, 6; *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 538–39, 541 (S.D.N.Y. 1988). It also conflicts with *Mitchell* because this was a claim by a carrier against its GHA. *See Connaught*, 94 D.L.R. 3d at 588; *Mitchell*, 704 F. Supp. at 527–28. One cannot accept the holding in *Connaught*—even where narrowly construed—without accepting the broader rationale.

¹⁷⁷ *See also* *Sabena Belgian World Airlines v. United Airlines, Inc.*, 773 F. Supp. 1117, 1119–20 (N.D. Ill. 1991) (applying the same special exception as *Mitchell* and refusing to apply the Warsaw Convention to a third-party action by a carrier against its GHA).

¹⁷⁸ *Mitchell*, 704 F. Supp. at 527–28.

¹⁷⁹ For example, Judge Kram stated in reference to *Split End* and other cases: “Unlike these cases, however, third-party defendant Triangle is not an air carrier, but a ground handler.” *Id.* at 526 (referring to, *inter alia*, *Split End*, 1986 WL 2199, at *1; *Data Gen.*, 676 F. Supp. at 538–39). This was wrong; there were two third-party defendants in *Split End*, one of them was an actual carrier (i.e., Kuwait Airways), but the other was the ground handling agent of the actual carrier (i.e., Aer Lingus). *See Split End*, 1986 WL 2199, at *1. Although Aer Lingus is best known as an air carrier, it was not operating as a carrier in this case but as the ground handling agent of Kuwait Airways. *See id.* Indeed, Judge Kram noted this at other points in the judgment. *See Mitchell*, 704 F. Supp. at 527 (“In *Split End*, the third party action was initiated by a freight forwarder against the carrier and its ground operations agent.”). At another point, Judge Kram described the holding in *Split End* as “the Convention applied to indemnity actions by a non-carrier agent against the actual carrier.” *Id.* at 527 n.4. However, Dimerco was the third-party plaintiff in *Split End*—it was the principal, not the agent. *Split End*, 1986 WL 2199, at *1.

vention's goals of uniform treatment of carrier liability.¹⁸⁰ Judge Kram claimed that *Data General* and *Split End* had likewise been concerned with avoiding circumvention of the Warsaw Convention.¹⁸¹ In her view, *Mitchell* was distinguishable because "[t]he Convention's limitation on carrier liability would not be circumvented if the Convention is not applied to this indemnification action."¹⁸² In terms of outcome, this is absolutely right. Because the Warsaw Convention had been applied to the main action against the carrier, whatever liability was sought by way of indemnification against the third-party defendant could not be more than what was permitted under the Warsaw Convention.¹⁸³ At base, it seems that Judge Kram's purported *ratio* was that if the Warsaw Convention's limitation of liability is not at risk of circumvention by the third-party action, then there is no need to apply the Warsaw Convention to that action.¹⁸⁴

However, one of the problems with Judge Kram's reasoning is that there was no risk of circumvention in *L.B. Smith*, *Split End*, or *Data General*; or to be precise, there was no risk of circumvention of the Warsaw Convention's *limitation of liability*. In those cases, the only circumvention directly at issue was the time limits for bringing a claim under the Warsaw Convention.¹⁸⁵ Because

¹⁸⁰ *Mitchell*, 704 F. Supp. at 526–27 (quoting *Reed II*, 555 F.2d 1079, 1092 (2d Cir. 1977)) ("The Second Circuit has explained: 'If this method of circumventing the Convention's liability limitation [by suing an employee of an airline] is accepted, not only will the purpose of defining the limits of the carrier's obligations be circumvented, but in the process the Convention's most fundamental objective of providing a uniform system of liability and litigation rules for international air disasters will be abandoned as well.'").

¹⁸¹ *Id.* at 527 ("A close look at *Reed*, *Data General Corp.*, *Split End*, and similar cases reveals that the courts primarily have been concerned with preventing shippers and passengers from circumventing the Convention's liability limit and its two-year time limit.").

¹⁸² *Id.* (Judge Kram referring to the concerns raised by "*Reed*, *Data General Corp.*, *Split End*, and similar cases," but distinguishing *Mitchell* by stating that "[s]uch concerns are not compelling here.").

¹⁸³ *Id.* ("The Convention's limitation on carrier liability would not be circumvented if the Convention is not applied to this indemnification action. Instead, the upper limit of the third-party defendant's liability in this indemnity action is the Convention's liability limitation that applies to the main action. By allowing this indemnification action to proceed, this Court ensures that the carrier's liability will be appropriately limited, within the liability parameters of the Convention, by its actual fault, if any.").

¹⁸⁴ *Id.*

¹⁸⁵ To be fair, Judge Kram did note that circumvention of time limits was at issue in these cases. *Id.* ("A close look at *Reed*, *Data General Corp.*, *Split End*, and similar cases reveals that the courts primarily have been concerned with preventing shippers and passengers from circumventing the Convention's liability limit

the main actions in *L.B. Smith*, *Split End*, and *Data General* were all taken by shippers against contracting carriers, those actions would have been subject to the Warsaw Convention, so any liability sought to be reallocated via the third-party action for contribution would, as a consequence, have been subjected to the Warsaw Convention's provisions of monetary limitation.¹⁸⁶

If we continue to examine the basis for Judge Kram's ratio, we find that her perception of there being no risk of circumvention of the Warsaw Convention's monetary limitation was based on the notion of a non-carrier agent. *L.B. Smith*, *Split End*, and *Data General* all involved third-party actions taken by a carrier (the contracting carrier) against a *préposé*, specifically an actual carrier.¹⁸⁷ *Mitchell* involved a third-party action by a carrier (who

and its two-year time limit.") (emphasis added). But, Judge Kram then seems to have turned a blind eye to this and focused exclusively on circumvention of the monetary limitation for her ratio.

¹⁸⁶ This is well illustrated by *Swiss Bank Corp. v. First National City Bank*, 1979 U.S. Dist. LEXIS 12472 (S.D.N.Y. May 11, 1979). Swiss Bank had consigned shipments of gold coins to First National City Bank, who was to deliver them to Metropolitan Rare Coin Exchange, Inc. once First National had received payment from Metropolitan to the favor of the consignee, i.e., Swiss Bank. *Id.* at *1–2. In practice, the coins were just delivered over to Metropolitan without first confirming a deposit. *Id.* The seventh shipment was 142kg of gold, worth U.S. \$637,000. *Id.* Again, the shipment was delivered to Metropolitan without first receiving a deposit. *Id.* Unfortunately, Metropolitan went out of business before it made any deposit. *Id.* Swiss Bank sued Swiss Air and First National. *Id.* Swiss Air settled with Swiss Bank for U.S. \$3,355, i.e., its maximum liability under the Warsaw Convention. *Id.* at *3. First National brought a third-party action for contribution against Swiss Air for whatever liability it ended up owing to Swiss Bank. *Id.* at *7. Swiss Air successfully petitioned the court to dismiss First National's third-party action. *See id.* at *14. The court held that federal law imposed the limitation of liability (i.e., as a treaty of the land), and that "[a]ny further contribution to Swiss Bank, whether direct or indirect . . . would exceed this limit." *Id.* at *10. Absent proof of Swiss Air being guilty of willful misconduct, its limitation of liability under the Warsaw Convention represented the maximum it could be held to pay in contribution. *See id.* at *10 n.6. First National attempted to argue that under the applicable New York rules as to contribution (i.e., N.Y. GEN. OBLIG. LAW § 15-108(a) (McKinney 1978)), Swiss Air's settlement automatically reduced First National's potential liability to Swiss Bank to the extent of Swiss Air's equitable share of the damages. *See id.* at *12. The court explained that this "could not be construed to mean any amount greater than the maximum liability permitted by law." *Id.* at *13. In other words, the liability that Swiss Air owed by law, i.e., under the Warsaw Convention, was its equitable share, and First National was potentially liable for the remainder of the U.S. \$637,000.

¹⁸⁷ *See MANKIEWICZ, supra* note 56, at 38 ("The carrier who performs the carriage on behalf of the contracting carrier is, as the case may be, his servant or agent, the *préposé* in civil law countries . . . or the actual carrier under the Guadalajara Convention.").

was both the contracting and actual carrier) against its *préposé*, specifically its own ground handling agent.¹⁸⁸ Judge Kram distinguished these factual scenarios with the notion of a non-carrier agent, by which it is clear she meant an agent who is not itself a carrier.¹⁸⁹ She held that the Warsaw Convention does not need to apply to a third-party action by a carrier against a non-carrier agent.¹⁹⁰ She could seemingly explain why the Warsaw Convention was applied in *Data General* and *Split End* by pointing to the distinguishing feature that the third-party action was against a carrier agent in those cases.¹⁹¹ This, it is submitted, is a false distinction. It is a purely descriptive distinction without a legal basis in the Warsaw Convention.

The distinction between a carrier agent and a non-carrier agent is one that could be made—but really should not be—if you have ratified the Guadalajara Convention and the Hague Protocol, or MC99; in other words, if you have adopted the concept of an actual carrier and all other *préposés* of a carrier.¹⁹² In that case, one could refer to an actual carrier as a carrier agent (i.e., of the contracting carrier) and all other *préposés* as non-carrier agents (whether they be agents of the actual or contracting carrier). However, you cannot adopt this understanding if you follow *Reed II* because it is committed to the singular concept of a carrier as including its *préposés*.¹⁹³ Being a non-carrier agent does not stop you from being a *préposé*, and, where one adheres to *Reed II*, if you are the *préposé* of a carrier, then the Warsaw Convention contemplates you as included in the meaning of carrier and it therefore applies.

Another problem with *Mitchell* is that it is irreconcilable with *Split End*. Judge Kram had distinguished *Split End* and *Data General* because those cases involved actions against carriers.¹⁹⁴ However, *Split End* also involved a claim between a carrier and a GHA.¹⁹⁵ There were two third-party defendants in *Split End*; one was the actual carrier, or, to use Judge Kram's terminology, a carrier agent. The other was the actual carrier's *préposé* (specifi-

¹⁸⁸ *Mitchell*, 704 F. Supp. at 525.

¹⁸⁹ *Id.* at 526 (“[T]hird-party defendant Triangle is not an air carrier, but a ground handler. Instead, the third-party plaintiff is the carrier.”).

¹⁹⁰ *Id.* at 527.

¹⁹¹ *Id.*

¹⁹² See *supra* text accompanying note 75.

¹⁹³ See *Reed II*, 555 F.2d 1079, 1092 (2d Cir. 1977).

¹⁹⁴ *Mitchell*, 704 F. Supp. at 526.

¹⁹⁵ *Split End Ltd. v. Dimerco Express (Phils) Inc.*, No. 85 Civ. 1506, 1986 WL 2199, at *1 (S.D.N.Y. Feb. 11, 1986).

cally a GHA), thus a non-carrier agent.¹⁹⁶ Judge Kram's non-carrier agent logic would be consistent with the *Split End* court applying the Warsaw Convention to the third-party action against the carrier agent but would not be consistent with the *Split End* court applying the Warsaw Convention to the third-party action against the GHA.¹⁹⁷

Even assuming we accept the distinction and apply the notion of a non-carrier agent, we find ourselves at a logical impasse. The defendants in *Reed II* were senior managers of the airline and thus *préposés* (or, in Judge Kram's terms, we might cram into them under the notion of non-carrier agents), but the Second Circuit maintained in *Reed II* that the Warsaw Convention applies to actions taken against *préposés* because they are to be deemed covered by the definition of *carrier*.¹⁹⁸ Yet, Judge Kram tells us that such *préposés* are non-carrier agents and, at least where they are sued by a carrier, that the Warsaw Convention does not apply to them.¹⁹⁹ Presumably, where the passenger or

¹⁹⁶ *Id.*

¹⁹⁷ One could try to argue that *Reed II* only applies the Warsaw Convention to carriers (i.e., contracting carriers) and *préposés* of carriers, but does not apply to an agent of the carrier, e.g., the GHA of an actual carrier. However, this would fly in the face of the *Reed II* court's efforts to avoid circumvention since it would allow a plaintiff to sue the agent of an agent outside the Warsaw Convention. We can, therefore, reject that explanation. In the only case which could be found on the issue, the District Court for the Southern District of New York (the same as *Split End* and *Mitchell*) applied the Warsaw Convention. See *Waxman v. C.I.S. Mexicana de Aviacion, S.A. de C.V.*, 13 F. Supp. 2d 508, 516 (S.D.N.Y. 1998). Plaintiff Waxman was on a flight from Newark, New Jersey, to Cancun, Mexico, with the defendant airline when he was stuck in the leg by a hypodermic needle protruding from the seat directly in front of him. *Id.* at 510. The cleaning services had been provided in Newark by Signature Flight Support under a contract between Mexicana and Lufthansa, the latter having subcontracted Signature. *Id.* Plaintiff argued that the Warsaw Convention only protected carriers and their agents/servants. See *id.* at 511. In this case, that meant Mexicana and Lufthansa. See *id.* However, the plaintiff disputed the application of the Warsaw Convention to the subcontracted agent of Lufthansa, Signature. See *id.* at 512–13. The court quoted the plaintiffs: "In other words, according to the Waxmans, 'no Federal Court in this Circuit has ever held that an entity which is neither an agent of nor in privity of contract with the carrier may invoke the liability limitations of the Warsaw Convention.'" *Id.* at 513. The court disagreed, stating that "it would be elevating form over substance to hold that parties to valid subcontracting agreements with a covered entity are not similarly protected from unlimited liability under the Convention." *Id.* The court supported its decision by reference to *Reed v. Wisser* and its rationale of preventing circumvention of the Warsaw Convention's limits. See *id.* at 514 ("Simply put, the failure to extend liability limitations to subcontractors would subvert the Convention's aims in exactly the same fashion.").

¹⁹⁸ *Reed II*, 555 F.2d at 1081, 1092.

¹⁹⁹ *Mitchell*, 704 F. Supp. at 527.

shipper directly sued the non-carrier agent—who, let us be clear, is a *préposé*—Judge Kram would have applied the Warsaw Convention (as per *Reed II*) because not to do so would risk circumvention. But why should the Warsaw Convention apply in one case but not in the other? Judge Kram's only explanation is the risk of circumvention of the Warsaw Convention's monetary limitation.²⁰⁰ This is the crux of the whole matter.

The courts in *L.B. Smith*, *Split End*, and *Data General* all applied the Warsaw Convention because they were compelled to do so in light of the rationale in *Reed II*—i.e., the Warsaw Convention applies to any claim against a carrier or its *préposé* arising out of damage covered by the Warsaw Convention, irrespective of who the plaintiff is.²⁰¹ They did not apply the Warsaw Convention because they feared direct circumvention of the Warsaw Convention's limitation of liability in the case at bar; instead, they were concerned about the hypothetical inverse situation. They were concerned with the situation where a plaintiff might choose to sue the *préposé*, not the contracting carrier.²⁰² Their thought process was as follows: If we don't apply the Convention to the third-party action against the *préposé*, then how can we justify applying it in a direct action against the *préposé*? If *Reed II* tells us that we must apply it in the main action, then we have to apply it to the third-party action, too; otherwise, it will create conflict with *Reed II*.

In *Mitchell*, Judge Kram took *L.B. Smith*, *Split End*, and *Data General* at face value. She, it seems, did not direct her attention to the hypothetical case of the plaintiff taking a direct action against the *préposé* and, therefore, concluded that there was no risk of circumvention of the Warsaw Convention's limitation of liability.²⁰³ Commendably, Judge Kram sought (intentionally or not) to chart a course away from *Reed II* for a small, exceptional class of cases.²⁰⁴ Most likely, she was motivated to do so because of the obvious inequity of preventing a defendant from seeking contribution against a third-party defendant because they were unable to file their complaint on time because the plaintiff to the main action had left their action to the very last moment. In

²⁰⁰ *Id.*

²⁰¹ See *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 488 N.Y.S.2d 547, 549 (N.Y. Sup. Ct. 1985); *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 540–41 (S.D.N.Y. 1988); *Reed II*, 555 F.2d at 1092–93.

²⁰² See *L.B. Smith*, 488 N.Y.S.2d at 549.

²⁰³ See *Mitchell*, 704 F. Supp. at 527.

²⁰⁴ *Id.*

the Author's view, in terms of the outcome, she was right; the Warsaw Convention should not apply to third-party actions, but being unable to overrule *Reed II*, not to mention the pressure created by the existence of its progeny (most notably, *L.B. Smith*, *Split End*, and *Data General*), she was building a house on sand.

3. *The Outliers*

A couple of U.S. court cases involving third-party actions taken against carriers for damages arising out of events covered by the Warsaw Convention deserve special attention—*In re Air Crash at Agana on August 6, 1997*,²⁰⁵ and *In re Air Crash Near Nantucket Island on October 31, 1999*.²⁰⁶ In both cases, the defendants

²⁰⁵ Civ. No. 97-7023, MDL No. 1237 (C.D. Cal. Jan. 25, 1999). The only report of the case is contained in Andrew J. Harakas, *International Case Notes and Commentaries*, AVIATION Q., Jan. 1999, at 108, 109–11 (George N. Tompkins, Jr. & Andrew J. Harakas, eds., 1999). The details provided herein are taken from commentaries on the case provided by Alan H. Collier & Stephanie N. Brie. Alan H. Collier & Stephanie N. Brie, *The Battle over Air France: Does the Montreal Convention Apply to Manufacturer Claims for Carrier Indemnity?*, in AIRCRAFT BUILDERS COUNCIL, INC. L. REP. (2010); see also Blanca I. Rodriguez, *Recent Developments in Aviation Liability Law*, 66 J. AIR L. & COM. 21, 65–66 (2001); Sheila A. Sundvall & Michael C. Andolina, *The Status of Pending Air Carrier Litigation*, 66 J. AIR L. & COM. 167, 175–76 (2001); Barry F. Benson & Jill Dahlmann Rosa, *The Status of Pending Air Carrier Litigation*, 66 J. AIR L. & COM. 1367, 1389–93 (2001); Anne M. Huarte, *Korean Air Flight 801: Warsaw and the FTCA*, MAGAÑA CATHCART & MCCARTHY (Mar. 19, 2010), <http://www.mcmc-law.com/korean-air-flight-801-warsaw-and-the-ftca/> [<https://perma.cc/Y9CC-GHBB>]. The basic facts are as follows: Korean Air Lines Flight 801 crashed short of the runway at Agana Airport in Guam, causing the deaths of 225 people and leaving only twenty-nine survivors. Sundvall & Andolina, *supra*, at 175. Various suits were filed in the United States against the U.S. Government (on account of the alleged negligence of the FAA) and Serco Management Services (the company that managed the air traffic control tower on behalf of the FAA). See *id.* at 175–76. The United States and Serco then brought contribution and indemnification claims against Korean Air Lines. *Id.* For a fuller account of the facts and procedural history, see Benson & Dahlmann Rosa, *supra*, at 1389–93.

²⁰⁶ 340 F. Supp. 2d 240 (E.D.N.Y. 2004). This litigation arose from the crash of EgyptAir Flight 990. *Id.* at 241. The litigation involved a multitude of plaintiffs whose actions had been consolidated. *Id.* The plaintiffs broadly fell into two groups. One consisted of representatives of the estates of two passengers who had died in the accident and whose claims were initially made only against EgyptAir. See *id.* The other group consisted of the vast majority of plaintiffs who had brought actions against the airframe manufacturer (Boeing) and a component manufacturer (Parker Hannifin) but not against EgyptAir. *Id.* The manufacturing defendants made cross-claims against each other, and both made third-party actions against EgyptAir for contribution and indemnification. *Id.* The probable cause of the accident is the subject of conflicting findings between the investigative authorities of the United States and Egypt. Compare NAT'L TRANSP. SAFETY BD. (NTSB), PB2002-910401, NTSB/AAB-02/01, DCA00MA006, AIRCRAFT ACCIDENT

to the main action (the U.S. State and the Air Traffic Control providers in *In re Air Crash at Agana*; manufacturers Boeing Co. and Parker Hannifin Corp. in *In re Air Crash Near Nantucket*) had brought third-party actions for indemnification or contribution against a carrier (Korean Air Lines in *In re Air Crash at Agana* and EgyptAir in *In re Air Crash Near Nantucket*).²⁰⁷ Both carriers argued that the Warsaw Convention governed the third-party action and that the U.S. court had no jurisdiction because the United States was not one of the forums available under Article 28.²⁰⁸

These cases are worthy of special attention for a few reasons. First, the U.S. district courts involved did not apply the Warsaw Convention to third-party actions against carriers, even though the decisions postdate the decisions discussed above (*In re Air Crash at Agana* was decided in 1999, and *In re Air Crash Near Nantucket* was decided in 2004), which had applied the Warsaw Convention.²⁰⁹ The reasoning applied in *In re Air Crash at Agana* and *In re Air Crash Near Nantucket* for not applying the Warsaw Con-

BRIEF: EGYPTAIR FLIGHT 990, BOEING 767-366ER, SU-GAP, 60 MILES SOUTH OF NANTUCKET, MASSACHUSETTS, OCTOBER 31, 1999 67 (2002), <https://www.nts.gov/investigations/AccidentReports/Reports/AAB0201.pdf> [<https://perma.cc/VV4N-KTAB>], with EGYPTIAN CIV. AVIATION AUTH., REPORT OF INVESTIGATION OF ACCIDENT: EGYPTAIR FLIGHT 990, OCTOBER 31, 1999, BOEING 767-300ER SU-GAP, ATLANTIC OCEAN – 60 MILES SOUTHEAST OF NANTUCKET ISLAND 142, <https://data.nts.gov/Docket/Document/docBLOB?ID=40146942&FileExtension=.PDF&FileName=Report%20of%20the%20Egyptian%20Civil%20Aviation%20Authority-Master.pdf> [<https://perma.cc/39TE-ZJ4F>]. The NTSB concluded that the accident's probable cause was the relief first officer's control inputs. See NAT'L TRANSP. SAFETY BD. (NTSB), *supra*, at 67. Although the NTSB did not determine the reasons for the first officer's actions, some believe it was a suicide. See Benson & Rosa, *supra* note 205, at 1377–78. On the other hand, the Egyptian Civil Aviation Authority concluded that the cause of the accident could not conclusively be identified and it determined that there was no evidence that the first officer intentionally dove the airplane into the ocean, but instead, that a mechanical problem was a “plausible theory that deserves further attention.” EGYPTIAN CIV. AVIATION AUTH., *supra*, at 141–42.

²⁰⁷ For details pertaining to the parties in *In re Air Crash at Agana on August 6, 1997*, see Benson & Dahlmann Rosa, *supra* note 205, at 1389–90. For details pertaining to the parties in *In re Air Crash Near Nantucket Island on October 31, 1999*, see *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 241.

²⁰⁸ Sundvall & Andolina, *supra* note 205, at 176 (noting, in regards to *In re Air Crash at Agana*, that “Korean Airlines contended that, in cases where the United States and Serco had been sued by plaintiffs for whom there was no Article 28 jurisdiction in the United States, Serco and the United States should be barred from seeking contribution and indemnity from Korean Airlines in the U.S.”); *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 242.

²⁰⁹ See generally Collier & Brie, *supra* note 205, at 20–22.

vention echoed that of the orthodox approach, exemplified by *Connaught*.²¹⁰ Second, whether *In re Air Crash at Agana* did, or did not, apply the Warsaw Convention is the subject of some doubt that needs to be cleared up. Third, in *In re Air Crash Near Nantucket*, the court raised a new line of argument about the nature of a third-party action for contribution or indemnity and its relationship to the main action—a line of argument that would reemerge in subsequent cases such as *Armavia*.²¹¹ Lastly, these cases help demonstrate the uneasiness that exists from the continued presence of *Reed II*.

a. *In re Air Crash at Agana*

In *In re Air Crash at Agana* the U.S. District Court for the Central District of California held that the text of the Warsaw Convention applied exclusively to actions by passengers or shippers.²¹² Therefore, an action taken by a manufacturer against a carrier was not subject to the Warsaw Convention's provisions.²¹³ In the court's view, the third-party action could be separated from the underlying passenger action, with the result that while a plaintiff-passenger would not have jurisdiction in the United States against the carrier, nothing prevented the defendants from bringing their claim for contribution or indemnification against the carrier in the United States.²¹⁴

²¹⁰ See generally *In re Air Crash at Agana*, Civ. No. 97-7023, MDL No. 1237; *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 242; *Connaught Labs. Ltd. v. Air Can.* (1978), 94 D.L.R. 3d 586, 593–94 (Can. Ont. Sup. Ct. J).

²¹¹ See *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 242–43.

²¹² See *Collier & Brie*, *supra* note 205, at 20.

²¹³ *Collier and Brie* state:

The [*Agana*] court interpreted the text of Warsaw to suggest it exclusively concerned itself with suits by passengers and shippers. In holding the identities of the parties central to the treaty's interpretation, the court concluded that the manufacturer's indemnity claim against the carrier was independent of the underlying passenger's claim, and therefore not governed by treaty.

Id. *Collier and Brie* also quote from a brief submitted by the U.S. Government in *In re Air Crash at Agana*:

The United States was also a party in the [*Agana*] litigation and argued in opposition to KAL's motion to dismiss that "[n]othing in the Convention covers, or was intended to cover, claims between carriers and third parties such as the United States or manufacturers, whether the carriers are in the position of plaintiffs, defendants, or intervenors."

Id. at 21.

²¹⁴ See *Rodriguez*, *supra* note 205, at 66.

Having concluded that the Warsaw Convention did not apply to the third-party action, the court also stated that the contribution or indemnity for which the airline could be liable would be limited to the same extent as it would in passenger actions.²¹⁵ This appears to be inconsistent with the non-applicability of the Warsaw Convention to the third-party action. How is it possible that the Warsaw Convention would not apply to the third-party action insofar as jurisdiction was concerned but would for limiting liability? Finding an answer to this question is made more difficult by the absence of a case report. However, the commentary on the case is enlightening. In their article, Collier and Brie attempted to account for this inconsistency by arguing that the court in *In re Air Crash at Agana* reached this holding on a “perceived misapplication” of the Sixth Circuit’s judgment in *Polec v. Northwest Airlines, Inc.*²¹⁶ They stated that the court *In re Air Crash at Agana* “read *Polec* to say that because a passenger’s recovery could not exceed the liability limit of Warsaw, that limit also restricts the potential recovery of a manufacturer by indemnity.”²¹⁷ This is a correct reading of *Polec*, so where is the perceived misapplication?

The court in *In re Air Crash at Agana* may have correctly understood the point being made (*obiter dictum*) in *Polec*, and, at least on this point, there was no perceived misapplication. In *Polec*, the third-party plaintiff had been permitted to recover in full because the carrier, the third-party defendant, had been guilty of willful misconduct (one of the permitted grounds upon which the Warsaw Convention’s limitation of liability can be broken).²¹⁸ However, the *Polec* court had commented that if the limit of liability had applied, this limit would have restricted the third-party plaintiff’s recovery against the carrier or third-party defendant.²¹⁹ Although *obiter*, the court seems to strongly suggest that the court would have applied the Warsaw Convention’s

²¹⁵ Sundvall & Andolina, *supra* note 205, at 176 (“The court . . . held that the indemnity claims were independent of the passenger claims and therefore not governed by the requirements of Article 28. However, the court recognized that the third-party indemnity claim must be limited by the Convention to the extent that the carrier’s liability would be limited in claims brought by passengers under the Convention.”); *cf.* Benson & Dahlmann Rosa, *supra* note 205, at 1390.

²¹⁶ See Collier & Brie, *supra* note 205, at 20 (referring to *Polec v. Nw. Airlines*, 86 F.3d 498 (6th Cir. 1996)).

²¹⁷ *Id.*

²¹⁸ See Warsaw Convention, *supra* note 9, art. 25.

²¹⁹ *Polec*, 86 F.3d at 544 (“If Northwest committed ‘only’ ordinary negligence, the international travel[]ers’ recovery may not exceed the liability limit of the

limitation of liability to the third-party action in the appropriate circumstances.²²⁰

The problem with *Polec* is that it was a third-party action based on subrogation, not contribution.²²¹ The distinction is vital because not all third-party actions are born equal. Subrogation usually arises in the context of insurance but, more generally, may arise wherever one party indemnifies another against an injury suffered at the hands of a third party.²²² In simple terms, subrogation operates to grant the indemnifier the right to step into the shoes of the indemnified in order to exercise any cause(s) of action vested in the indemnified against the third party in respect of the loss indemnified against.²²³ This is the vital point to note—the indemnifier (i.e., the subrogor) is not granted a cause of action against the third party; instead—by operation of law—the indemnifier is recognized as being entitled to exercise the cause of action of the injured party (i.e., the subrogee) against the third party.²²⁴ The subrogated action is

Warsaw Convention, and this liability limit restricts McDonnell Douglas's potential recovery.”).

²²⁰ See *id.* at 544.

²²¹ Unlike in *In re Air Crash at Agana on August 6, 1997*, Civ. No. 97-7023, MDL No. 1237 (C.D. Cal. Jan. 25, 1999), jurisdiction was not at issue in *Polec*. See Collier & Brie, *supra* note 205, at 20. Furthermore, the third-party plaintiff's contribution claims had been rejected because there was no common liability involved; the jury had found the carrier 100% liable. See *Polec*, 86 F.3d at 552. The actual basis of recovery in *Polec* was a third-party action for equitable subrogation. *Id.* at 513. This arose because the manufacturer had settled with the plaintiffs and thereby indemnified them. *Id.* at 551. However, because the manufacturer was ultimately not found liable at all, equitable subrogation allowed it to recover these payments. *Id.*

²²² S. R. DERHAM, SUBROGATION IN INSURANCE LAW 1 (1985).

²²³ *Id.* Lord Cairns summarized it as “[W]here one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.” *Simpson & Co. v. Thomson* [1877] 3 App. Cas. 279 (HL) 284 (appeal taken from Scot.); see JOHN BIRDS, BEN LYNCH & SIMON MILNES, MACGILLIVRAY ON INSURANCE LAW para. 24-001 (13th ed. 2015) (“In insurance law ‘subrogation’ is the name given to the right of the insurer who has paid a loss to be put in the place of the insured so that he can take advantage of any means available to the insured to extinguish or diminish the loss for which the insurer has indemnified the insured.”); see also DERHAM, *supra* note 222, at 1; JOHN BIRDS, BIRD’S MODERN INSURANCE LAW 331 (10th ed. 2016).

²²⁴ See DERHAM, *supra* note 222, at 69 (“The doctrine of subrogation does not confer a new and independent right of action on the insurer, but merely gives it the benefit of any personal right that the insured himself has against the third party.”).

actually taken in the name of the subrogee, not the subrogor.²²⁵ This is different from an action for contribution, where the third-party plaintiff brings an action in their own name against a third-party defendant.²²⁶ This action for contribution is distinct from—although dependent upon—the cause of action exercised in the main action, whereas, in subrogation, they are one and the same cause of action. Therefore, applying the Warsaw Convention to a subrogated cause of action is no different than it would be to apply it where the cause of action had been exercised directly by the injured party.

Because subrogation was involved and not contribution, *Polec* was of no value to *In re Air Crash at Agana*. Yet, Collier & Brie tell us that the court in *In re Air Crash at Agana* had taken a lead from *Polec*.²²⁷ It appears that the perceived misapplication of *Polec* in *In re Air Crash at Agana* (as understood by Collier & Brie) relates to the matter of the general applicability of the Warsaw Convention to third-party actions.²²⁸ Collier & Brie state that *In re Air Crash at Agana* read *Polec* as authority for applying only the monetary limitation of liability, but not the rest of the Warsaw Convention.²²⁹ They argue that the *In re Air Crash at Agana* court did not appreciate that in *Polec* the court had applied the Warsaw Convention generally.²³⁰ The limitation of liability had not applied in *Polec* precisely because the Warsaw Convention told the court that it did not apply where the carrier was guilty of willful misconduct, not because the Warsaw Convention was inapplicable.²³¹

If the *In re Air Crash at Agana* court did actually (mis)understand *Polec* as authority for applying only the limitation of liability, but not the rest of the Warsaw Convention, then it was clearly wrong. However, the Author has doubts about this.

²²⁵ As Lord Mansfield famously said of subrogation: “Every day the insurer is put in the place of the insured. . . . The insurer uses the name of the insured.” *Mason v. Sainsbury* (1782) 99 Eng. Rep. 538, 540 (KB).

²²⁶ See Collier & Brie, *supra* note 205, at 21–22.

²²⁷ *Id.* at 20.

²²⁸ *Id.*

²²⁹ *Id.* at 20–21.

²³⁰ *Id.* at 21 (“[T]he court in *Polec* generally applied the limitations of Warsaw to a third-party claim by a manufacturer against a carrier. Although the [*Agana*] court relied on *Polec* in applying the limitations of Warsaw to the liability exposure of a carrier in a third-party action, the court in [*Agana*] expressly declined to apply the limitations of Warsaw to jurisdiction over the carrier in a third-party action.”).

²³¹ See *Polec v. Nw. Airlines*, 86 F.3d 498, 544 (6th Cir. 1996).

In the Author's view, there was a misperception of *Polec* by the *In re Air Crash at Agana* court, but it was not consequential. This is because it is possible that the court was only making a very general point in *In re Air Crash at Agana*, one upon which the two courts were essentially in agreement. What the *In re Air Crash at Agana* court may have wished to use *Polec* for was to bolster the point that a third-party plaintiff cannot recover more from a third-party defendant than that defendant would have been liable for in a direct action taken by the plaintiff (e.g., the passenger). This much is true of both cases. One can imagine that the third-party defendants in *In re Air Crash at Agana* were stressing the need to apply the Warsaw Convention to the third-party action to avoid circumvention of the Warsaw Convention's limitation of liability. In response, the court was pointing out that there was no risk of circumvention. However, what was misperceived was the basis for not applying the limitation of liability in both cases. In other words, what was elided was the distinction between subrogation and contribution.

If the court in *In re Air Crash at Agana* was saying that if the passenger could only have recovered a limited amount from the carrier in a direct action under the Warsaw Convention, then, in any a third-party action for indemnification or contribution, the third-party plaintiff could not gain contribution in excess of that amount. Descriptively speaking, one could say this makes the Warsaw Convention's limitation of liability applicable to a third-party action. Still, legally speaking, it is not the Warsaw Convention that is being applied, but rather the doctrine of contribution or indemnification that typically permits the third-party defendant to rely upon any defenses or limitations that it would have had in a direct action by the plaintiff to the main action.²³²

Assuming this to be the substance of the doctrine of contribution applicable by the court in *In re Air Crash at Agana*, then it seems that the court was only stating the obvious. It was not stating that the Warsaw Convention's limitation of liability was applicable to the third-party action, but simply noting that where contribution is sought, the third-party defendant is entitled to rely upon defenses or limitations that would have been applicable in a direct action. The Warsaw Convention applies *de facto* to the third-party action only because of its *de jure* applicability

²³² Indeed, the United Kingdom's Civil Liability (Contribution) Act applies a similar principle. See Civil Liability (Contribution) Act, (1978) § 2(3), 47 CURRENT LAW (UK).

to the main action; one might say that it is indirectly or reflexively applicable.

While it cannot be said conclusively, it seems more likely that *In re Air Crash at Agana* stands for the general non-applicability of the Warsaw Convention to third-party actions.

b. *In re Air Crash Near Nantucket*

Turning now to the other outlier case, in *In re Air Crash Near Nantucket*, the plaintiffs broadly fell into two groups.²³³ One group consisted of the representatives of the estates of two passengers who had died in the accident and whose claims were made against EgyptAir.²³⁴ The other group consisted of plaintiffs who had brought actions against the airframe manufacturer (Boeing Co.) and a component manufacturer (Parker Hannifin Corp.), but not against EgyptAir.²³⁵ These manufacturer defendants then brought contribution or indemnification actions against EgyptAir.²³⁶

The plaintiffs' claims against EgyptAir were not actionable in the United States due to a lack of jurisdiction under the Warsaw Convention.²³⁷ EgyptAir sought to rely on this lack of jurisdiction to dismiss the third-party actions against it, arguing that its liability concerning these claims was coextensive with its liability toward the passengers under the Warsaw Convention.²³⁸ EgyptAir maintained that it would circumvent the Warsaw Convention if the manufacturing defendants could establish jurisdiction over the carrier in the United States in circumstances where the plaintiff-passenger could not.²³⁹ EgyptAir's logic was that the third-party action was derivative of the main action to

²³³ See *In re Air Crash Near Nantucket Island* on October 31, 1999, 340 F. Supp. 2d 240, 242 (E.D.N.Y. 2004).

²³⁴ See *id.* Initially, the plaintiffs only claimed against EgyptAir but subsequently joined Boeing and Parker Hannifin as defendants. *Id.* at 242 n.3.

²³⁵ *Id.* at 242.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* ("EgyptAir reasons that permitting Boeing and Parker Hannifin to recover via contribution or indemnity against EgyptAir would allow recovery on the passenger claims to be indirectly imposed against EgyptAir in the United States, when such recovery could not be directly imposed."). EgyptAir also stressed that the Warsaw Convention's goals of uniformity and limiting carrier ability would be undermined if it could be made indirectly liable to passenger claims via actions for contribution or indemnification. See *id.* at 243.

the extent that both were to be seen as two sides of the same coin.²⁴⁰

The manufacturing defendants counterargued that the Warsaw Convention did not apply to their claims against the carrier because the Warsaw Convention was solely directed at regulating the legal relationship between the carrier and the passenger or shipper.²⁴¹ Boeing also noted that its claim was founded on “separate contractual obligations” that were “voluntarily assumed” by EgyptAir in the aircraft purchase agreement.²⁴² The thrust of this point is that the origin of Boeing’s cause of action was by way of contractual indemnity rather than by operation of law and was, therefore, legally distinguishable from the underlying passenger action.²⁴³ As noted earlier, a distinction must be

²⁴⁰ See *id.*

²⁴¹ *Id.* at 242–43. Boeing relied on the Minutes of the Warsaw Convention for support, contending that the drafters had only intended the Warsaw Convention to regulate the legal relationship between the carrier and the passenger and not that between the carrier and other parties. See *id.* The reference was to the comments of the Rapporteur, which provided:

Before examining the articles of the preliminary draft, it is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. The text applies, therefore, only to the contract of carriage in its formal appearances first of all, and in the legal relationships which arise between the carrier and the persons carried or the people who ship.

WARSAW MINUTES ENGLISH, *supra* note 67, at 246.

²⁴² *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 242–43. A couple of subsidiary points were made by the manufacturing defendants. Boeing argued [T]hat the purpose of the Convention was to create a *quid pro quo* between carriers and passengers, in which passengers recover damages without the need to prove the carrier’s negligence, but in return have a cap placed on their recovery. . . . It notes that no such *quid pro quo* was contemplated by the Convention as to manufacturers.

Id. at 243 (citation omitted). Parker Hannifin made the point that “while the four fora are clearly designed to have a connection with carriers and passengers, they do not provide a forum that would necessarily have any connection to the manufacturer, as the present case illustrates.” *Id.*

²⁴³ The origin of Parker Hannifin’s claim is subject to some residual doubt. The court did note that “the contribution and contractual indemnity claims are based on Boeing and Parker Hannifin’s legal and equitable relationships with EgyptAir.” *Id.* at 244. This suggests that Parker Hannifin also had a contractual indemnity but we cannot be sure without further details. Certainly, both third-party plaintiffs would have had a common law right to claim indemnification/contribution. See Collier & Brie, *supra* note 205, at 29. Boeing certainly had a contractual indemnity, but we cannot be certain whether Parker Hannifin (a component manufacturer) did.

maintained between contractual indemnities and a right to contribution or indemnification as arises by law; this will be addressed in the Conclusion to this Article.

The *In re Air Crash Near Nantucket* court referred to *In re Air Crash at Agana* approvingly, stating, “[t]he identity of the parties is central to the Convention.”²⁴⁴ The court continued by stating that “[t]he express purpose of the Convention was to regulate litigation between passengers and carriers”²⁴⁵ and noting that the “[Warsaw] Convention is silent as to contribution and indemnification claims between manufacturers and carriers.”²⁴⁶ The *In re Air Crash Near Nantucket* court concluded that “to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”²⁴⁷ The practical result of which meant that the third-party plaintiffs’ actions were not preempted by the Warsaw Convention’s jurisdictional provisions and could be brought in the United States.

As for EgyptAir’s argument that the manufacturing defendants’ claims were coextensive with the underlying passenger actions, the court was forthright in its rejection. The court took the view that the manufacturing defendants’ “contribution and contractual indemnity claims” were based on “legal and equitable relationships with EgyptAir . . . distinct from any passenger claim.”²⁴⁸ As shown in Part III of this Article, the court was right in its conclusion. However, there is a problem with how the *In re Air Crash Near Nantucket* court justified its view.

The court relied on the authority of the U.S. Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, where it permitted a third-party action against the backdrop of a statute that—similarly to the Warsaw Convention—provided a limitation of liability and an exclusive remedy for an injured party against its employer.²⁴⁹ In *Ryan*, the employer was the third-party defen-

²⁴⁴ *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 243.

²⁴⁵ *Id.* (citing *El Al Isr. Airlines Ltd. v. Tseng*, 525 U.S. 155, 171–72 (1999) (“[T]he convention addresses and concerns, only and exclusively, the airline’s liability for passenger injuries occurring ‘on board the aircraft or in the course of any of the operations of embarking or disembarking.’”)).

²⁴⁶ *Id.* at 244. The court also referred to the Minutes of Warsaw Convention for support. *See id.* at 243–44 (citing WARSAW MINUTES ENGLISH, *supra* note 67, at 246).

²⁴⁷ *Id.* at 244.

²⁴⁸ *Id.*

²⁴⁹ *Id.* *See generally* *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan*, a longshoreman (also known as a stevedore) had been compen-

dant to a claim for contribution or indemnification made by a third-party plaintiff who the employee in the main action had sued.²⁵⁰ The difficulty with *Ryan*, for *In re Air Crash Near Nantucket*, is that *Ryan* was decided on the basis of a contractual indemnity only.²⁵¹ In other words, the third-party defendant's duty to indemnify the third-party plaintiff arose from a freely given contractual indemnity; it did not arise by force of law, e.g., as arises between joint tortfeasors. The Court determined that the statute did not in any way restrict the power of the parties to agree to such a contractual indemnity, confirming that the cause of action based on the contractual indemnity was legally distinct from the underlying liability owed by the third-party defendant to the injured party.²⁵² What *Ryan* did not address—the

sated by their employer (Ryan Stevedoring Co.) for injuries sustained due to negligence imputed to the employer. *Id.* at 126–28. Under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, Ryan Stevedoring Co.'s liability was limited to approximately \$13,000. *Id.* at 128. Subsequently, the injured longshoreman sued the shipowner (Pan-Atlantic S.S. Corp.) and was awarded \$75,000. *Id.* The shipowner then turned to Ryan Stevedoring, seeking contribution/indemnification. *Id.* Ryan Stevedoring argued that its liability to the injured employee was exclusive and pre-empted the shipowner's claims to contribution/indemnification. *Id.* In other words, Ryan Stevedoring sought to maintain that the two claims were effectively one and the same. While the Supreme Court's decision allowed the shipowner to recover an indemnity, the basis for that was contractual, not tort. *Id.* at 131–32. Ryan Stevedoring had given a contractual indemnity to the shipowner whereby it committed to hold the shipowner harmless from the consequences of Ryan Stevedoring's negligence. *Id.* at 130.

²⁵⁰ *Id.* at 127.

²⁵¹ *Id.* at 131–32 (“The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner.”). Interestingly, the court in *In re Air Crash Near Nantucket Island on October 31, 1999*, 340 F. Supp. 2d 240, 244 (E.D.N.Y. 2004) also cited *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 99 (2d Cir. 1991). While it seems that *Triguero* was cited in *In re Air Crash Near Nantucket* to bolster *Ryan* with a Second Circuit authority because *In re Air Crash Near Nantucket* was an E.D.N.Y. case, *Triguero* concerned the same statute (i.e., LHWCA), and had facts very similar to those of *Ryan*. See *Triguero*, 932 F.2d at 97. Most interestingly, the Second Circuit in *Triguero* actually applied the LHWCA to pre-empt a *non-contractual* third-party action. See *id.* at 98–99 (citing *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 717 (2d Cir. 1978); *Lopez v. Oldendorf*, 545 F.2d 836, 839–40 (2d Cir. 1976)). Indeed, in *Triguero* the court determined there was no contractual indemnity. *Id.* at 102. Therefore, *Triguero* reached a decision on the matter which the Supreme Court had left unanswered in *Ryan*, i.e., whether LHWCA pre-empted non-contractual claims for indemnification or contribution. *Id.* Unfortunately, this aspect of *Triguero* was not addressed specifically in *In re Air Crash Near Nantucket*.

²⁵² *Ryan*, 350 U.S. at 130 (“In the face of a formal bond of indemnity this statute clearly does not cut off a shipowner's right to recover from a bonding com-

Court specifically leaving this issue open—was whether the statute would have preempted a noncontractual claim to indemnification or contribution.²⁵³

The difficulty for *In re Air Crash Near Nantucket* is that it involved, not only claims based on contractual indemnity, but also ones based on common law.²⁵⁴ *Ryan* only provides an answer to the former, not the latter.²⁵⁵ It is not entirely clear what the *In re Air Crash Near Nantucket* court's intention was. Did it understand *Ryan* as authority for a wider proposition, i.e., that third-party actions, whether contractual or non-contractual, are legally distinct from the underlying actions upon which liability in the main action is established? If so, then *In re Air Crash Near Nantucket*'s reliance on *Ryan* was misplaced because the U.S. Supreme Court left the status of noncontractual third-party actions undecided in *Ryan*. Alternatively, provided both Boeing and Parker Hannifin had contractual indemnities from EgyptAir, the court may have, like the Supreme Court in *Ryan*, regarded the preemptive effect on any noncontractual causes of action for contribution or indemnification as moot. In either case, *In re Air Crash Near Nantucket* cannot provide us with an authoritative answer on this point.

A final salient feature of *In re Air Crash Near Nantucket* is that the case report tells us that EgyptAir had “relied heavily” on *Reed II*.²⁵⁶ Unfortunately, the carrier's argument is not presented in the report. Still, it is most likely that EgyptAir argued that the court ought to apply the Warsaw Convention to the third-party action because, if it did not, the Warsaw Convention would be circumvented, as would have happened in *Reed II* if the court

pany the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages ‘on account of’ an employee’s ‘injury or death.’ It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship.”).

²⁵³ *Id.* at 142 n.6 (“We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor.”).

²⁵⁴ *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 244.

²⁵⁵ See Collier & Brie, *supra* note 205, at 22 (“This reasoning explains the court’s decision to not apply Warsaw to a third-party claim for *contractual* indemnity, but does not necessarily provide support for *equitable* indemnity outside the Convention.”).

²⁵⁶ *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 244.

had not therein applied the Warsaw Convention.²⁵⁷ This put the *In re Air Crash Near Nantucket* court in a tight spot. How could avoiding circumvention be grounds for applying the Warsaw Convention in *Reed II* but not in *In re Air Crash Near Nantucket*?

The *In re Air Crash Near Nantucket* court elected to distinguish *Reed II*. The principal basis upon which the *In re Air Crash Near Nantucket* court relied to distinguish the cases was that the Second Circuit in *Reed II* applied the Warsaw Convention to the main action (i.e., between the plaintiff and the carrier's *préposés*). In contrast, the parties in *In re Air Crash Near Nantucket* accepted that the Warsaw Convention did not apply to the main action (i.e., between the plaintiffs and the manufacturing defendants).²⁵⁸ Instead, EgyptAir asked that the court apply the Warsaw Convention to the recourse action (i.e., the manufacturing defendants against EgyptAir).²⁵⁹ Furthermore, the court noted that the plaintiffs in *In re Air Crash Near Nantucket* were not—unlike the plaintiffs in *Reed II*—attempting to circumvent the Warsaw Convention's limitation of liability.²⁶⁰ Here is what the court stated:

In the present case, EgyptAir is not contending that the liability limitations of the Convention apply to the passengers' claims against the manufacturers. While the plaintiffs in *Reed* were obviously trying to indirectly reach further into the carrier's pockets than they would be able to directly reach, here the passengers (assuming, *arguendo*, that they succeed on their claims) will be entitled to the same recovery from the manufacturers regardless of whether the manufacturers are successful in obtaining contribution and/or indemnity from EgyptAir.²⁶¹

²⁵⁷ This corresponds with the very brief account given, in *In re Air Crash Near Nantucket*, of the holding in *Reed II*:

Reed involved an attempt by the estates of passengers who perished in an international air crash to circumvent the Convention's liability limitations by bringing suit against individual airline employees. Noting that the "liability limitations of the Convention could then be circumvented by the simple device of a suit against the pilot and/or other employees, which would force the American employer . . . to provide indemnity for higher recoveries as the price for service by employees," . . . the court held that the Convention's liability limitations applied to such claims.

Id. at 244 (quoting *Reed II*, 555 F.2d 1079, 1083 (2d Cir. 1977)).

²⁵⁸ *Id.* at 244.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

The court essentially said that the plaintiffs' full damages were not dependent on the solvency of the defendant to the main action; they would recover their full damages from the defendant manufacturers irrespective of the success of the third-party action against EgyptAir. Whereas, in *Reed II*, the plaintiffs depended upon the third-party action to secure full damages (knowing that the carrier's employees would be unable to satisfy the judgment).²⁶² This is not a distinction in law but one based on the purported intentions of the plaintiffs in the two cases. Just because the plaintiff may not have intended to circumvent the Warsaw Convention in *In re Air Crash Near Nantucket* does not alter that the fact that their actions may result in the Warsaw Convention's circumvention.

Secondly, the court's distinction refers to the circumvention of the limits of liability.²⁶³ This is disingenuous. It seems very unlikely that EgyptAir was arguing that the limitation of liability should be applied.²⁶⁴ It was more likely it was making a broader point that to avoid circumventing the Warsaw Convention, specifically its jurisdictional provisions, the court ought to apply the Warsaw Convention to the third-party action; to not do so would effectively allow the plaintiffs to circumvent it. This would suggest that EgyptAir understood that *Reed II* required that the Warsaw Convention be applied to an action for damages arising from an event covered by the Warsaw Convention taken against a carrier, regardless of who the plaintiff is. However, the *In re Air Crash Near Nantucket* court had earlier declared that it was imperative that the plaintiff be a passenger or shipper (yet had not mentioned *Reed II* in that context).²⁶⁵ As noted in our treatment of *Reed II*, this line of argument—although not directly at issue in *Reed II*—was opened up by its reasoning and later applied by its progeny, e.g., *L.B. Smith*, *Split End*, and *Data General*.²⁶⁶ *In re Air Crash Near Nantucket* stands in direct opposition with the line

²⁶² *Reed II*, 555 F.2d at 1081–82.

²⁶³ *See id.* at 1092.

²⁶⁴ In their article on the EgyptAir Flight 990 crash, Benson & Dahlmann Rosa state that EgyptAir had conceded that it was bound by the International Air Transport Association (IATA) Intercarrier Agreement of 1997, by which it waived the limit of liability under the Warsaw Convention. Benson & Dahlmann Rosa, *supra* note 205, at 1379. In addition, they note that by February 2001, EgyptAir had announced that it would not contest liability in litigation where jurisdiction was properly founded in the United States. *Id.*

²⁶⁵ *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 242–43.

²⁶⁶ *See generally supra* Section II.B.2; *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 488 N.Y.S.2d 547 (N.Y. Sup. Ct. 1985); *Split End Ltd. v. Dimerco Express (Phils)*

of authority that can be traced back to *Reed II*. Yet, neither *In re Air Crash Near Nantucket* nor *In re Air Crash at Agana* addressed this conflict. Indeed, *In re Air Crash Near Nantucket* avoided it by distinguishing *Reed II* on spurious grounds. *In re Air Crash at Agana* seemingly did not refer to it whatsoever.²⁶⁷

Although the Author submits that *In re Air Crash at Agana* and *In re Air Crash Near Nantucket* were decided correctly, both failed to distinguish themselves from the precedents established under the reasoning first laid down in *Reed II*. It would seem that the courts were reluctant to reject *Reed II* and its progeny expressly. The result is that there are conflicting decisions in the United States on the question of the applicability of the Warsaw Convention to third-party actions.²⁶⁸ With no satisfactory conclusion, the issue has carried over into the litigation of third-party actions under MC99.²⁶⁹

III. THIRD-PARTY ACTIONS AND MC99: A DIFFERENT STORY?

MC99 contains two articles directly relating to third-party recourse actions: one regarding any right of recourse against third parties (Article 37) and the other regarding any right of recourse between contracting and actual carriers (Article 48).²⁷⁰ Article 37 (entitled “Right of Recourse Against Third Parties”) provides: “Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its

Inc., No. 85 Civ. 1506, 1986 WL 2199 (S.D.N.Y. Feb. 11, 1986); *Data Gen. Corp. v. Air Express Int’l Co.*, 676 F. Supp. 538 (S.D.N.Y. 1988).

²⁶⁷ See generally *In re Air Crash at Agana*, Civ. No. 97-7023, MDL No. 1237; *In re Air Crash Near Nantucket*, 340 F. Supp. 2d 240.

²⁶⁸ See, e.g., *Reed II*, 555 F.2d at 1082.

²⁶⁹ See, e.g., *In re Air Crash Over the Mid-Atl.* on June 1, 2009, 760 F. Supp. 2d 832, 846–47 (N.D. Cal. 2010). In this case, the court recognized the tension that exists with respect to third-party actions under MC99:

If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with the MC[99] in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the MC[99].

. . . .

Second, Air France’s presence as a third-party Defendant would undercut the MC[99]’s jurisdictional restrictions because Air France will end up indirectly litigating the passengers’ claims outside one of the five forums expressly provided for in the MC[99].

Id.

²⁷⁰ MC99, *supra* note 10, art. 37.

provisions has a right of recourse against any other person.”²⁷¹ Article 37 of MC99 does not create a right of recourse against a third party; it merely ensures that the existence of such a right shall not be affected by the provisions of the Warsaw Convention.²⁷² Therefore, a third-party plaintiff must rely on *le droit commun* to find a recourse action.²⁷³ Although there is no equivalent to Article 37 in the Warsaw Convention, the proposition has been accepted as applying equally to it.²⁷⁴ As noted earlier, a very similar recourse provision was proposed in the Guatemala City Protocol of 1971, but this instrument never came into effect.²⁷⁵ That provision eventually made its way into WCS with MAP4, which was concluded in 1975 but only came into effect in 1998 (the United States acceded to it in 1998).²⁷⁶

Insofar as any right (or obligation) of recourse exists between carriers, Article 48 provides that the provisions of Chapter V (entitled “Carriage by Air Performed by a Person Other than the Contracting Carrier”) shall not affect such right or obligation.²⁷⁷ The substance of Article 48 is that recourse actions between con-

²⁷¹ *Id.*

²⁷² *Chubb II*, 634 F.3d 1023, 1026 (9th Cir. 2011) (“While the Montreal Convention does not create a cause of action for indemnification or contribution among carriers, it does not preclude such actions as may be available under local law.”). A Kentucky district court held that it “must honor the express provision of Article 37 that a right of recourse against third parties is not prohibited by the Montreal Convention.” *In re Air Crash at Lexington, Ky.*, August 27, 2006, No. 5:06-CV-316, 2007 WL 2915187, at *3 (E.D. Ky. Oct. 5, 2007).

²⁷³ *See* TOMPKINS, *supra* note 77, at 68 (“The existence and extent of the right of recourse is determined by applicable local law.”) (citing *Sompo Japan Ins. v. Nippon Cargo Airlines Co.*, 522 F.3d 776 (7th Cir. 2008)).

²⁷⁴ 1 SHAWCROSS & BEAUMONT, AIR LAW at VII-241 (J David McClean ed., 2021) (“Although [Article 37 of MC99] has no counterpart in earlier instruments in the Warsaw system, the proposition is equally true under those earlier conventions.”). Several court decisions support this view. *See, e.g.*, *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1305 (11th Cir. 1999); *In re Air Crash at Little Rock, Ark.*, on June 1, 1999, 291 F.3d 503, 516–17 (8th Cir. 2002). In *Sompo*, the Seventh Circuit held that WCS (as amended by MAP4) did not preempt the carrier’s right of recourse. 522 F.3d at 781 (“An air carrier’s right to a setoff or contribution from a joint tortfeasor is, similarly, incidental to the causes of action available under the Convention and therefore not subject to its limited preemption.”). The court also noted that Article 30A expressly contemplates recourse actions, which appeared to show that “the Convention refused explicitly to preempt local contribution schemes.” *Id.* at 782.

²⁷⁵ *See supra* Section II.B.1.

²⁷⁶ *See Sompo*, 522 F.3d at 780–82.

²⁷⁷ MC99, *supra* note 10, art. 48. “Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.” *Id.*

tracting and actual carriers are anticipated *but not* governed by MC99.²⁷⁸ However, there is one exception. Article 45 provides:

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately.

*If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.*²⁷⁹

Only the latter half of the provision is of relevance to recourse. Simply put, it provides that where only one of the carriers is sued by the plaintiff, that carrier has the right to join the other carrier in the proceedings. The final part of Article 45 makes it clear that the procedure and effects of this right of joinder shall be governed by the *lex fori*. With the exception of Article 45, Chapter V of the Warsaw Convention does not affect the rights or obligations of carriers *inter se*.²⁸⁰ Just as with the Guadalajara Convention, the drafters of MC99 were solely concerned with facilitating recourse actions and not regulating them.²⁸¹ At the Montreal Conference, the U.S. Delegate explained that the purpose of Article 48 was to allow “the carriers to work out amongst themselves issues of indemnification.”²⁸²

Given that MC99 is a consolidation of the provisions on recourse from the Guadalajara Convention and MAP4, one would expect that the question of how MC99 might apply to third-party actions would follow the precedent set by the WCS cases. The first cases to address the applicability of MC99 to third-party actions for contribution/indemnification emerged in the United States and were the subject of two district court cases in 2008 and a third in 2010.²⁸³ The first case was *Chubb Insurance Co. of*

²⁷⁸ *Id.*

²⁷⁹ *Id.* art. 45 (emphasis added).

²⁸⁰ *See id.*

²⁸¹ *See supra* Section II.B.1.

²⁸² 1 INT’L CIV. AVIATION ORG. [ICAO], *Commission of the Whole: Minutes of the Tenth Meeting*, in INTERNATIONAL CONFERENCE ON AIR LAW (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR): MONTREAL, 10–28 MAY 1999: MINUTES, 190, ICAO Doc. 9775-DC/2 (1999).

²⁸³ *See Chubb I*, No. CV 06-7267, 2008 WL 11357925, at *1 (C.D. Cal. Jan. 14, 2008), *rev’d*, 634 F.3d 1023 (9th Cir. 2011); *Am. Home Assurance Co. v. Kuehne & Nagel (AG & Co.) KG*, 544 F. Supp. 2d 261, 262 (S.D.N.Y. 2008); *Allianz Glob.*

*Europe S.A. v. Menlo Worldwide Forwarding, Inc. (Chubb I)*²⁸⁴ before the U.S. District Court for the Central District of California. The second case was *American Home Assurance Co. v. Kuehne & Nagel (AG & Co.) KG*²⁸⁵ before the U.S. District Court for the Southern District of New York. The third case was *Allianz Global Corporate & Specialty v. EMO Trans California, Inc.*²⁸⁶ before the District Court for the Northern District of California. In each case, the courts adopted the same perspective on the issue as applied under WCS: that MC99 applied to third-party actions.²⁸⁷ In reaching this view, the courts relied heavily on the need to achieve uniformity.²⁸⁸ However, the proverbial cat was set

Corp. & Specialty v. EMO Trans Cal., Inc., No. C 09-4893, 2010 WL 2594360, at *1 (N.D. Cal. June 22, 2010).

²⁸⁴ *Chubb I*, 2008 WL 10988806, at *1. In *Chubb I*, the court applied the time limitation of the Warsaw Convention to a third-party action brought by a contracting carrier against the actual carrier, referring to authorities for the same proposition under the Warsaw Convention. *Id.* at *2 (citing *Motorola, Inc. v. MSAS Cargo Int'l, Inc.*, 42 F. Supp. 2d 952, 955 (N.D. Cal. 1998); *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 540 (S.D.N.Y. 1988)); see also *Olaya v. Am. Airlines, Inc.*, No. 08-CV-4853, 2009 WL 3242116, at *2 (E.D.N.Y. Oct. 6, 2009) (“Because Olaya’s claims are based upon damages allegedly suffered by the plaintiff as a consequence of American’s international shipment of the cargo, and because the Derisos’ cross-claims for indemnification and contribution arose from the same transaction, all claims against American are governed exclusively by the Montreal Convention, including the Derisos’ cross-claims.”) (citing *Kuehne & Nagel*, 544 F. Supp. 2d at 263).

²⁸⁵ 544 F. Supp. 2d 261. Strictly speaking, the court in *Kuehne & Nagel* did not have to decide the question of the applicability of MC99 to a claim between a contracting carrier and an actual carrier because the parties had not contested it. See *id.* at 261. However, in the course of its opinion, the court did express its agreement with *Split End* that the time limitation would apply in an action between a contracting and actual carrier. See *id.* at 263 (citing *Split End Ltd. v. Dimerco Express (Phils) Inc.*, No. 85 Civ. 1506, 1986 WL 2199, at *6 (S.D.N.Y. Feb. 11, 1986)); see also *Allianz*, 2010 WL 2594360, at *4.

²⁸⁶ *Allianz*, 2010 WL 2594360, at *1.

²⁸⁷ See *Chubb I*, 2008 WL 11357925, at *1; *Kuehne & Nagel*, 544 F. Supp. 2d at 262–66; *Allianz*, 2010 WL 2594360, at *4–5.

²⁸⁸ *Chubb I*, 2008 WL 11357925, at *4 (“UPS’s proposed rule would destroy uniformity and predictability in cases involving transport by a carrier other than the contracting carrier. . . . This outcome would be inconsistent with the Convention’s over-arching purpose of promoting uniformity and predictability.”); *Allianz*, 2010 WL 2594360, at *4 (“Under EMO’s proposed regime, however, third-party claims for indemnity would be governed by the local forum’s rules and time limitations, eviscerating the uniformity provided by Article 35.”). The courts here fell into the all too familiar error of failing to note that MC99 (like the Warsaw Convention) only intended to achieve uniformity of *certain* rules, not *all* rules. See, e.g., *Chubb I*, 2008 WL 11357925, at *3–4. MC99, like the Warsaw Convention before it, sought to achieve uniformity in the actions between carriers and their customers, not third parties.

amongst the pigeons in 2011 when *Chubb I* reached the U.S. Court of Appeals for the Ninth Circuit, i.e., *Chubb Insurance Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc. (Chubb II)*.²⁸⁹

A. A TALE OF TWO CHUBBS

The background to the *Chubb* litigation began when Air New Zealand Engineering Ltd. contracted with Menlo Worldwide Forwarding Inc. (Menlo) to transport an aircraft engine from New Zealand to the United States.²⁹⁰ Menlo (as contracting carrier) contracted Qantas Airways Ltd. (Qantas) to perform the actual carriage.²⁹¹ The engine arrived damaged in Los Angeles, and roughly U.S. \$120,000 was paid out by the insurer, Chubb Insurance Co. of Europe S.A. (Chubb).²⁹² Chubb then brought a subrogated claim against UPS Supply Chain Solutions, Inc. (UPS); UPS had acquired Menlo in the interim, thereby becoming the successor-in-interest.²⁹³ The parties reached a settlement whereby UPS agreed to pay Chubb U.S. \$80,000.²⁹⁴ Nearly one year later, UPS brought third-party actions for indemnification and contribution against Qantas, alleging that the damage was solely the result of Qantas's negligence.²⁹⁵ Qantas maintained that the two-year limitation period laid down by Article 35(1) of MC99 had expired when UPS brought the recourse action.²⁹⁶ In contrast, UPS argued that MC99's time limit did not apply to the recourse action.²⁹⁷ At first, the U.S. District Court for the Central District of California applied MC99's time limitation.²⁹⁸ But, on appeal, the Ninth Circuit reversed that decision.²⁹⁹

A key feature of *Chubb I* and *Chubb II* is that the parties, both at first instance and on appeal, maintained that MC99 *governed*

²⁸⁹ *Chubb II*, 634 F.3d 1023 (9th Cir. 2011).

²⁹⁰ *See id.* at 1025.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *See id.* at 1025–26; *Chubb I*, No. CV 06-7267, 2008 WL 11357925, at *1–2 (C.D. Cal. Jan. 14, 2008).

²⁹⁷ *See id.*

²⁹⁸ *Chubb I*, 2008 WL 11357925, at *4; *see also id.* at *2 (citing *Motorola, Inc. v. MSAS Cargo Int'l, Inc.*, 42 F. Supp. 2d 952, 955–56 (N.D. Cal. 1998); *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 540 (S.D.N.Y. 1988)) (referring to WCS precedent which held “there are no exceptions to the two year limitations period”).

²⁹⁹ *Chubb II*, 634 F.3d at 1028.

the recourse action between them.³⁰⁰ This is important to note for two reasons: (1) it was submitted that it was erroneous, and (2) it painted the courts—particularly the appellate court—into a corner. Were the court to decide that the time limitation of MC99 did not apply to the recourse action, then it would have been faced with maintaining that position while holding to the parties' contention that MC99 governed the action. More substantially, it prevented the Ninth Circuit from reaching the conclusion that MC99 does not govern recourse actions. By taking this as its starting point, the third-party plaintiff (UPS) put itself in the position of having to explain how MC99 could simultaneously regulate third-party actions yet not apply the time limit of Article 35.³⁰¹

In *Chubb I*, UPS argued that only Chapter V of MC99 (i.e., Articles 39 to 48, consisting of special provisions relating to contracting/actual carriers) applied, not the remainder of the Warsaw Convention, e.g., Article 35.³⁰² If only Chapter V applied, UPS could then point to Article 48 that specifies: "Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification."³⁰³ Thus, in UPS's view, the only exception recognized by Article 48 is a right of joinder, the procedure and effects of being governed by national law.³⁰⁴ Therefore, UPS maintained that it was national law, not Article 35, to which the parties must turn for any appli-

³⁰⁰ *Chubb I*, 2008 WL 11357925, at *1 ("The parties agree that this third-party action is governed by the Montreal Convention, as it concerns international air carriage of cargo."); *Chubb II*, 634 F.3d at 1025 n.2 ("Both parties agree that this case is governed by the Montreal Convention.").

³⁰¹ *Chubb I*, 2008 WL 11357925, at *2–3.

³⁰² *Id.* Some support can be mustered for this by myopically looking to the wording of Article 48 that states, "Except as provided in Article 45, *nothing in this Chapter* shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification." MC99, *supra* note, art. 48 (emphasis added). UPS also argued that it was supported by the fact that the remainder of the Convention makes no distinction between the actual and contracting carrier. *Chubb I*, 2008 WL 11357925, at *2. The most obvious explanation for this is the fact that MC99 was drafted by incorporating preceding instruments of WCS. *Id.* at *3. Chapter V was lifted from the Guadalajara Convention, and much of the rest of MC99 from the Warsaw Convention and its amending protocols, only the former addressed actual and contractual carriers. *See id.* Aside from this, as explained by the district court, "[t]here was simply no need to distinguish between the two types of carriers other than in Chapter V, which defines the two types of carriers and clarifies their relationship." *Id.*

³⁰³ MC99, *supra* note 10, art. 48.

³⁰⁴ *Chubb I*, 2008 WL 11357925, at *3.

cable time limitations.³⁰⁵ The trial judge rejected this argument and pointed out that Article 40³⁰⁶ (contained in Chapter V) incorporates the remainder of the Warsaw Convention and makes its general provisions applicable to contracting/actual carriers, including the time limit of Article 35.³⁰⁷

An inconsistency with UPS's argument is that it essentially conflicts with the basic premise that MC99 governs third-party actions. Maintaining that premise alongside its proffered interpretation of Article 48 demands a tortured use of the word *governs*. This is because it essentially boils down to claiming that MC99 governs third-party actions by providing that national law governs third-party actions with the single exception of Article 45.

On appeal to the Ninth Circuit, the question to be resolved was neatly summarized by Judge O'Scannlain: "We must decide whether the Montreal Convention's two-year statute of limitations on 'the right to damages' in connection with international air cargo shipments applies to suits seeking indemnification and contribution."³⁰⁸ The manner in which Judge O'Scannlain pitched the issue was inspired; it drew a direct link between the time limitation of Article 35 and the "right to damages," explain-

³⁰⁵ *Id.* at *2.

³⁰⁶ MC99, *supra* note 10, art. 40 ("If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.")

³⁰⁷ *See Chubb I*, 2008 WL 11357925, at *2 ("Chapter V does not, as UPS contends, establish a free-standing body of rules for third party contribution or indemnification actions, independent of the requirements of the remainder of the Montreal Convention."); *see also id.* at *3 ("The plain language of Article 45 refers to the 'procedure and effects' of joinder. A statutory limitations period has nothing to do with whether or how a party is joined. Nor does it govern the 'effects' of joinder. The limitations period is thus not governed by the 'law of the court seized of the case.'") (footnote omitted). The court in *Allianz* makes the same point. *Allianz Glob. Corp. & Specialty v. EMO Trans Cal., Inc.*, No. C 09-4893, 2010 WL 2594360, at *4 (N.D. Cal. June 22, 2010) ("While the plain language of Article 45 does require that third-party claims be subject to the procedure and effects of the forum in which they are brought, this language does not refer to the limitation period. The limitation period does not affect the procedures by which a party can be joined as a third-party defendant, nor does the limitation period govern the effects of joinder. Thus, the period set forth in Article 35 is not affected by Article 45, and EMO's argument is not supported by the plain language of the Montreal Convention.") (citations omitted).

³⁰⁸ *Chubb II*, 634 F.3d 1023, 1025 (9th Cir. 2011).

ing that “[b]y its terms, Article 35 extinguishes only a single right: the ‘right to damages.’”³⁰⁹ This reframed the issue and permitted the court to ask whether UPS’s claims against Qantas fell within the single right recognized by Article 35, i.e., a right to damages.³¹⁰ Because if it did not, then the time limitation did not apply.³¹¹

The substantive elements of the right to damages are laid out in Articles 17 to 19 of MC99, i.e., that “by which a passenger or consignor may hold a carrier liable for damage sustained to passengers, baggage, or cargo.”³¹² The right to damages referred to in Article 35 was thus identified as the cause of action under MC99.³¹³ Turning to the facts, it was clear that Chubb (as subrogee of the consignee’s right) had such a right to damages against UPS (via Menlo as the contracting carrier) or against Qantas as the actual carrier.³¹⁴ But the claim that was actually at issue in *Chubb II* was something else. It was one between UPS and Qantas, i.e., between the contracting carrier and the actual carrier, and it was a claim for contribution/indemnification, not damages.³¹⁵ The court concluded that this claim was not based upon the Montreal Convention’s right to damages but upon a right of recourse; the court drew a strong distinction between the two.³¹⁶ Indeed, the court acknowledged that the Montreal Convention does not create a cause of action for contribution/indemnification, but neither is it preempted where available under *le droit commun*.³¹⁷ By making the distinction between the right to damages and the right of recourse, the court concluded:

³⁰⁹ *Id.* at 1026.

³¹⁰ *Id.*

³¹¹ *Id.* at 1026–27.

³¹² *Id.* at 1026.

³¹³ *Id.* (“Construed against this backdrop, the ‘right to damages’ referenced in Article 35 is the cause of action under the Montreal Convention by which a passenger or consignor may hold a carrier liable for damage sustained to passengers, baggage, or cargo.”).

³¹⁴ *See id.* at 1025.

³¹⁵ *Id.*

³¹⁶ *Id.* at 1026 (“UPS does not seek compensation for damage sustained to the engine; rather, UPS, as a contracting carrier, seeks *indemnification* (and *contribution*) from Qantas, as an actual carrier, for such compensation it has already paid Chubb.”).

³¹⁷ *Id.* (“While the Montreal Convention does not create a cause of action for indemnification or contribution among carriers, it does not preclude such actions as may be available under local law.”) (citing *In re Air Crash at Lexington, Ky.*, August 27, 2006, No. 5:06-CV-316, 2007 WL 2915187, at *3 (E.D. Ky. Oct. 5, 2007); *Sompo Japan Ins. v. Nippon Cargo Airlines Co.*, 522 F.3d 776, 785–87 (7th Cir. 2008)).

“[B]ecause an action between carriers for indemnification or contribution is premised on the ‘right of recourse,’ rather than the ‘right to damages,’ Article 35’s time bar does not apply. Instead, the timing of such an action is governed by local law.”³¹⁸ In the court’s view, if the time limit of Article 35 were to have been regarded as applicable to the right of recourse under Article 37, then the effect of such in the present case would be to extinguish UPS’s third-party action.³¹⁹ The court regarded this as inimical to the Montreal Convention’s regime because it would produce a conflict between two of its articles.³²⁰ How so? The purpose of Article 37 is to ensure that nothing in the Montreal Convention shall prejudice the question of whether a person liable under the Montreal Convention has a right of recourse against any other person.³²¹ But, if Article 35 were to be applied to such a right of recourse, then the very mischief that Article 37 sought to avoid would arise.³²² To avoid this conflict, Judge O’Scannlain determined that the right of damages referred to in Article 35 must be interpreted as not including the right of recourse against another carrier.³²³

Other provisions of MC99 supported the distinction between the right to damages and the right of recourse.³²⁴ For instance, Judge O’Scannlain referred to Article 35, noting that it only envisages the extinguishment of the right to damages where an action is not brought within the two-year period.³²⁵ In his view, had the drafters intended for the time limit to apply to third-party actions arising out of the same damage, then it would have

³¹⁸ *Id.* at 1027.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ MC99, *supra* note 10, art. 37.

³²² *Chubb II*, 634 F.3d at 1027.

³²³ *Id.* (“To avoid an explicit conflict between Articles 35 and 37, the ‘right to damages’ extinguished by Article 35 must be understood *not* to include a carrier’s ‘right of recourse’ against another carrier.”).

³²⁴ *Id.* Judge O’Scannlain referred *inter alia* to Article 48 but did not expand on it. *See id.* However, we can speculate on his possible reasoning. Article 48 (entitled “Mutual Relations of Contracting and Actual Carriers”) makes express provision for the application of Article 45, on an exceptional basis, to recourse actions between such carriers. MC99, *supra* note 10, art. 48. The court thus likely concluded that Article 45 represented the single exception and that no other provision of the Montreal Convention, such as Article 35, was intended to apply to such actions, rather such actions would be governed by national law. *See Chubb II*, 634 F.3d at 1028.

³²⁵ *Chubb II*, 634 F.3d at 1027.

referred to all actions.³²⁶ Article 45 also lent support. The court stated:

Thus, where an action is brought against one carrier within Article 35's two-year period, "that carrier shall have the right to require" other carriers "to be joined in the proceedings," and that third-party action will be subject to "the procedures and effects" of local law, not the strictures of Article 35.³²⁷

This statement is welcome but only insofar as it holds that Article 45 provides that *le droit commun* governs the procedures and effects of joinder. However, the Author submits that the manner of the court's expression may be exploited to interpret this reference to "local law" more broadly. The court's formulation could be taken to suggest that Article 45's reference to "procedures and effects" of local law is intended to apply local law to the third-party action in its entirety. This interpretation should be avoided for three reasons. First, it presumes that joinder amounts to a third-party action, and hence, a right of recourse is guaranteed. This is not the thrust of Article 45; Article 45 only guarantees joinder but leaves the effects of such joinder to *le droit commun*.³²⁸ In other words, the question of whether a right of recourse exists at all is not decided by the Montreal Convention but by *le droit commun*. Second, it gives the impression that *le droit commun* governs third-party actions by leave of Article 45, which is not the case. Article 45's primary concern is with the main action by the passenger/shipper against the carrier chosen as a single defendant and ensuring that the defendant carrier can join the other in the same proceedings.³²⁹ As far as recourse actions between the carriers are concerned, Article 45's secondary purpose is only to facilitate such actions; it does not purport to regulate any action between the two carriers.³³⁰ Third, it simply does not agree with the text of Article 45 that limits the

³²⁶ *Id.* ("[I]t is worth noting that Article 35 only mandates that 'the right to damages shall be extinguished if *an action* is not brought within a period of two years. . . . It does not require that 'all actions' relating to a particular event must be brought within two years. Thus, if a party has timely brought an action for damages against an actual carrier or a contracting carrier, nothing in Article 35 prevents the defendant carrier from exercising its Article 45 right to 'require the other carrier to be joined in the proceedings,' subject to the 'procedure and effects' of local law.") (citation omitted).

³²⁷ *Id.*

³²⁸ MC99, *supra* note 10, art. 45.

³²⁹ *See id.*

³³⁰ *See supra* introduction to Part III.

application of *le droit commun* to the procedures and effects pertaining to joinder of the other carrier and not beyond.³³¹

All of the above led Judge O’Scannlain to conclude that “the plain language of the Montreal Convention makes clear that actions for indemnification and contribution are not subject to Article 35’s two-year statute of limitations.”³³² The judgment of the Ninth Circuit is to be commended for breaking with the U.S. courts’ long-running approach to the issue. It has been received favorably by some district courts.³³³ However, it is to be criticized for refusing to consider the *travaux préparatoires* because this may leave room for the issue to be relitigated at some point.³³⁴ Likewise, the precedents on WCS, i.e., the progeny of *Reed II*, that had determined that the regime did apply to third-party actions, although noted as “unpersuasive” by the court, were not expressly rejected.³³⁵ More unfortunate is that the *ratio decidendi* limited itself to stating that Article 35 of MC99 did not apply to third-party actions and stopped short of holding that MC99 does not generally apply to third-party actions.³³⁶ One suspects this is

³³¹ For example, Rule 14 of the Federal Rules of Civil Procedure provides that, “A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court’s leave if it files the third-party complaint more than 14 days after serving its original answer.” FED. R. Civ. P. 14(a)(1). This rule does not address the substantive elements of the third-party cause of action.

³³² *Chubb II*, 634 F.3d at 1028.

³³³ See, e.g., *AGCS Marine Ins. Co. v. Geodis Calberson Hungaria Logisztikai KFT*, No. 16-CV-9710, 2017 WL 5891818, at *3–4 (S.D.N.Y. Nov. 28, 2017); *Tokio Marine & Nichido Fire Ins. Co. v. Danzas Corp.*, No. 17 C 7228, 2018 WL 2214093, at *2–4 (N.D. Ill. May 15, 2018) (both courts giving a lengthy account of *Chubb II* and following its reasoning on the non-application of Article 35 of MC99 to third-party actions).

³³⁴ The court thought itself unable to consult the *travaux* because the text was unambiguous. See *Chubb II*, 634 F.3d at 1028 (citing *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989)). According to Article 32 of the Vienna Convention on the Law of Treaties, recourse to the supplementary means of interpretation (including *travaux préparatoires*) is permissible for confirming the meaning arrived at by the general rule of interpretation under Article 31. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331, 340.

³³⁵ See *Chubb II*, 634 F.3d at 1028 (citing *Motorola, Inc. v. MSAS Cargo Int’l, Inc.*, 42 F. Supp. 2d 952, 956 (N.D. Cal. 1998); *Data Gen. Corp. v. Air Express Int’l Co.*, 676 F. Supp. 538, 540–41 (S.D.N.Y. 1988); *Split End Ltd. v. Dimerco Express (Phils) Inc.*, No. 85 Civ. 1506, 1986 WL 2199, at *6 (S.D.N.Y. Feb. 11, 1986); *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 488 N.Y.S.2d 547, 549–50 (N.Y. Sup. Ct. 1985)). All the court was prepared to say was: “We have considered these cases, but find their textual analysis unpersuasive.” *Id.*

³³⁶ *Id.* at 1027.

only because the parties had submitted the dispute to the court on the basic premise that MC99 governed the recourse action between them. Indeed, that the court was minded toward the more general proposition is suggested by its positive endorsement of *Connaught*.³³⁷

The greatest value of *Chubb II* is its clear distinction between the cause of action pertaining to the right to damages recognized by MC99 and the cause of action involved in third-party actions for contribution/indemnification.³³⁸ As discussed above in the context of *In re Air Crash Near Nantucket*, a new line of argument was raised to the effect that the third-party action brought by the manufacturer defendants is coextensive with the underlying passenger action and ought, therefore, to be governed by the same law, i.e., the Warsaw Convention.³³⁹ While the *In re Air Crash Near Nantucket* court had rejected this proposition and maintained that the two actions were distinct, its holding provided no reasoning and instead relied on authority that we saw was not directly on point.³⁴⁰ This line of argumentation—which was also featured in the *Armavia* case discussed in Part I—was taken up by the Court of Appeal for the Ninth Circuit in *Chubb II*, this time in the context of MC99.³⁴¹ Although it did not expressly state as much, the court implicitly rejected the notion that a third-party action for contribution/indemnification is coextensive with, or derivative of, the cause of action upon which the right to damages is established; this time providing a fuller reasoning for the distinction.³⁴²

In this context, it is worth noting a 2012 decision of the Court of Appeal for New South Wales, Australia, in *United Airlines Inc v Sercel Australia Pty Ltd*.³⁴³ Again, the issue was the applicability of

³³⁷ *Id.* at 1028 (“[W]e are guided by the Ontario Supreme Court of Canada’s ruling that Article 29 of the Warsaw Convention does *not* apply to suits brought by one carrier against another. . . . ‘Such claims,’ the court held, were not ‘intended to be included, within the purview of The Warsaw Convention,’ which, ‘deals with the claims of passengers, consignors and consignees, and the liability of carriers therefor,’ not ‘with the claims of carriers *inter se.*’”) (footnote omitted) (citations omitted).

³³⁸ *Id.* at 1026.

³³⁹ *See supra* Section II.B.3.b.

³⁴⁰ *In re Air Crash Near Nantucket Island* on October 31, 1999, 340 F. Supp. 2d 240, 244 (E.D.N.Y. 2004) (citing *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124, 130 (1956); *Triguero v. Consol. Rail Corp.*, 932 F.2d 95, 99 (2d Cir. 1991)).

³⁴¹ *Chubb II*, 634 F.3d at 1027.

³⁴² *See id.* at 1026.

³⁴³ [2012] NSWCA 24 (Austl.).

the time limitation—this time of WCS³⁴⁴—to a third-party action for indemnification taken against an air carrier.³⁴⁵ Like *Chubb II*, the Australian court distinguished between the causes of action, explaining that the cause of action granted to the passenger arises under the Warsaw Convention³⁴⁶ and consists of a claim made by a passenger against a carrier seeking to hold it liable to compensate the plaintiff for damages arising from personal injury.³⁴⁷ In contrast, the court explained that a third-party action is not one for damages for the injury of a passenger but one that seeks to hold the carrier liable to provide contribution or indemnification, the cause of action for which is sourced, not in the Warsaw Convention, but in *le droit commun*.³⁴⁸ On that basis,

³⁴⁴ MC99 did not apply because the accident involved had occurred in 2005, whereas Australia only ratified MC99 in 2008. *Civil Aviation (Carriers' Liability) Act 1959* (Cth) n 3 (Austl.). The action was taken pursuant to the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) pt II s 11, which gives force of law to the Warsaw Convention (as amended by the Hague Protocol and MAP4).

³⁴⁵ This was a case relating to injuries suffered by a passenger while traveling on business with United Airlines Inc. from Sydney to Houston. *Sercel* [2012] NSWCA 24 at [1]. The passenger was seriously injured when part of the interior of the aircraft detached during the landing run and fell on him. *Id.* Although an action existed under WCS, the passenger made no claim against United. *Id.* at [3]. However, the passenger was compensated by the passenger's employer, Sercel Australia Pty. Ltd. (Sercel), pursuant to Australian workers' compensation legislation. *Id.* at [2]. Sercel then sought indemnification for a sum under \$100,000 (AUD) from United Airlines Inc. based on a right of action granted under the same legislation. *Id.* at [2]–[3]. The relevant part of the legislation provided, "If the injury for which compensation is payable under this Act was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, the following provisions have effect . . . if the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an indemnity limited to the amount of those damages) . . ." *Workers Compensation Act 1987* (NSW) pt 5 div 5 s 151Z(1)(d) (Austl.).

³⁴⁶ This was given effect by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) pt II s 11 (Austl.). The Act provides: "Subject to the next succeeding section, the liability of a carrier under this Part in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger, is in substitution for any civil liability of the carrier under any other law in respect of the injury." *Id.* pt IV s 36. Section 36 only encompasses the cause of action of a passenger suffering personal injury. *Id.* Section 35 addresses liability in respect of death. *Id.* pt IV s 35.

³⁴⁷ See *Sercel* [2012] NSWCA 24 at [9].

³⁴⁸ *Id.* at [67] ("Section 37 [of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (Austl.)] does not deal with an action for damages or liability for the injury or death of the passenger, though it does provide for liability of the carrier in respect of the injury to or death of the passenger. It deals with the liability to pay two types of payments (creating two co-relative rights of well-known rights or enti-

the court held that the Warsaw Convention's time-bar did not apply to the cause of action for contribution/indemnification.³⁴⁹ In the court's view, "[c]laims by persons other than passengers their estates or heirs were not picked up by the words of the Convention."³⁵⁰ Simply put, the Warsaw Convention does not apply to third-party actions for contribution or indemnification.³⁵¹

While the Author finds the source of the cause of action a less persuasive argument,³⁵² *Sercel's* distinction between the nature of

lements) which might arise in respect of the death of or injury to a passenger-workers' compensation payments and contribution of another tortfeasor who is also liable. Neither type of liability or right is for damages or for the primary liability, though as would have been understood in 1959, both are, or are likely to be, conditioned on the existence of liability of the carrier to the passenger for injury or death.").

³⁴⁹ *Id.* at [77] ("Thus, in my view, the text and structure of the Act, the Warsaw Convention, the Warsaw/Hague Convention and the Convention lead to the conclusion that the right of indemnity in ss 14 and 37 is not subject to the two year time bar in s 34 and Art 29."). The right of recourse was referenced in Section 37 of the Carriers' Liability Act. *Civil Aviation (Carriers' Liability) Act 1959* (Cth) pt IV s 37 (Austl.). Regarding the time-bar for actions under Section 34 of the Australian Act (incorporating Article 29 of the Warsaw Convention), it has a different referent to that of Section 37. The Section 34 time-bar refers only to the right to damages, i.e., the cause of action granted by the Warsaw Convention under Section 36. *Sercel* [2012] NSWCA 24 at [66]. Whereas Section 37 refers to the right to indemnification or contribution, such right not being granted by the Warsaw Convention, and Section 36 only mentions it in order to safeguard against its exclusion and permit national law to grant such rights. *See id.* at [69]. The court stated:

Section 37 operated in its terms to protect the rights there identified. It was not a 'right to damages' as in s 34. . . . Sections 34 and 37 were directed to different legal rights, obligations and remedies: the 'right to damages' (s 34) and the liability to indemnify and pay contribution (s 37).

Id.

³⁵⁰ *Id.* at [99].

³⁵¹ That this was the view of the Warsaw Convention by the drafters of the *Civil Aviation (Carriers' Liability) Act 1959* was confirmed by the monetary limitation imposed on claims by Section 37. *Civil Aviation (Carriers' Liability) Act 1959* (Cth) pt IV s 37 (Austl.). It ensured that the liability of the carrier in such a claim would not exceed the monetary limits of the Warsaw Convention. *See id.* Justice Allsop (then President of the Court of Appeal) shrewdly observed that such provision would have been unnecessary had the drafters assumed that such actions were already covered by the Warsaw Convention. *See Sercel* [2012] NSWCA 24 at [75].

³⁵² Such an argument depends upon accepting the view that the Warsaw Convention provides an independent and exclusive cause of action for passenger injury and death and wrongful death. The court did appear to hold this. *See id.* at [47] ("It is important to appreciate that it is Art 17 that creates the relevant cause of action: for wrongful death or personal injury . . .") (citing *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978); *In re Mex. City Aircrash of October 31, 1979*, 708 F.2d 400, 410-14 (9th Cir. 1983)) ("It is important to

an action for damages and that of a third-party action for contribution or indemnification reinforces the same distinction made in *Chubb II*.³⁵³ In addition, by endorsing the general non-applicability of WCS to third-party actions, the *Sercel* court went further than the Ninth Circuit was prepared (or perhaps permitted) to do in *Chubb II*. Unfortunately, having been decided under WCS, the lucid and compelling rationale of *Sercel* on this point of law may not be immune from challenge in the context of MC99.

B. A POSSIBLE ENGLISH PERSPECTIVE

The U.K. courts have yet to issue an opinion on the issue, possibly because it is generally accepted that WCS and MC99 are not applicable to recourse actions.³⁵⁴ However, in 2015, the Court of Appeal, in the case of *Fest v. South West Strategic Health Authority*,³⁵⁵ did deliver a judgment on a third-party action for contribution in the context of the Athens Convention.³⁵⁶ Although obviously not a WCS or MC99 case, nor even a carriage-by-air case, Lord Justice Tomlinson's opinion should be recognized as holding persuasive value because the Athens Convention was modeled on the Warsaw Convention and the provisions at issue are substantially the same in both instruments.³⁵⁷ The

appreciate that it is Art 17 that creates the relevant cause of action: for wrongful death or personal injury.”); *see also id.* at [48] (“[T]ogether, Arts 17 and 24 can be seen to create and condition a cause of action in favo[]r of the passenger and his or her estate or heirs, subject to the operation of national law in the identification of such people. The phrase ‘however founded’ does not widen the cause of action created by Art 17 (when read with Art 24) into one that is available beyond the liability contemplated by Art 17 - the liability for damage sustained arising out of the performance of the contract of transportation which in the event of injury is sustained by the passenger and in the case of death, may be sustained by his or her estate or others. It is a structure not apt to encompass other legal claims by third parties who are strangers to the passenger or the contract of carriage.”). The author argues that the Warsaw Convention and MC99 are capable of providing an independent cause of action for passenger injury or death but that it is not exclusive. CLUXTON, *supra* note 47, at 150. However, the author also argues that the Warsaw Convention and MC99 are not capable of providing an independent cause of action for wrongful death. *Id.*

³⁵³ *See Sercel* [2012] NSWCA 24 at [69]; *Chubb II*, 634 F.3d 1023, 1026 (9th Cir. 2011).

³⁵⁴ *See SHAWCROSS & BEAUMONT, supra* note 274, at VII-232.

³⁵⁵ [2015] EWCA (Civ) 708, [2016] QB 503 (Eng.).

³⁵⁶ Athens Convention, *supra* note 52, at 24.

³⁵⁷ For our purposes, Articles 14 and 16 of the Athens Convention are of relevance. Article 14 provides the basis of claims and states that “[n]o action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention.” *Id.* This is the equivalent of

Athens Convention, in the simplest of terms, does for carriage of passengers by sea what WCS and MC99 do for carriage of passengers by air.³⁵⁸

The case involved a claimant who had sustained a spinal injury while on a boat trip in the Bristol Channel.³⁵⁹ She brought a claim in negligence against the defendant (her employer), alleging that the injury had been sustained in the course of her employment.³⁶⁰ The defendant denied liability and brought a third-party action for contribution against the sea carrier (Bay Island Voyages) who operated the boat trip.³⁶¹ The carrier argued that the Athens Convention provided the exclusive basis for claims against carriers and that the defendant's contribution claim was time-barred by the Convention's two-year limitation.³⁶² Lord Justice Tomlinson of the Court of Appeal had to decide whether the Athens Convention governs a third-party action for contribution made against a carrier.³⁶³

The lower appellate court had applied the Warsaw Convention to the third-party action, taking the view that a third-party action for contribution and a passenger action for damages was essentially the same creature.³⁶⁴ Lord Justice Tomlinson rejected this notion, holding instead that there existed a distinction such

Article 24 of the Warsaw Convention. Warsaw Convention, *supra* note 9, art. 24. Article 16 of the Athens Convention provides, *inter alia*, a two-year time-bar for bringing of actions. See Athens Convention, *supra* note 52, art. 16.

³⁵⁸ See Athens Convention, *supra* note 52, at 21–22; Warsaw Convention, *supra* note 9, at 3014–15; MC99, *supra* note 10, at 350–51.

³⁵⁹ *Feest* [2015] EWCA (Civ) 708 [6].

³⁶⁰ *Id.* at [7].

³⁶¹ *Id.* The third-party action was brought pursuant to the Civil Liability (Contribution) Act 1978, c. 47, § 1 (UK).

³⁶² The carrier essentially argued that the Athens Convention provided the exclusive cause of action for claims made against carriers in relation to injuries suffered by passengers coming within its scope of application. *Feest* [2015] EWCA (Civ) 708 [9]. If the third-party claimant wanted to seek contribution from the carrier then it was obliged to rely upon the Athens Convention, which meant that the basis upon which the third-party claimant relied (i.e., the Civil Liability (Contribution) Act 1978) was preempted. *Id.* at [9]–[11]. Once it was shown that the claimant would have no alternative but to bring an action under the Athens Convention, the next line of defense was to show that such a claim was time-barred. See *id.* at [9]–[10].

³⁶³ See *id.* at [1] (“The first question is whether the Convention, which undoubtedly governs the liability owed by carriers to their passengers, extends also to claims against the carrier for contribution to the liability of others.”).

³⁶⁴ *Id.* at [14]. Referring to the opinion of the trial judge, Lord Justice Tomlinson said, “He considered it a ‘solecism’ to say that a claim for damages and a claim for contribution to a claim for damages are different creatures.” *Id.*

that a claim for contribution could not be regarded as an action for damages for personal injury to a passenger.³⁶⁵ This holding was supported by noting that the Athens Convention only aims to unify certain rules and not provide “a complete code governing all liability of sea carriers to whomsoever owed.”³⁶⁶ Lord Justice Tomlinson summed up his view in remarkably concise terms: “[R]eading the Convention as a whole it is to my mind clear that it deals with claims by passengers against carriers, and with nothing else.”³⁶⁷

In addition to distinguishing based on the identity of the parties, the court also found support in the distinct sources of each cause of action. While recognizing that “the liability of the carrier to contribute is critically dependent upon its own liability to the passenger,”³⁶⁸ the court emphasized that the cause of action for contribution is provided under the Civil Liability (Contribution) Act 1978 (U.K.), thus being an autonomous cause of action distinct in source from the Warsaw Convention’s action for damages.³⁶⁹ In so doing, Lord Justice Tomlinson showed he was more in favor of the view that the Warsaw Convention and MC99 likewise do not apply to claims for contribution;³⁷⁰ he cited *SHAWCROSS AND BEAUMONT, AIR LAW*, which referenced *Connaught, Chubb II*, and *Sercel*.³⁷¹ Although, he acknowledged

³⁶⁵ *Id.* at [15] (“Moreover I respectfully disagree with the judge as to the proper characterisation of the claim to contribution. An action in which a claim to contribution from the carrier is sought in respect of the liability of SWSHA for the personal injury to Dr Feest is not in my view ‘an action for damages for . . . personal injury to a passenger . . . brought against a carrier.’”) (alteration in original).

³⁶⁶ *Id.*

³⁶⁷ *Id.* Additional support for this view is found in the fact that the Athens Convention makes only one reference to recourse (i.e., in Article 4(5)), which is in the context of recourse claims between actual and contracting carriers. Athens Convention, *supra* note 52, art. 4(5). No reference whatsoever was made to recourse actions involving other parties. *See Feest* [2015] EWCA (Civ) 708 [16]. (“Nowhere else in the Convention are rights of recourse as between the carrier and the performing carrier dealt with. This is unsurprising, as such matters will be governed by the terms of the contractual arrangements concluded between carrier and performing carrier. Furthermore, rights of recourse as between carriers and other parties are simply not mentioned.”).

³⁶⁸ *Id.* at [21].

³⁶⁹ *Id.* (Lord Justice Tomlinson opining that “[i]t is unsurprising that the claim in itself is unaffected by the provisions of the Athens Convention.”).

³⁷⁰ *Id.* at [18] (citing *Connaught Labs. Ltd. v. Air Can.* (1978), 94 D.L.R. 3d 586, 593 (Can. Ont. Sup. Ct. J.)).

³⁷¹ *Id.* at [20] (citing *Chubb II*, 634 F.3d 1023, 1027 (9th Cir. 2011); *United Airlines Inc v Sercel Austl Pty Ltd* [2012] NSWCA 24 at [119] (Austl.)).

the existence of controversy over the matter and cited several U.S. cases in which the courts had applied the Warsaw Convention.³⁷² Nevertheless, were a suitable case under MC99 to present itself, the U.K. courts would most likely take a lead from *Feest* and hold that MC99 does not apply to third-party actions for contribution/indemnification.

IV. CONCLUSION

As the title of this Article makes abundantly clear, the Author is no fan of the Second Circuit's decision in *Reed II*. He hopes that the analysis presented in this Article and the conclusions reached therefrom will provide sufficient proof that the time has come to dump *Reed II*, and by so doing, we can get real about third-party actions in the context of WCS and, more presingly, MC99.

This Article began with the *Armavia* case because, aside from giving some factual context and illustration, it highlights two key aspects of the issue. First, the diversity of opinion that currently exists between courts, both domestically and internationally, on the question of the applicability of the WCS (and MC99) to third-party actions, which has led to a lack of uniformity that may be prejudicial to the purposes of those systems. Second, in holding to the non-applicability of the WCS (and MC99) to third-party actions, the risk of circumventing the provisions of the Warsaw Convention arises, which may likewise be prejudicial. The driving goal of this Article is to identify and evaluate the doctrinal foundations for the competing arguments for and against the applicability of the WCS and MC99 to third-party actions, and in so doing, attempt to divine which is doctrinally correct.

Part II of this Article began by examining the so-called *préposé* problem, i.e., that by simply suing a carrier's *préposé*, a plaintiff-passenger could, knowing that the carrier would have to indemnify its *préposé*, circumvent the Warsaw Convention's limitation of liability.³⁷³ This was viewed as inimical to the Warsaw Convention's goals. The international community's response at large had been to close this loophole by amending the Warsaw Con-

³⁷² *Id.* at [18] (citing *Magnus Elecs., Inc. v. Royal Bank of Can.*, 611 F. Supp. 436, 440 (N.D. Ill. 1985); *Oriental Fire & Gen. Ins. Co. v. Citizens Nat'l Bank of Decatur*, 581 N.E.2d 49, 51 (Ill. App. Ct. 1991); *Royal Ins. Co. v. Emery Air Freight Corp.*, 834 F. Supp. 633, 634-35 (S.D.N.Y. 1993)).

³⁷³ *See supra* Section II.A.

vention with the Hague Protocol.³⁷⁴ However, with the United States being utterly opposed to acceding to the Hague Protocol, its courts found themselves in a tight spot. Rather than concede that the Warsaw Convention could be circumvented in this way, the Second Circuit decided that the Warsaw Convention must be applied to an action taken against the *préposé* of a carrier.³⁷⁵ Its reasoning was based on a suspect definition of the term carrier as including its *préposés* and an unjustifiably broad interpretation of Article 24 of the Warsaw Convention;³⁷⁶ it was demonstrated in Section II.A.2 that the Second Circuit's *rationes* do not pass muster. At base, although arguably a necessary evil, *Reed II* is an amendment of the Warsaw Convention by judicial fiat and, therefore, amounts to a usurpation of the legislative function.

Furthermore, *Reed II* committed two errors that proved baneful for the subsequent issue of the applicability of the Warsaw Convention to third-party actions for contribution/indemnification. First, although it only extended the application of the Warsaw Convention's monetary limitation of liability to actions against *préposés*,³⁷⁷ it was inevitable that its reasoning would be employed by the courts to extend the application of other provisions of the Warsaw Convention (e.g., time limitations), something that the Hague Protocol had not done. Second, it fostered the notion that the identity of the plaintiff is not an essential factor in determining the application of the Warsaw Convention. Its interpretation of Article 24 was that the Warsaw Convention would apply if the action were taken against a carrier for damages arising from an event covered by the Warsaw Convention during qualifying carriage by air.³⁷⁸

In Section II.B, this Article turned directly to the question of the applicability of the Warsaw Convention to third-party actions. Ironically, *Reed II* had not directly involved a third-party action for contribution or indemnification, but the court's decision was driven by the reality that the carrier would be forced to indemnify its *préposé*, the court's eye had been firmly fixed on this in reaching its decision.³⁷⁹ Two approaches were identified. First, the orthodox approach stands for the view that the Warsaw

³⁷⁴ See *supra* Section II.A.

³⁷⁵ *Reed II*, 555 F.2d 1079, 1092 (2d Cir. 1977).

³⁷⁶ See *id.* at 1083, 1092.

³⁷⁷ *Id.*

³⁷⁸ See *id.* at 1084.

³⁷⁹ See *supra* Section II.B.

Convention does not apply to third-party actions for contribution or indemnification.³⁸⁰ Indeed, it was noted that the Warsaw Convention makes no reference at all to recourse actions, an understandable omission given the state of the law at the time of its drafting. With the subsequent evolution of the law, the existence of recourse actions was noted within the international air law community.³⁸¹ At the Guadalajara Conference in 1961 and the Guatemala City Conference in 1971, both held under the auspices of the International Civil Aviation Organization, the topic of recourse actions was raised.³⁸² Rather than take steps to regulate such actions, the international community limited itself to merely facilitating such actions where they existed under *le droit commun*,³⁸³ thereby underlining the reality that the Warsaw Convention does not govern nor apply to recourse actions.

That the Warsaw Convention does not apply to recourse actions was a reality reflected in the approach taken by a Canadian court in *Connaught*.³⁸⁴ Therein, the court emphasized the importance of the identities of the parties to the application of the Warsaw Convention and held that the Warsaw Convention only governs actions taken by passengers (or shippers) against carriers, not those of third parties against the carrier.³⁸⁵ This corresponds with the underlying cause of action upon which Warsaw Convention claims are based, i.e., the contractual undertaking between passenger (or shipper) and carrier.³⁸⁶

The baneful influence of *Reed II* was revealed in the U.S. courts' alternative approach to the question of the applicability of the Warsaw Convention to third-party actions for contribution/indemnification. The meaning attributed to the term "carrier" in *Reed II* permitted the courts to view actions taken against *préposés* as actions against the carrier.³⁸⁷ In addition, the expansive interpretation of Article 24 adopted by *Reed II* meant the courts could dispense with the requirement that the plaintiff must be a passenger or shipper.³⁸⁸ *Reed II* supplied the courts with the necessary ammunition to make the Warsaw Convention

³⁸⁰ See *supra* Section II.B.1.

³⁸¹ See *supra* Section II.B.1.

³⁸² See *supra* Section II.B.1.

³⁸³ See *Reed II*, 555 F.2d at 1083.

³⁸⁴ See *supra* Section II.B.1; *Connaught*, 94 D.L.R. 3d at 593–94.

³⁸⁵ *Connaught*, 94 D.L.R. 3d at 593–94.

³⁸⁶ For more on the nature of the cause of action in the Warsaw Convention and MC99, see generally CLUXTON, *supra* note 47.

³⁸⁷ *Reed II*, 555 F.2d at 1083.

³⁸⁸ See *id.* at 1092.

applicable to third-party actions for contribution/indemnification. This resulted in a slew of cases—*L.B. Smith*, *Split End*, and *Data General*—referred to herein as the progeny of *Reed II*.³⁸⁹ The exception (*Mitchell*) proved the rule that these cases had all applied the Warsaw Convention to third-party actions out of fear that not doing so would conflict with *Reed II* and create a risk of circumvention of the Warsaw Convention's monetary limit of liability.³⁹⁰

Lastly, Section II.B.3 studied two outlier cases, i.e., *In re Air Crash at Agana* and *In re Air Crash Near Nantucket*.³⁹¹ In these, U.S. courts refused to apply the Warsaw Convention to third-party actions against carriers.³⁹² In so doing, they echoed the reasoning of the orthodox approach, emphasizing the identities of the parties to actions as a key factor in establishing the applicability of the Warsaw Convention.³⁹³ Yet, *In re Air Crash at Agana* and *In re Air Crash Near Nantucket* conflict with the alternative approach generally adopted by the U.S. courts.³⁹⁴ While it is submitted that they were correctly decided, the difficulty with these decisions is their failure to adequately address the conflict with, or distinguish themselves from, *Reed II* and its progeny.

Part III began with a summary of the relevant provisions of WCS as consolidated in MC99 and demonstrated how the U.S. courts initially maintained the status quo, i.e., with *Chubb I* and other decisions, thereby continuing with MC99 the alternative approach to third-party actions taken toward WCS.³⁹⁵ However, in *Chubb II*, the Ninth Circuit upset the applecart and concluded

³⁸⁹ *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 488 N.Y.S.2d 547, 550 (N.Y. Sup. Ct. 1985); *Split End Ltd. v. Dimerco Express (Phils) Inc.*, No. 85 Civ. 1506, 1986 WL 2199, at *6 (S.D.N.Y. Feb. 11, 1986); *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 541 (S.D.N.Y. 1988).

³⁹⁰ See *supra* Section II.B.2.a.

³⁹¹ *In re Air Crash at Agana* on August 6, 1997, Civ. No. 97-7023, MDL No. 1237 (C.D. Cal. Jan. 25, 1999); *In re Air Crash Near Nantucket Island* on October 31, 1999, 340 F. Supp. 2d 240, 244 (E.D.N.Y. 2004). For details regarding *In re Air Crash at Agana*, see Sundvall & Andolina, *supra* note 205, at 175–76.

³⁹² *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 244; *In re Air Crash at Agana*, Civ. No. 97-7023, MDL No. 1237; Sundvall & Andolina, *supra* note 205, at 175–76.

³⁹³ *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 244; *In re Air Crash at Agana*, Civ. No. 97-7023, MDL No. 1237; Sundvall & Andolina, *supra* note 205, at 175–76.

³⁹⁴ Compare *In re Air Crash Near Nantucket*, 340 F. Supp. 2d at 244, and Sundvall & Andolina, *supra* note 205, at 175–76 (summarizing *In re Air Crash at Agana*, Civ. No. 97-7023, MDL No. 1237), with *L.B. Smith*, 488 N.Y.S.2d at 550, and *Split End*, 1986 WL 2199, at *6, and *Data Gen. Corp.*, 676 F. Supp. at 541.

³⁹⁵ See *supra* introduction to Part III.

that MC99 does not apply to third-party actions, thereby aligning with the orthodox position.³⁹⁶ Although credit should also be given to Judge Block in *In re Air Crash Near Nantucket*,³⁹⁷ Judge O'Scannlain in *Chubb II* added a powerful additional argument in support of the orthodox approach, one that made a distinction in nature between an action for damages and a recourse action, concluding that the Warsaw Convention only applies to the former.³⁹⁸ This reasoning was also key to the Australian court's decision not to apply WCS to a third-party action in *Sercel*.³⁹⁹ In addition, although not a carriage-by-air case, this Article found support for this reasoning in the English Court of Appeal decision in *Feest*.⁴⁰⁰ Thus, in light of *Chubb II* and these other authorities, this Article refers to an orthodox approach⁺ (plus).

This may seem like a formalistic perspective to adopt since the liability of the carrier to provide contribution or indemnification is conditional on its primary liability toward the passenger. However, if one looks at the matter from the perspective of the right being vindicated by each cause of action, it becomes clear that they do indeed represent independent and separate causes of action. A right to damages seeks to compensate for damages arising from injury suffered during international carriage by air.⁴⁰¹ A right to contribution or indemnification seeks to reimburse a paying tortfeasor or indemnifier who has paid more than its equitable share;⁴⁰² the purpose is not to compensate the passenger for their loss but to redistribute the liability between the liable parties. That a third-party action for contribution or indemnification is so derivative of the main action as to be indistinguishable for the purposes of determining the applicability of the Warsaw Convention—an argument raised in *In re Air Crash Near Nantucket* and *Armavia*—is thus not sustainable.

The tide has changed, and there is growing authority for the view that third-party actions are not governed by WCS or

³⁹⁶ See *supra* Section III.A; *Chubb II*, 634 F.3d 1023, 1028 (9th Cir. 2011).

³⁹⁷ See *supra* Section II.B.3.b.

³⁹⁸ See *supra* Section III.A.

³⁹⁹ See *supra* Section III.A; *United Airlines Inc v Sercel Austl Pty Ltd* [2012] NSWCA 24 at [90] (Austl.).

⁴⁰⁰ See *supra* Section III.B; *Feest v. S. W. Strategic Health Auth.* [2015] EWCA (Civ) 708 [15], [2016] QB 503 (Eng.).

⁴⁰¹ *Chubb II*, 634 F.3d at 1026.

⁴⁰² *Id.* at 1026–27.

MC99.⁴⁰³ This is the correct view. Therefore, the decisions reached by the *Cour de Cassation* in *Armavia*, by the Ninth Circuit in *Chubb II*, and by the Court of Appeal of New South Wales in *Sercel*, got it right. It seems Judge Frankel's opinion in *Reed I* is finally vindicated.

Love it or loathe it, *Reed II* served a purpose during the period in which the United States was neither party to the Hague Protocol nor the Guadalajara Convention by ensuring that the Warsaw Convention could not be circumvented by means of a plaintiff suing a *préposé* free of the Warsaw Convention. However, now that the Hague Protocol is applicable in the United States, via U.S. accession to MAP4, and given that MC99 (to which the United States and 136 other States are Contracting Parties)⁴⁰⁴ governs most of the international carriage by air, the need for *Reed II* has greatly diminished. It is time to dump *Reed II* once and for all and accept that the orthodox approach was the correct one all along. As we saw in Part III, *Reed II* continues to exert its noxious influence on the matter of third-party actions in the context of MC99. Given the limited holding in *Chubb II*,⁴⁰⁵ until such a time as there is U.S. judicial endorsement across the circuit courts of the general non-applicability of WCS and MC99 to third-party actions, there will still exist the potential for conflict between U.S. courts on this matter and, most likely, between some U.S. courts and those of other countries, such as France, Australia, and the U.K. Is *Reed II* not now more of a hindrance to uniformity than a safeguard?

What barriers remain to banishing *Reed II* and fully endorsing the non-applicability of WCS and MC99 to third-party actions? The Author believes there are two principal concerns. First, there is a glaring issue with one of the pillars of the orthodox approach, as applied in *Connaught*.⁴⁰⁶ Second, there is a risk of exposing carriers to the risk of circumvention of the Warsaw Convention. The following discussion of these issues raises pol-

⁴⁰³ See *id.* at 1028; *United Airlines Inc v Sercel Austl Pty Ltd* [2012] NSWCA 24 at [113] (Austl.).

⁴⁰⁴ MC99 entered into force on November 4, 2003, and currently has 137 contracting parties. Int'l Civ. Aviation Org. [ICAO], *Current Lists of Parties to Multilateral Air Law Treaties*, [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) [<https://perma.cc/95SU-GNAB>] (search "9740" in the "Find an item" field; then select "English" under "Status (EN)").

⁴⁰⁵ See *Chubb II*, 634 F.3d at 1028.

⁴⁰⁶ See *Connaught Labs. Ltd. v. Air Can.* (1978), 94 D.L.R. 3d 586, 593–94 (Can. Ont. Sup. Ct. J.) (limiting the application of the WSC to "passengers, consignors and consignees").

icy considerations outside the scope of this Article, which has focused on the strict doctrinal issues at play. Nevertheless, the Author thinks it is germane and important to flag some of these policy considerations.⁴⁰⁷

The glaring issue with the orthodox approach relates to the supposition that the Warsaw Convention only applies to actions against the carrier taken by passengers or shippers. What about wrongful death actions? These are actions against the carrier, but they are not taken by the passenger; they are taken by third parties (i.e., to the contractual undertaking between passenger and carrier), typically spouses, children, and/or close relatives of the passenger. The logic of the orthodox approach would lead to the conclusion that the Warsaw Convention does not apply to wrongful death actions, but when we look at the text of Article 24 of the Warsaw Convention, we see that it states:

- (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
- (2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.⁴⁰⁸

One of the purposes of Article 24 is to ensure that the Warsaw Convention would apply to wrongful death actions.⁴⁰⁹ The substance of Article 24(2), read in light of Article 24(1), is not only to ensure that the Warsaw Convention will apply, but to ensure that it is not prejudicial to the question of who has the right to sue in wrongful death cases. The identity of the plaintiff in wrongful death was a question that the drafters had very deliberately left to be determined by *le droit commun*. This evidences that, contrary to the orthodox approach's point of view, the Warsaw Convention does indeed apply to at least one type of action by a third party against the carrier, i.e., the Warsaw Convention is not only applicable to actions by passengers or shippers against the carrier. While it is abundantly clear that the drafters had wrongful death actions in mind when drafting these provisions,⁴¹⁰ it is possible to interpret them as casting a

⁴⁰⁷ For a fuller discussion of some of the policy considerations, see generally CLUXTON, *supra* note 47.

⁴⁰⁸ Warsaw Convention, *supra* note 9, art. 24.

⁴⁰⁹ For an account of the drafting history and purposes of Article 24, see CLUXTON, *supra* note 47, at 38–54.

⁴¹⁰ *See id.* at 54.

much wider net, one that would capture all non-contractual actions by third parties pertaining to damages arising from the death or personal injury to a passenger; furthermore, under MC99, these provisions have also been adopted for cargo and delay actions.⁴¹¹ Whether such a broad interpretation is correct, or even desirable, is a question that can be left for another day.⁴¹² What is of immediate relevance is what impact, if any, this has on third-party actions.

If one adopts the broad interpretation of Article 24 of the Warsaw Convention and Article 29 of MC99, then a third-party action for contribution or indemnification could fall within that interpretation and, therefore, be subject to the Warsaw Convention's provisions. For the reasons explained throughout, the Author's view that the drafters of the Warsaw Convention did not intend such a broad interpretation and that they did not conceive the Warsaw Convention applying to recourse actions at all. But it must be admitted that the ambiguity surrounding this question is a thorn in the side of the orthodox approach. However, this argument is rendered moot by the distinction applied by the courts in *Chubb II*, *Sercel*, and *Feest*, between an action for damages and a third-party action for contribution or indemnification.⁴¹³ The weakness with the original orthodox approach has been remedied with the orthodox approach⁺ (plus).

⁴¹¹ Article 24(2) of the Warsaw Convention addressed actions for damages arising from accidental passenger death or personal injury during qualifying international carriage by air (Article 17); it did not apply to cargo (Article 18) or delay (Article 19), which were addressed by Article 24(1). Warsaw Convention, *supra* note 9, art. 24(2). First, under the Guatemala City Protocol (GCP) and then Montreal Additional Protocol No. 4 (MAP4), the text of Article 24 was amended, such that the wording "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights" was also applicable to cargo and delay actions. Guatemala City Protocol, *supra* note 46, art. IX; MAP4, *supra* note 46, art. VIII. Under Article 29, the same wording is applied to passenger, baggage, and cargo actions. MC99, *supra* note 10, art. 29.

⁴¹² It is difficult to reconcile the contractual emphasis of the Warsaw Convention (and MC99) with a construction of Article 24 that would permit a wide range of potential plaintiffs. See SHAWCROSS & BEAUMONT, *supra* note 274, at VII-401. The drafters of the Warsaw Convention certainly contemplated its application being limited to a narrow class of potential plaintiffs. Yet they clearly intended it to apply to some third parties to the contract (e.g., wrongful death plaintiffs). How far they intended this to extend and whether the text of the Warsaw Convention succeeded in attaining that intention are questions ripe for future research. On the question of who has the right to sue in cargo cases, see the authorities and literature cited by Shawcross and Beaumont. *Id.* at VII-530-31.

⁴¹³ See *supra* Sections III.A, III.B.

The second issue with adopting the orthodox approach (including the plus version) is that it opens the door to circumvention of the Warsaw Convention. If the Warsaw Convention does not apply to third-party actions, the risk emerges that the plaintiff might sue a third party, free of the Warsaw Convention and that the third party will seek recourse from the carrier. If the Warsaw Convention does not apply to the third-party action, then the carrier may end up being indirectly subjected to liability unconditioned by the provisions of the Warsaw Convention.

In reality, the risk of circumvention is far less than it seems; several factors must be borne in mind when assessing the gravity of the risk of circumvention. First, with the Hague Protocol, Guadalajara Convention, MAP4, and now MC99, the liability of the *préposé* is governed by the Warsaw Convention; this fact, in and of itself, greatly limits the scope for potential circumvention. Second, doctrines of contribution or indemnification generally permit a third-party defendant, e.g., the carrier, to invoke the same conditions and limits of liability as would have applied had the plaintiff sued it directly. For example, if the third-party defendant's liability to the plaintiff in the main action would have been limited, then the doctrine of contribution will generally limit the third-party defendant's liability to make contribution to a third-party plaintiff. Therefore, in most cases, the limitation of liability (where applicable) will still be applied in the context of the third-party action; hence, circumvention would not arise. It is possible that a particular doctrine of contribution might not work in this manner and may provide for simple pro-rata apportionment of the damages between joint tortfeasors. There would be a risk of circumvention of the limit of liability in such a case. However, the likelihood of a carrier seeking to rely upon the limit of liability under MC99 is exceptional, given that it is extremely difficult to prove the required elements.

As we saw with *Armavia*, *Chubb II*, and many of the other third-party action cases considered in this Article, it was not the theory or limitation of liability that was at risk of circumvention; it was the time limit or jurisdiction. Insofar as jurisdiction is concerned, what is often really at issue in these cases is choice of forum rather than circumvention per se. It is less a matter of the appropriateness of the forum than the desire of the defendants to secure a preferential forum if it results in lower net liability. When it comes to the time limits for taking an action, there is potential prejudice to carriers in checked baggage and cargo

cases in not applying the Warsaw Convention's time limits to third-party actions. This is, for example, because it may deprive them of the timely notice essential to investigate the circumstances of damages that may not have been reasonably detectable by the carrier.

If doctrines of contribution or indemnification usually permit the carrier, as a third-party defendant, to invoke any conditions or limits of liability that would have applied had the plaintiff to the main action sued it directly, then why was the Second Circuit concerned about circumvention of the limit of liability in *Reed II*? This comes down to the distinction between a duty to provide contribution under common law and a duty to provide contribution under contract, a distinction we earmarked earlier in this Article as requiring further inspection. This is the third point to be borne in mind when considering the gravity of the risk of circumvention.

What can arise is that a third party sues a carrier for indemnification based on a contractual indemnity given in an agreement between the carrier and that third party (e.g., an aircraft purchase agreement). In *Reed II*, the carrier's potential liability to indemnify its *préposés* arose from a presumed contractual indemnity in the employment contract.⁴¹⁴ In such cases, because the indemnification being sought is based on contract and not on a common law doctrine of contribution or indemnification, the carrier cannot rely on that doctrine to condition or limit its liability to provide indemnification (unless the contract were to incorporate such right expressly).

In such cases, the conditions and/or limits of liability of the Warsaw Convention could be viewed as having been circumvented. However, it is arguable that by giving a contractual indemnity, the carrier effectively and voluntarily waives its right to invoke the limitation of liability provided under the Warsaw Convention. We have to ask ourselves if this amounts to circumvention of the Warsaw Convention. How is it circumvention to hold the carrier to its freely given contractual obligations? It is worth noting that Article 22(1) of the Warsaw Convention allows the carrier to waive the limitation of liability by agreeing to a higher sum, by special contract, with the passenger,⁴¹⁵ and

⁴¹⁴ See *Reed II*, 555 F.2d 1079, 1090 (2d Cir. 1977).

⁴¹⁵ See Warsaw Convention, *supra* note 9, art. 22(1) ("In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital

MC99 contains an equivalent provision.⁴¹⁶ If it is circumvention, then it is a circumvention the carrier is complicit in. Thus, the legal basis for the third-party action, specifically whether it is a cause of action ground in a contractual or non-contractual obligation, changes the complexion of the issue of circumvention.

At this point, we find ourselves knee-deep in policy. In *Reed II*, the potential third-party plaintiffs were the carrier's *préposés*, specifically employees.⁴¹⁷ Clearly the Second Circuit and the international community who concluded the Hague Protocol saw compelling policy considerations in those circumstances for extending the limit of liability to actions taken against *préposés*. This was then built upon with the Guadalajara Convention and now consolidated and modernized in MC99. Do the same or similar policy considerations and circumstances apply to the remaining third parties outside of the Warsaw Convention, and are they sufficiently compelling? Should third parties, such as airframe and component manufacturers, aircraft lessors, airports, and other aviation service providers, be entitled to the same preferential treatment as *préposés*? These are the kinds of questions that the Author has addressed elsewhere.⁴¹⁸ Here, it suffices to say that whatever reform is necessary concerning third-party actions for contribution or indemnification in the context of WCS and MC99, the correct starting point for such, the Author submits, is to accept that the correct doctrinal position is that WCS and MC99 do not apply to third-party actions for contribution or indemnification against the carrier. Furthermore, the path to accepting this truth and finding a way to tackle the consequences is to exorcise the baleful influence of *Reed II* once and for all.

value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.”). In the carriage of goods, Article 22(2) allows the parties to agree to a higher limit of liability by through a special declaration as to value. *See id.* art. 22(2); *see also* DRION, *supra* note 61, at 104 (“[S]ince the Convention does not forbid the carrier to accept a contractual liability in excess of the Warsaw limits, it will depend on the interpretation of the contract on which the recourse action is founded, whether it was intended to set aside any limitation of liability provided by the Convention.”).

⁴¹⁶ MC99, *supra* note 10, art. 25 (“A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.”).

⁴¹⁷ *Reed II*, 555 F.2d at 1081.

⁴¹⁸ For the author's view and his proposals for possible reform, see generally CLUXTON, *supra* note 47.