



**RIGA
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LAW**

BACHELOR THESIS

Air Carrier Liability In Case Of Passenger Death Or Bodily Injury Under the Montreal Convention

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DECLARATION OF HONOR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of other are fully and correctly cited.

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ABSTRACT

This bachelor thesis examines the liability of air carriers for passenger injuries or deaths under the Montreal Convention. With the growing importance of air travel globally, the number of passengers is expected to rise, leading to an increased probability of in-flight injuries. The Montreal Convention offers detailed guidelines outlining the obligations of air carriers in such incidents. To be more precise, air carrier's liability for passenger deaths or injuries during different stages of air travel is emphasized in Article 17 of the Convention, which specifically addresses the conditions under which an accident can be attributed to them. However, this Article contains ambiguous terms that require interpretation by the courts, leading to differing understandings and applications in individual cases. The objective of this thesis is to examine the Montreal Convention's provisions, specifically concentrating on the liability of air carriers and any potential limitations that may exist. By examining relevant case law and legal principles, this study seeks to provide a comprehensive understanding of the legal framework governing air carrier liability.

Keywords: *Montreal Convention, Air Carrier Liability, Passenger Death, Bodily Injury, Air Travel.*

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1. INTRODUCTION

Air travel has become an essential part of modern-day transportation, connecting people across the globe for business, tourism, and other purposes. Despite the unprecedented challenges posed by the COVID-19 pandemic, the aviation industry managed to achieve a remarkable feat in 2022 by carrying 3.7 billion passengers worldwide, signifying a noteworthy rise from the previous year.¹ As the number of travelers continues to grow, the probability of passengers sustaining injuries during air travel is also expected to increase.

International air travel involves various foreign elements such as nationalities, points of origin, destination, and the location of the contract of carriage. Complicated legal matters arise when accidents occur that cause harm or fatalities to passengers, which require determining the relevant jurisdiction and applicable laws. In order to maintain uniformity in the legal system across different regions, the Warsaw Convention of 1929 was established with the aim of creating a unified liability regime. This regime has undergone several amendments and has evolved significantly over time, ultimately culminating into Warsaw System. In early 2000's, this liability regime was replaced by the Montreal Convention, which essentially modernized Warsaw System and set forth updated rules regarding air carrier liability.

Montreal Convention sets forth specific guidelines regarding the responsibility of air carriers in the event of an accident. Article 17 outlines the conditions under which an accident can be attributed to the carrier, specifically stating that the carrier liable in case of death or injury while the the passengers are either onboard the airplane or in the process of embarking or disembarking from it. However, this article contains some terms that are ambiguous and can be understood in different ways. Therefore, it is up to the courts to interpret these terms and apply them to each case.

The research will examine the main aspects of air carrier liability, including the circumstances under which liability arises, the extent of liability, and the defenses available to air carriers and passengers. It will also explore the challenges that arise in implementing and enforcing the Montreal Convention, and propose possible solutions to address them. Moreover, the ambiguous terms under Article 17 will be analyzed, as they are crucial in determining the extent of the liability. Through the analysis of relevant legal documents, case law, and academic literature, the research aims to contribute to the existing legal scholarship by providing a comprehensive and up-to-date understanding of the legal framework governing air carrier liability.

The purpose of this study is to address the following research question: What is the extent of air carrier liability for passenger death or bodily injury under the Montreal Convention, and are there any liability limitations? To answer this question, the study will undertake a comprehensive analysis of Article 17 of the Montreal Convention. The analysis will pay special attention to the terms that are not well-defined in the article and can have different interpretations. Moreover, the study will also examine other articles in the Convention that relate to air carrier liability. This investigation will ultimately determine the precise scope of air carrier liability and reveal any possible limitations.

To address the research question, the author adopts several research approaches throughout the doctrinal legal research process. The first approach employed is the historical

¹ Statista. "Number of scheduled passengers boarded by the global airline industry from 2004 to 2022." Available on: <https://www.statista.com/statistics/564717/airline-industry-passenger-traffic-globally/>.

interpretation method, which examines the historical context and evolution of the provisions under the Montreal Convention. However, in order to provide a comprehensive understanding of the current state of air carrier liability, this thesis will not only examine the Montreal Convention, but also consider the evolution of international treaties that preceded it. Specifically, in this chapter, I will also analyse Warsaw Convention and its associated agreements.

The second approach is the analytical interpretation method, which involves a detailed analysis of Article 17 and other articles of the Convention through case law, relevant literature and articles by recognized Air Law experts. This analysis involves the examination of landmark cases such as *Air France v. Saks*, *Eastern Airlines Inc v Floyd*, and *Rubina Husain v. Olympic Airways*, among others, as well as relevant case law from the European Union.

The third approach is the grammatical interpretation method, which involves an analysis of the key terms, such as ‘bodily injury’, ‘accident’, ‘embarkation’, and ‘disembarkation’ used in Article 17. The author also utilizes the systematic interpretation method as the fourth approach, which explores how Article 17 interrelates with other articles in the Convention that impact the air carrier's liability.

Finally, the author will incorporate an interdisciplinary research method by incorporating statistical analysis, specifically focusing on the historical exchange rates between the Special Drawing Right (SDR), which is the unit monetary measurement for expressing liability limits, and six different national currencies: Euro, Pound Sterling, U.S Dollar, Swiss Franc, Chinese Yen, and Japanese Yuan. This analysis aims to determine the value of one SDR in each of these currencies over the years. By examining the fluctuations in these exchange rates, the author seeks to assess whether the amount to which a victim would be entitled under the liability limits has varied due to currency valuation changes and thus whether SDR is an adequate unit of account to express limits of liability.

This thesis may have certain limitations, as it only offers a limited analysis of the air carrier's responsibility towards passengers. This research does not cover other areas of air carrier liability, such as liability for lost or damaged baggage.

This thesis is composed of an introduction, three main parts, a conclusion, and a bibliography. The first main part of this thesis focuses on the historical evolution of air carrier liability. It begins by examining the the context and rationale behind the adoption of Warsaw Convention and its associated protocols. Additionally, in this chapter I also explore the factors that led to the adoption of the existing liability regime and examine the liability framework within the European Union.

In the second part of the thesis I will provide a thorough examination of Article 17. This section of the thesis closely examines the interpretation of this provision and addresses several key questions, such as what constitutes an accident, whether mental injury is included within the definition of bodily injury, and the scope of embarkation and disembarkation. This section will also investigate how courts and legal experts in different jurisdictions have addressed these issues, and what implications these interpretations may have on air carriers' liability.

In the third part of the thesis I will critically assess the adequacy of the SDR as a monetary measurement for expressing liability limits, and question whether it remains a sensible approach in the current aviation landscape. In this chapter, I will provide a comprehensive overview of the exchange rates between the SDR and six different national currencies over a significant period, spanning from the implementation of the Montreal

Convention in November 2003 to April 2023, I seek to analyze the volatility and stability of SDR. By doing so, I aim to shed light on the possible implications of using the SDR as a unit of account for air carrier liability limits.

2. HISTORICAL BACKGROUND: THE JOURNEY FROM WARSAW TO MONTREAL

February 8th of 1919 marked a significant milestone in the history of aviation, as Henry Farman, an accomplished aviator and airplane designer, steered the first-ever international commercial flight from Paris to London.² Civilian flying was not permitted after the First World War, so all 12 passengers on the flight were soldiers.³ As soon as the war ended and commercial airlines began to emerge, the French government realized the importance of creating international regulations and liability rules for the aviation industry.⁴

In 1925, the President of France convened the International Conference on Private Air Law.⁵ The conference marked an important turning point in the development of air law, bringing together legal experts from around the world to discuss and draft an initial version of an international convention.⁶ Also, during this conference a committee of air law experts was established to oversee the continued development of the convention. In 1929, the city of Warsaw hosted the second International Conference on Private Air Law. This conference served as a forum for representatives from 33 countries to come together and discuss issues related to the regulation of air travel, including air carrier liability and compensation for accidents.⁷ During the conference, the attendees signed the Warsaw Convention.

The Warsaw Convention is a multinational agreement that establishes legal standards for the liability of air carriers in cases of accidents that take place when travelling internationally. It has been ratified by 152 countries and sets limits on the amount of compensation that air carriers can be held responsible for in case of an accident.⁸ However, over time, the Convention was amended through various treaties and protocols as liability limits and other factors were reconsidered.⁹ This resulted in a patchwork of different protocols and conventions regulating air carrier liability. In response to emerging concerns over the outdated legal framework governing air carrier liability, the International Civil Aviation Organization (ICAO) initiated a process of negotiations aimed at developing a new international agreement.¹⁰ This effort culminated in the adoption of the Montreal Convention in 1999.

² Malcolm Abbott and Jill Bamforth, *The Early Development of the Aviation Industry: Entrepreneurs of the Sky* (Routledge, 2020), pp. 10-14.

³ *Ibid.*

⁴ Stephen Latchford, "Growth of Private International Air Law," *George Washington Law Review* 13, no. 3 (1945): pp. 276-307, accessed April 10, 2023, available on: <https://bit.ly/3GN0pkC>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ International Civil Aviation Organization. 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, available on: <https://bit.ly/3SANaIB>. Accessed February 22, 2023.

⁹ James N. Fincher, "Watching Liability Limits under the Warsaw Convention Fly Away, and the IATA Initiative," *Transnational Lawyer* 10, no. 2 (1997): pp. 309-330, accessed April 10, 2023, available on: <https://bit.ly/3oh8IEv>.

¹⁰ *Ibid.*

As indicated in preamble, along with the aim of achieving uniformity with the Warsaw System, the Montreal Convention seeks to: (i) to modernize and revise the Warsaw System, (ii) to protect the rights of customers, and (iii) to create a fair balance of interests.¹¹ Currently, the Montreal Convention has been ratified by 135 State Parties, including the European Union, making it a widely accepted international agreement.¹²

Several factors necessitated the modernization of the Warsaw System such as outdated liability limits and a fragmented liability regime with overlapping and contradictory provisions.¹³ Moreover, different countries belonged to different liability regimes, as not all countries signed all the associated protocols of Warsaw Convention, which caused unpredictability and contradictions.¹⁴ Montreal Convention was designed to address these shortcomings and provide a modern and uniform liability regime.

To fully grasp the existing liability framework and the potential issues it may involve, it is essential to examine and analyse the preceding liability regime.

2.1. The Warsaw System

The Warsaw Convention was adopted 1929 to establish a framework for international air transportation. As time passed, more international agreements and protocols were introduced to broaden and improve the coverage of the Convention, and to raise the liability limits. These agreements, together with various private arrangements, gave rise to a comprehensive liability system referred to as the "Warsaw System", remained in effect until the adoption of the Montreal Convention. Among the most significant conventions and protocols that comprised the Warsaw System are the Hague Protocol of 1955, the Guadalajara Convention of 1961, the Montreal Agreement of 1966, the Guatemala Protocol of 1971, and the Montreal Protocols of 1975. Together, these agreements helped to shape the international air transportation industry and provide important protections for passengers and cargo.

The Warsaw Convention outlines the conditions under which carriers can be held liable for injury or death of passengers. The Convention applies to flights that begin and end in two different contracting countries, even if there are stopovers in between.¹⁵ The Convention also mandates that flights within a country that make a stop in another country are also subject to its regulations, even if that country is not a signatory to the Convention. This provision ensures that passengers on such flights are protected by a consistent set of rules, no matter where the stopover takes place.¹⁶

¹¹ International Civil Aviation Organization. *Convention For The Unification Of Certain Rules For International Carriage By Air 1999 (Montreal Convention)*, Date of entry into force: 4 November 2003. Available on: <https://bit.ly/3mk0xAU>. Accessed February 22, 2023.

¹² Robert Lawson, "The Montreal Convention 1999 at 21: Has It Come of Age or Passed Its Sell-by Date?" *Air and Space Law vol. 45, Issue 3* (2020): pp. 265-284, accessed April 11, 2023, doi: <https://doi.org/10.54648/aila2020039>.

¹³ Jennifer McKay, "The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity," *Case Western Reserve Journal of International Law* (2002): p. 75-81, accessed February 22, 2023, available on: <https://bit.ly/3IIzyqd>.

¹⁴ *Ibid.*

¹⁵ International Civil Aviation Organization. *Convention For The Unification Of Certain Rules Relating To International Carriage By Air 1929 (Warsaw Convention)*, Date of entry into force: 13 February 1933. Available on: <https://bit.ly/3KGUQpa>. Accessed April 11, 2023.

¹⁶ *Ibid.*

Article 17 of the Warsaw Convention specifies that airlines are obliged to compensate passengers for any damages they suffer during the flight, including physical injuries or fatalities.¹⁷ The Convention follows a liability system that shifts the burden of proof onto the carrier, which means that the carrier is automatically held liable without the need for the passenger to prove negligence on the carrier's side. To balance this, Convention sets a limit on the amount of compensation passengers can claim to prevent carriers from facing financial difficulties or bankruptcy in the event of major accidents. The liability limit is 125,000 gold francs but this limit can be exceeded if the passenger can demonstrate that the carrier acted deliberately or displayed gross negligence.¹⁸ However, proving such misconduct or negligence can be difficult for passengers as the burden of proof remains on them. Additionally, Convention also provides a provision that allows air carriers to be exonerated of liability if they can demonstrate that they took all necessary precautions to avoid the accident. This provision acknowledges that despite an airline's best efforts, unforeseeable circumstances may still lead to death or injury.

The aviation industry experienced significant expansion and technological progress since the implementation of the Warsaw Convention in 1929, leading to the need for revision and modernization of its provisions. This led to the adoption of the Hague Protocol in 1955, which raised the liability limits and implemented other regulations to safeguard passengers' rights. Notable change was the increase in the liability limit to 250,000 francs.¹⁹ Moreover, the Protocol brought a significant alteration to Article 25 of the Warsaw Convention, which aimed to provide clarity on circumstances where carriers could not rely on liability limitations as a defense. The Warsaw Convention had already stipulated that liability limitations could not be invoked by air carriers in cases of willful misconduct. However, the term "willful misconduct" was vague and subject to different interpretations, leading to inconsistent application across various countries. The Hague Protocol sought to address this issue by replacing Article 25 with a new article, which provided a more precise definition.

While the Hague Protocol was an important step forward in terms of establishing greater protections for passengers in cases of air travel accidents, there were several criticisms against the protocol. Although the Hague Protocol raised the liability thresholds for air carriers in situations where passengers were killed or injured, some still criticized that the thresholds were still insufficient and did not provide reasonable remuneration to the passengers who had been harmed.²⁰

During the 1950s, the growing popularity of charter flights highlighted a significant gap in the Warsaw Convention's definition of the term "carrier by not addressing the unique liability concerns associated with charter flights. To fill this gap, the Guadalajara Convention was established in 1961 by introducing regulations that were specifically designed to govern charter flights. It differentiated between the contracting carrier and the actual carrier and stated that

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ International Civil Aviation Organization. *Protocol To Amend The Convention For The Unification Of Certain Rules Relating To International Carriage By Air, Signed At Warsaw On 12 October 1929, Done At The Hague On 28 September 1955 (The Hague Protocol 1955)*, Date of entry into force: 28 September 1955. Available on: <https://bit.ly/3ZAAaoD>. Accessed February 23, 2022.

²⁰ Rene H. Mankiewicz, "Hague Protocol to Amend the Warsaw Convention," *The American Journal of Comparative Law Volume 5, No. 1* (1956): pp. 78-97, accessed February 24, 2022, doi: <https://doi.org/10.2307/838140>.

while the actual carrier shares responsibility, the charterer or the contracting carrier is primarily liable.²¹

In the 1960s, the Hague Protocol's low liability limits gave rise to concerns that caused the United States to be hesitant in its ratification.²² In 1965, US announced its withdrawal from the Warsaw Convention due to concerns over the limited liability thresholds of the Hague Protocol.²³ This withdrawal was particularly worrisome because US was a major player in the international aviation industry, and its withdrawal could potentially have significant implications for the harmonization of private air law worldwide. To solve this problem, the Montreal Agreement was signed in 1966 as a private agreement among air carriers, American government, and American Civil Aeronautics Board.²⁴

One major change introduced by the Montreal Agreement was an increase in the maximum liability limit, which was set at \$75,000 USD for flights operating in, departing from, or arriving in the United States.²⁵ In order to operate commercially within the US, air carriers were obligated to adhere to the terms and conditions outlined in the Agreement. This was a necessary condition for conducting business within the country's airspace. During the period in which the Montreal Agreement was adopted, the United States had a major presence in the global air travel industry. It was responsible for a considerable percentage of international passenger carriage and operated the largest number of domestic flights worldwide.²⁶ As a result, it was in a position to pressure airlines interested in cooperation. Following the introduction of the Montreal Agreement, the US remained a party to the Warsaw Convention.²⁷ However, the Montreal Agreement was never intended to be a long-term solution. Its purpose was to provide a temporary framework while a new liability regime was developed through a new international convention.

After the Montreal Agreement, there was a need for a permanent solution. The adoption of the Guatemala City Protocol in 1971 was a response to the need for amendment to the Warsaw Convention. Despite the efforts to amend the Convention, the Protocol failed to come into force due to lack of ratification by enough states.²⁸ Nevertheless, the protocol still had a considerable impact on the evolution of air law. It introduced several important concepts, such as strict liability for air carriers and increased compensation for victims of accidents. For instance, it proposed that carrier liability should be limited to 1,500,000 Francs Poincare (approximately 90,000 EUR) and that carriers should be held liable for all cases of injury or death.²⁹ Furthermore, Protocol introduced a provision that gave claimants the right to file

²¹ International Civil Aviation Organization. *Convention Supplementary To The Warsaw Convention For The Unification Of Certain Rules Relating To International Carriage By Air Performed By A Person Other Than The Contracting Carrier, Signed In Guadalajara, On 18 September 1961 (The Guadalajara Convention 1961)*, Date of entry into force: 1 May 1964. Available on: <https://bit.ly/3A3eTsQ>. Accessed April 11, 2023.

²² J. C. Batra, "Modernization of the Warsaw System - Montreal 1999," *Journal of Air Law and Commerce* 65, no. 3 (2000): pp. 429-444, accessed April 11, 2023, available on: <https://bit.ly/3oeKQM9>.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Michael Milde, "Liability in International Carriage by Air: The New Montreal Convention," *Uniform Law Review Volume 4, no. 4* (1999): pp. 835-862, accessed April 12, 2023, available on: <https://bit.ly/42xeUID>.

²⁷ *Ibid.*

²⁸ Rene H. Mankiewicz, "The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention," *Journal of Air Law and Commerce* 38, no. 4 (1972): pp. 519-546, accessed April 12, 2023, available on: <https://bit.ly/3L415XM>.

²⁹ *Ibid.*

lawsuits against the carrier in their state of residence if the carrier had a place of business in that state.³⁰

As the Guatemala City Protocol was never implemented, numerous questions were left unanswered. To address these questions, a Diplomatic Conference was organized in Montreal. The conference resulted in the adoption of four protocols that amended the previous Conventions and Protocols. The amendments made in the four Montreal Protocols included various significant changes such as increasing the liability limits and changing the monetary measurement to Special Drawing Rights.³¹ These amendments aimed to address the questions that were left unanswered after the Guatemala City Protocol was not implemented. Finally, after many years of law-making, Montreal Convention was signed in 1999 to summarize outcome of these efforts.

2.2. The current liability regime: the Montreal Convention

The Warsaw System was complex, as it comprised of many amendments to the Warsaw Convention. This complexity was increased when some countries ratified the Convention without agreeing to its amendments. This inconsistency created confusion, as different states were applying different rules, ultimately leading to the failure of a uniform legal system. Consequently, ICAO established a study group in 1996 to tackle the issue, but it took until the Montreal Conference in 1999 for substantial advancements to be achieved and for the new Convention to be formally adopted.

The aim of the new Convention was to update and modernize existing global legal framework that regulates the liability of air carriers. Instead of continuously modifying the Warsaw Convention, the new Convention was meant to replace it entirely. In essence, the Montreal Convention integrates most legal provisions of the Warsaw System into a single comprehensive agreement.

The new Convention brought forth revised liability limits and implemented the use of Special Drawing Rights as the standard unit of currency for calculating indemnification for losses incurred. SDRs are an international monetary unit used by the International Monetary Fund (IMF). Currently, liability limit in case of death or injury to passengers is 128,821 SDRs (equivalent to approximately 159 136 EUR), which is the minimum amount of compensation in case of an accident.³² Air carriers have the option to provide greater compensation, but they cannot provide less than the minimum specified. Moreover, while the Warsaw Convention and Hague Protocol followed a fault-based liability approach, Montreal Convention uses strict liability approach, holding the air carrier responsible for any damages caused by passenger injury or death, irrespective of fault.

While strict liability may seem like a better approach than the fault-based liability system used in the Warsaw Convention and Hague Protocol, it also has its limitations. Strict liability may lead to carriers being held liable for damages that are outside of their control or due to circumstances beyond their reasonable control. With that being said, it is crucial to

³⁰ *Ibid.*

³¹ Gerald F. Fitzgerald, 'The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air,' *Journal of Air Law and Commerce* Volume 42, Issue 2 (1976): p. 279, accessed February 25, 2023, available on: <https://bit.ly/3Zk1edu>.

³² *Supra* note 11.

maintain a balance between safeguarding the interests of passengers and ensuring the business continuity of airline industry.

Moreover, the Montreal Convention introduced the fifth jurisdiction, which is a significant improvement over the Warsaw system.³³ The concept of the fifth jurisdiction entails that the claimant has the right to file a claim for damages, as per Article 17, depending on the passenger's permanent residence at the time of the accident.³⁴ However, this option is available when the carrier has a designated business presence in that particular jurisdiction.³⁵ The inclusion of the fifth jurisdiction in raised concerns among the US delegation, primarily due to the belief that it could potentially enable foreign citizens to file claims against foreign air carriers in the United States, where they could potentially be awarded larger damages than what would be awarded in their home country.³⁶ Thus, the principle of "forum non conveniens" is incorporated into the Montreal Convention, allowing a court to refrain from assuming jurisdiction over a case if another forum is better equipped to offer a fair, convenient, and efficient trial for all parties involved. This is applied to make sure that foreign citizens do not take advantage of the concept of fifth jurisdiction.

The Montreal Convention has brought about notable amendments to the previous liability regime, indicating the progressive evolution of the legal framework. The introduction of updated liability limitations and the advancements in jurisdiction provisions demonstrate a commitment to adapting to the changing needs and challenges of international air travel. Furthermore, it is important to consider that the liability of air carriers within the context of EU law, which provides a broader perspective on the subject.

2.3. Liability regime in European Union

By exploring how air carrier liability is governed within the EU is significant due to the regulations specific to the region. The EU has its own set of rules and directives that govern air carrier liability, which may or may not differ from international standards. Analyzing the EU context helps in understanding whether it aligns with the international framework or diverges from it. This will provide valuable insights into the complexities and potential discrepancies in air carrier liability regulations.

The European Union expressed dissatisfaction with the outdated liability rules that were established by the 1929 Warsaw Convention, given that the latest amendment to the Convention was made in 1961.³⁷ The outdated rules required national laws to fill in the gaps, leading the European Union to realize the necessity of a new and up-to-date liability framework throughout the Union.³⁸

Consequently, in 1997, the European Council adopted Regulation 2027/97. This regulation applies to both domestic and international flights operated by carriers licensed in EU member states and requires EU carriers to incorporate its provisions into their terms of

³³ George N. Tompkins, "The Montreal Convention 1999, the Fifth Jurisdiction in the United States and the Doctrine of Forum Non Conveniens," *Air and Space Law Volume 33, Issue 3* (2008): pp. 306-308, accessed February 25, 2023, doi: <https://doi.org/10.54648/aila2008022>.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Paul Stephen Dempsey, *European Aviation Law* (Kluwer Law International, 2004), pp. 54.

³⁸ *Ibid.*

carriage.³⁹ In the event that carriers outside the Union chose not to adhere to the regulations stipulated in Regulation, they were obligated to inform passengers with explicit notice of this decision.⁴⁰ Furthermore, the liability of these carriers was unrestricted and not subject to any legal limitations, conventions, or contractual obligations. According to Regulation 2027/97, carriers were liable for up to 100,000 SDRs in case of an accident. However, if the carrier could provide evidence that the passenger was at fault or contributed to the damage, they could avoid liability and be exonerated.⁴¹

Soon after the Montreal Convention was signed, the Regulation 2027/97 underwent revisions through Regulation 889/2002 to harmonize it with the newly adopted Convention. The revised Regulation specifies that the liability of an air carrier operating within the EU is subject to the relevant provisions of the Montreal Convention. In contrast, under the Regulation 2027/97 carriers were subject to the relevant provisions of Warsaw Convention.⁴² However, this new regulation has a significant deficiency. The Regulation mandates that EU air adhere to the liability system outlined in the Montreal Convention, even in cases where the carriage would typically be within the jurisdiction of the Warsaw Convention. This requirement may result in potential breaches of international law commitments for EU Member States under the Warsaw Convention to those parties that are not signatories to Montreal Convention.

According to the amended Regulation No 2027/97, air carriers are held strictly liable for any losses resulting from passenger death or bodily harm due to an accident during a flight, or while embarking or disembarking.⁴³ There are no financial limits to the obligation for losses incurred by passengers due to injury or fatality. If damages are below 100,000 SDRs, the air carrier must pay compensation without contesting the claim.⁴⁴ However, for amounts exceeding this limit, the air carrier can dispute the claim by demonstrating that it was not responsible or at fault for the incident.⁴⁵ However, the carrier may be able to recover some or all of the damages paid to the passenger from a third party if the air carrier can prove that the accident was caused by the wrongful actions or negligence of the said third party.⁴⁶ This can provide some relief to the carrier in cases where they are not solely responsible for the accident.

As for the scope of application, the Regulation also covers incidents outside of the EU or on flights operated by non-EU carriers, as long as the flight departed from an EU airport.⁴⁷ Even though this expanded scope of the regulation provides a strong legal framework for protecting passengers and holds airlines accountable for their actions, airlines may face increased liability and insurance costs. This could ultimately lead to higher ticket prices and reduced competition in the industry. Additionally, such extended scope of the application places an undue administrative burden on airlines, by requiring them to process and respond to claims

³⁹ Council Regulation (EC) No 2027/97 Of 9 October 1997 On Air Carrier Liability In The Event Of Accidents, OJ L 285, 17 October, 1997. Available on: <http://data.europa.eu/eli/reg/1997/2027/oj>. Accessed February 25, 2023.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Council Regulation (EC) No 2027/97 Of The Council Of 9 October 1997 On Air Carrier Liability In Respect Of The Carriage Of Passengers And Their Baggage By Air (Consolidated version 2002), OJ L 285, 17 October, 1997. Available on: <http://data.europa.eu/eli/reg/1997/2027/2002-05-30>. Accessed April 12, 2023.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Elmar M. Gjemulla and Ronald Schmid, "Council Regulation (EC) No. 2027/97 on Air Carrier Liability in the Event of Accidents and its Implications for Air Carriers," *Air and Space Law Volume 23, Issue 3* (1998): pp. 98-105, accessed February 26, 2023, doi: <https://doi.org/10.54648/aila1998014>.

for compensation and assistance from passengers. This can be particularly challenging for smaller airlines with limited resources, and may result in delays or errors in processing claims.

Overall, Regulation (EC) No 2027/97 aligns closely with the principles of the Montreal Convention and, in fact, offers a comparable if not enhanced level of protection to passengers within the EU. The close alignment demonstrates a significant level of uniformity in air carrier liability laws.

3. UNDERSTANDING LIABILITY UNDER ARTICLE 17 OF THE MONTREAL CONVENTION

Article 17 of the Montreal Convention regulates the liability of air carriers in the event of passenger death or bodily injury, and specifies the following:

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.⁴⁸

The wording of Article 17 in the Montreal Convention in comparison to that of the Warsaw Convention has encountered just some minor variations, but these differences seem to be insignificant and do not alter the fundamental principles established under the Warsaw Convention. The minor variations between the two conventions suggest that the drafters of the Montreal Convention intended to maintain a certain level of consistency with the existing legal framework. Thus, legal precedents established under the Warsaw Convention and associated agreements are still applicable.

At the Montreal Diplomatic Conference held in 1999, a proposal was made to expand the scope of Article 17. The reason behind this proposal was that certain Drafters of the Montreal Convention believed that it was necessary to address situations where the passengers suffer a mental injury.⁴⁹ These types of cases were not originally covered under the Warsaw Convention. However, the draft of the Montreal Convention which aimed at providing compensation solely for mental injuries was rejected and the provision was not substantially changed.⁵⁰

To make a claim of liability against an air carrier, Article 17 specifies three conditions that must be fulfilled. First, there must have been an "accident" which refers to any unexpected event or incident that occurred during the flight or embarking/disembarking. Second, the passenger must have suffered death or bodily injury as a result of the accident. Finally, it is necessary that the accident took place while the passenger was either on the aircraft or during the embarking or disembarking process. However, there has always been a lack of clarity surrounding these three conditions.

In the upcoming section of this thesis, I will shed light on the above-mentioned critical issues surrounding Article 17 of the Convention. The section will focus on defining what

⁴⁸ *Supra* note 11.

⁴⁹ McKay Cunningham, "The Montreal Convention: Can Passengers Finally Recover for Mental Injuries," *Vanderbilt Journal of Transnational Law* Volume 41, no. 4 (2008): pp. 1043-1082, accessed April 13, 2023, available on: <https://bit.ly/3Abelvz>.

⁵⁰ *Ibid*.

constitutes an accident and determining whether the term "bodily injury" covers mental injury. Additionally, I will provide clarity on the scope of embarking and disembarking.

3.1. What constitutes an ‘accident’?

For air carriers to be liable under Montreal Convention, it is essential for an "accident" to have occurred. This requirement has been in place since the Warsaw Convention. Defining the term "accident" has been a contentious issue that has led to extensive litigation, with its interpretation changing over time. To understand the concept of "accident", it is important to start by examining the case law in the United States, because the United States was among the first jurisdictions to address the issue of "accident" within the context of air carrier liability. This knowledge will help us later compare it with legal decisions from U.K and EU. Examining U.S., U.K., and EU case law provides a comprehensive understanding of air carrier liability, taking into account the legal principles and interpretations from different jurisdictions. This approach allows for a more nuanced analysis, facilitates the identification of commonalities and divergences, and helps in developing a coherent and well-informed perspective on the international legal framework governing air carrier liability.

In 1985, the US Supreme Court delivered a landmark ruling in *Air France v. Saks*. The case provided clarity on the criteria that must be met to classify an incident as an "accident" under Article 17. The Saks decision was influenced by two prior cases in the United States. One of these cases, *Warsaw v. Trans World* heard by the U.S Court of Appeals, resulted in the denial of compensation to the plaintiff because the injury occurred during the regular operation of the aircraft on a routine flight.⁵¹ This ruling established that an incident must meet a specific standard of unexpectedness or unusualness to be considered an "accident". Another case, *Desmarines v. KLM*, heard by the U.S District Court for the Eastern District of Pennsylvania, further clarified that an accident should be understood as an event or occurrence that deviates from the normal course of events, rather than being an inherent danger commonly associated with air travel.⁵²

The *Saks* case involved a passenger who suffered permanent hearing loss in her left ear after experiencing intense pain and pressure during the descent of a flight. The passenger was ultimately diagnosed with irreversible damage to her ear, as the pain persisted after the flight. The passenger initiated legal proceedings against the airline, claiming that her hearing loss was due to the airline's failure to properly maintain and operate the pressurization system. In order for the plaintiff to be eligible for compensation, she needed to demonstrate that her injury was the result of an "accident" as defined by Article 17.

To fully understand provisions of the Convention, the Court needed to conduct a thorough analysis of the language used in the treaty and the circumstances in which the words were used.⁵³ This process involved a careful interpretation of the text of the treaty, as well as an examination of the intent and purpose of the Convention. For example, Article 17 and Article 18 of the Convention were compared, and it was concluded that there is a significant contrast between the use of different terminology to describe the airline's liability. Article 17 places

⁵¹ U.S. District Court for the Eastern District of Pennsylvania, *Warsaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977), December 21, 1977.

⁵² US District Court for the Eastern District of Pennsylvania, *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), June 28, 1977.

⁵³ Lawrence Goldhirsch, ‘Definition of ‘Accident’: Revisiting *Air France v. Saks*,’ *Air and Space Law, Volume 26, Issue 2* (2001): pp. 86-89, accessed April 14, 2023, doi: <https://doi.org/10.54648/338942>.

responsibility on the airline for any damages resulting from an "accident," while Article 18 holds the airline accountable for lost or damaged luggage due to an "occurrence." This language suggests that the Convention's drafters intended the term "accident" to have a distinct meaning from "occurrence." Moreover, Article 17 specifies that the injury sustained has to be a direct consequence of an accident, rather than the injury itself being categorized as an accident. Therefore, it is not sufficient for only the injury to fit the description of an "accident". Furthermore, in order to gain additional valuable insights, the Court also looked at the French definition of "accident".⁵⁴ This was due to the fact that originally the Convention was written in French. Within this legal context, "accident" is generally understood to refer to a unusual, unexpected, or unintended event.⁵⁵

The ruling in *Saks* highlighted that a carrier can only be held liable if passenger's injury results from an unexpected and unusual external event, rather than resulting from a typical and expected functioning of the aircraft.⁵⁶ In essence, if a passenger sustains an injury due to a regular and anticipated event that takes place during a flight, such as turbulence, then the airline cannot be held responsible for any resulting harm. This means that if a passenger's internal response to the standard operation of the aircraft causes injury, it would not be considered an "accident". In light of this, the Court concluded that the woman's injury resulted from her own bodily reaction to the normal operation of the aircraft, and therefore did not qualify as an "accident" under Article 17.⁵⁷ Therefore, the airline was not found liable for her injury.

After the *Saks* ruling, subsequent court decisions centered on the criteria of unexpected and unusual to interpret the term "accident". In another case, the U.S District Court for the Southern District of New York determined that a miscarriage caused by a bomb threat during a flight could be classified as an "accident". The Court's rationale behind its decision was that the bomb threat was not a regular and anticipated event that takes place during a normal flight.⁵⁸ However, another U.S District Court in case *Fischer v. Northwest Airlines, Inc* had a differing opinion on this matter, holding that a landings that exacerbated a neck injury did not meet the criteria of "accident".⁵⁹ This was because landings are an anticipated component of any flight and therefore, do not qualify as unusual or unexpected.⁶⁰

Typically, injuries or fatalities that are a result from an already existing medical condition would not meet the criteria for an accident. Nonetheless, if the flight crew's conduct or negligence exacerbates the situation, it could be categorized as an accident. This was demonstrated in *Olympic Airways v. Husain*, when the U.S Supreme Court ruled that the death of a passenger, who had asthma and passed away as a result of being exposed to smoke and not being relocated to a seat further from the aircraft's smoking section, was considered an accident.⁶¹ The court arrived at its judgment by considering the fact that cabin crew's breach of standard procedures and company policies constituted an exceptional and unforeseeable

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ U.S. Supreme Court, *Air France v. Saks*, 470 U.S. 392 (1985), March 4, 1985.

⁵⁷ *Ibid.*

⁵⁸ U.S District Court for the Southern District of New York, *Salerno v. Pan American Airways, Inc.*, 606 F. Supp. 656 (S.D.N.Y. 1985), April 19, 1985.

⁵⁹ US District Court for the Northern District of Illinois, *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064 (N.D. Ill. 1985), December 12, 1985.

⁶⁰ *Ibid.*

⁶¹ U.S. Supreme Court, *Olympic Airways v. Husain*, 540 U.S. 644 (2004), February 24, 2004.

event⁶². Consequently, this event met the requirements for being classified as an accident as per Article 17.

However, recent cases have demonstrated a lack of clarity regarding whether the "unusual and unexpected" test applied in cases concerning injury claims by airline passengers should be applied subjectively or objectively.⁶³ The subjective approach focuses on the claimant's perception of what was unusual and unexpected at the time of the incident. In contrast, the objective approach takes into account what the carrier would consider unusual or unexpected in the given circumstances. This issue has arisen in two recent cases such as *Deep Vein Thrombosis Group Litigation* and *Moore v British Airways PLC*.⁶⁴ Airline companies and their insurance providers tend to prefer the objective approach, while representatives of claimants typically argue for a subjective approach.

To obtain additional valuable perspectives on the interpretation of air carrier liability and the concept of an "accident," it is crucial to examine recent case law in the United Kingdom concerning the subjective and objective approaches. The legal systems of US and UK share are very similar, making the analysis of UK case law highly relevant and informative.

In January 2023, the High Court of England and Wales clarified in case *Richard Arthern v Ryanair DAC* whether the definition of an "unusual and unexpected" event that results in bodily injury under the Convention should be determined subjectively or objectively. The judgment aimed to resolve the issue and provide a more precise understanding of how such incidents should be evaluated. According to the Court's decision, the evaluation of an event as "unusual or unexpected" should be based on the viewpoint of an average and sensible passenger who possesses knowledge of typical airline practices and has prior experience with commercial air travel.⁶⁵ This means that when determining whether an incident can be considered as an accident under the Convention, the claimant's personal opinion or subjective view about what is unusual or unexpected is not considered relevant. Instead, the evaluation should be based on the perspective of an objective and informed individual who has reasonable knowledge of common or established airline practices.⁶⁶

Furthermore, when analyzing air carrier liability, the EU case law is particularly important as it covers the legal framework established by EU regulations and directives, such as Regulation (EC) No 261/2004, which is built upon the provisions of Montreal Convention. Thus, EU case law developed by the European Court of Justice (ECJ) significantly influences the interpretation and application of these regulations, which plays a key role in shaping the rights and obligations of passengers and air carriers operating in EU. Moreover, by analyzing EU case law in conjunction with international perspectives, we can assess whether the interpretation of the term "accident" is consistent across jurisdictions worldwide.

The European Court of Justice (hereinafter 'ECJ') in recent case *GN v. ZU* departed from the *Saks* case's interpretation of "accident" and instead adopted the ordinary meaning of the term, which is an unforeseen, harmful, and involuntary event without taking into account the

⁶² *Ibid.*

⁶³ Tamara A. Marshall, "The Warsaw Convention: A Cat with Nine Lives Walks the Plank One More Time," *Northern Illinois University Law Review Volume 22, no. 2* (2002): pp. 337-364, accessed April 14, 2023, available on: <https://bit.ly/3A8Y2F8>.

⁶⁴ U.S Court of Appeals, First Circuit, *Moore v. British Airways PLC*, 32 F.4th 110 (1st Cir. 2022), April 29, 2022 and *Deep Vein Thrombosis and Air Travel Group Litigation* [2004] QB 234.

⁶⁵ High Court of England and Wales, *Richard Arthern v Ryanair DAC* [2023] EWHC 46 (KC), January 6, 2023.

⁶⁶ *Ibid.*

requirement of externality.⁶⁷ The departure from the Saks case's interpretation of "accident" is a significant development, as it changes the approach to assessing whether an event is an accident or not. It is true that this shift in approach could lead to a loss of certainty and uniformity regarding the definition of "accident," which could have implications for various legal areas, including insurance, liability, and compensation. Whether this decision gains acceptance or not remains to be seen, but if it does, it may be necessary to modify the Article's phrasing to either strengthen this new interpretation or to strengthen the Saks interpretation and ensure that the requirement of externality is not overlooked.

Upon examining the case law from the US, UK, and the EU, it becomes evident that there is a clash between the US and EU legal interpretations regarding certain aspects of air carrier liability. The US legal system, rooted in common law principles, often emphasizes the importance of the "accident" element in determining liability, requiring an unexpected or unusual event. On the other hand, EU case law, guided by the regulatory framework of EU legislation, tends to adopt a broader and more consumer-oriented approach, focusing on the protection of passenger rights and ensuring compensation for inconvenience or disruption. This clash highlights the differing priorities and legal perspectives between the jurisdictions, with the US placing greater emphasis on accident-related criteria, while the EU prioritizes passenger protection and rights.

3.2. Can air carrier be liable for emotional damages?

In 1999, during the Montreal Diplomatic Conference with the goal to adopt the Montreal Convention, Norway and Sweden put forward a proposal for the new convention to include provisions for compensating those who suffered mental injuries. Their reasoning was that mental injuries can be as severe as physical injuries and it would be unfair if compensation varied between two individuals who were equally disabled due to an accident, simply because one of them had a mental injury.⁶⁸

Various reasons were put forth to oppose the incorporation of mental injury in the Article, including concerns regarding the possibility of fraudulent claims as it is relatively easy to fake mental injury and the challenge of substantiating such claims with evidence.⁶⁹ It was also acknowledged that jurisprudence regarding this matter was still evolving. The final version of Article 17 did not include mental injury despite widespread support from most European Countries, United Kingdom, Canada, South Korea and others.⁷⁰ This was mainly due to the influence from the International Air Transport Association, and the US.⁷¹ This decision has been criticized as mental injury claims are increasing in prevalence worldwide.

The absence of specific provisions addressing mental injury in the Convention has resulted in the responsibility of interpretation falling upon the courts. In this context, the US Supreme Court seem to be the most authoritative judicial source in addressing mental injury. The decisions rendered by the US Supreme Court have been closely observed and upheld by other courts within the US and also in other countries. Therefore, it is essential to first analyze

⁶⁷ Judgment of the Court (Fourth Chamber) of 19 December 2019, *GN v ZU*, Case C-532/18, ECLI:EU:C:2019:1127.

⁶⁸ *Supra* note 49.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

the case law established by US domestic courts to gain insight into how mental injury is dealt with within the legal framework.

The *Eastern Airlines Inc v Floyd* case, solved by the U.S Supreme Court, is a landmark case in defining the scope of passenger injury claims regarding mental injury. It involved a group of passengers who sued Eastern Airlines seeking compensation for emotional distress.⁷² Eastern Airlines admitted that the event was an accident, but claimed that liability required physical injury, which was lacking in this case.⁷³ The U.S Supreme Court held that mental injury alone is not a compensable under the Convention, as it does not meet the definition of "bodily injury" specified in Article 17.⁷⁴

When making its ruling, the U.S Supreme Court analyzed the French term "lesion corporelle" (bodily injury) using both textual and contextual interpretations in accordance with the French legal definition. The court performed a comprehensive examination of the term by looking at bilingual dictionary, French legislation, legal precedents, and scholarly literature to verify that "lesion corporelle" accurately translated to bodily injury, which does not include psychological harm.⁷⁵ The Court determined that this interpretation of the term aligned with the aims of the Warsaw Convention and its past application.⁷⁶ Moreover, the ruling was based on the absence of any supporting evidence to propose an alternative interpretation.

While the *Floyd* decision has been cited in rulings across multiple jurisdictions, several questions remained as to what damages exactly are recoverable. To name a few, can a passenger claim compensation if their emotional injury resulted from physical injury? Could a passenger receive compensation for physical injuries caused by emotional injuries? Can a passenger seek compensation for emotional injuries that led to physical injuries, or only for emotional injuries resulting from bodily injuries?

In *Ehrlich v American Airlines, Inc* case, solved by the United States Court of Appeals, a new standard was established, which specified that individuals could claim compensation for mental injury that arises directly from physical injuries. By following the appropriate principles of interpreting treaties, the Court concluded that Article 17 allows passengers to seek reimbursement for mental injury, but only if it is a direct result of physical injury.⁷⁷ However, the Court recognized the significance of the *Floyd* decision and emphasized that compensating only for mental injuries would contradict underlying principles of the Convention.⁷⁸

The evolving interpretation of bodily injury by U.S Courts showcases a significant shift in understanding and development of the concept. Initially, the concept was strictly limited to physical injuries, excluding mental injuries. However, as time progressed, courts demonstrated increased flexibility and acknowledged that mental injuries could also be compensable, provided that they were associated with physical injuries.

Moreover, U.K Courts have further recognized and further advanced the legal landscape regarding mental injury claims by acknowledging that passengers can be entitled to compensation for physical injuries that were caused by mental injuries. Given the similarities

⁷² U.S. Supreme Court, *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), April 17, 1991.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ U.S Court of Appeals, Second Circuit., *Ehrlich v. American Airlines, Inc., American Eagle Airlines, Inc. and Simmons Airlines, Inc.*, 360 F.3d 366 (2004), Docket No. 02-9462, March 08, 2004.

⁷⁸ *Ibid.*

between the legal systems of the United States and the United Kingdom, it is worth examining the rulings of UK courts on this matter as well. Taking into account the UK courts' rulings can contribute to a more thorough examination of mental injury claims across jurisdictions and see whether or not there is a common understanding of the concept.

In the UK, a deeper understanding of liability for mental injury was established through the review of two significant cases, namely *King v. Bristow Helicopters Ltd* and *Morris v. KLM*. In both cases, the court primarily examined whether the mental injury in question had resulted in physical injury. In *King* plaintiff claimed to have developed PTSD because of the incident, which subsequently caused them to develop peptic ulcer disease.⁷⁹ The House of Lords concluded that peptic ulcer disease suffered by King was a form of bodily injury as it affected the body's tissues.⁸⁰ As a result, the Court ruled that King could receive compensation under Article 17 for the physical symptoms of his mental injury.

In contrast, in *Morris*, the England and Wales Court of Appeal concluded that Morris could not seek compensation for her clinical depression that resulted from a man caressing her left thigh after she had woken up from nap on flight, as the attack had not resulted in any physical injury to her.⁸¹ The Court acknowledged that the brain is a part of the human anatomy and is susceptible to injury, but that verifying such damage necessitates medical proof.⁸² The Court added that it may be possible to claim compensation for damages if medical evidence proves that clinical depression is caused by a brain injury that can be detected through scientific advancements.⁸³ In the case, the Court recognized the importance of considering advancements in medical science in interpreting the term "bodily injury."

The UK case law reveals that compensation for mental injury is possible, but only if the mental injury resulted in a physical injury that physically affected the human body. This requirement aligns with the observations made in US case law, suggesting a shared understanding between the courts of both jurisdictions. It is apparent that both the United States and the United Kingdom recognize the importance of a physical injury element when considering compensation for mental injuries.

In addition to comparing US and UK case law, it is equally important to consider the recent case law of the EU. This would allow for a comprehensive understanding of how different legal systems approach and interpret the same legal issues and see whether there are evolving standards and trends. By examining EU case law, I can identify potential divergences or similarities in the treatment of mental injury claims across jurisdictions.

In October 2022, contrary to long-standing international legal precedents, the ECJ in the case *BT v Laudamotion GmbH* decided that passengers have the right to seek damages for psychological injuries, even if there was no accompanying bodily injury.⁸⁴ In reaching its decision, the ECJ analyzed the wording of the Convention to establish whether or not carriers could be held accountable for mental injury that wasn't connected to physical injury. The Court discovered that the original creators of the Convention did not intend to exempt carriers from

⁷⁹ House of Lords, *King v Bristow Helicopters Limited* [2002] UKHL 7, February 28, 2002.

⁸⁰ *Ibid.*

⁸¹ England & Wales Court of Appeal (Civil Division), *Morris v KLM Royal Dutch Airlines* [2001] EWCA Civ 790, Case No: B3/2000/3820, May 17, 2001.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Judgment of the Court (Third Chamber) of 20 October 2022, *BT v Laudamotion GmbH*, C-111/21, ECLI:EU:C:2022:808.

liability for cases involving pure mental injury, despite their use of the term "bodily injury."⁸⁵ The Court observed that declining to provide compensation for pure mental injury would go against the objective of "equitable compensation" in the Convention's preamble and would harm the consumers' interests.⁸⁶ However, individuals who have experienced pure mental injury would need to prove that their mental state significantly impacts their overall well-being and necessitates medical intervention.⁸⁷ In order to avoid any false claims made by passengers, the Court emphasized the importance of having medical expertise and medical treatment evidence to support the demonstration of severe mental harm.⁸⁸ The Court concluded that passengers who experienced pure mental injury must be treated the same as those who suffered bodily injury.

The recent ruling by the ECJ once again shows the contrasting approaches and fragmentation in the interpretation of liability for mental injury among EU courts and the courts of the UK and US. EU courts have demonstrated a more liberal stance, acknowledging and incorporating advancements in medical technology. This progressive approach suggests a willingness to recognize a broader range of mental injuries as compensable. On the other hand, UK and US courts have historically maintained a stricter interpretation, requiring a more direct connection between physical and mental injuries. However, it is worth noting that the understanding of what constitutes bodily injury has evolved over time in both the UK and US as well, indicating a potential for future acceptance of the ECJ's established precedent and more harmonization on the matter. However, if it does not gain acceptance it is important to acknowledge that the ECJ's ruling may affect the behavior of claimants, leading to a possibility of forum shopping, where individuals may seek to have their cases heard in an EU Member State jurisdiction.

In my opinion, the inclusion of mental injuries as part of recoverable damages is a positive development that recognizes the significance of mental injury and the impact it can have on an individual's well-being. As medical advancements continue to shed light on the connection between mental and physical health, it is important for legal systems to adapt and provide adequate compensation for all forms of harm suffered by passengers. However, it is crucial to strike a balance between compensating legitimate claims and safeguarding against fraudulent ones. Courts should require proper medical evidence and expert opinions to establish the severity and veracity of mental injuries to prevent abuse of the system.

3.3. The scope of embarking or disembarking

For Article 17 to apply, it is a requirement that the accident occurred during the course of embarkation or disembarkation, or onboard the aircraft itself. While it is usually straightforward to determine whether an accident took place on the plane, establishing whether it occurred during embarkation or disembarkation can be more challenging since the Convention does not provide a specific definition for these terms

The preliminary version of the Warsaw Convention presented two options for defining the duration of liability, one of which included the time of entering and exiting the airport door,

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

while the other was limited to only the doors of the aircraft.⁸⁹ Nevertheless, both suggestions were turned down, and a more practical approach was eventually adopted. It defined the period of liability as the time when the passenger is aboard the aircraft, including the time spent embarking and disembarking.⁹⁰ Ultimately, the Court must consider the facts and circumstances of each individual case.

In order to thoroughly analyze the scope of embarkation and disembarkation, it is necessary to analyze the case law of US. The US jurisdiction has extensively examined and interpreted this matter, making it a valuable resource for a comprehensive understanding. Specifically, the *Day v. Trans World Airlines* case solved by the US District Court for the Southern District of New York is significant because it defines the scope of embarkation and disembarkation, and the interpretation provided in the ruling has been applied in different jurisdictions all over the world.

In 1973, two Palestinian terrorists attacked passengers at Hellenikon Airport in Athens, Greece, while they were waiting to board a Trans World Airlines flight. Subsequently, Trans World Airlines faced claims for compensation from some passengers who were injured, and the families of the three individuals who died.⁹¹ Question before the Court was whether the airline was liable to compensate for the damages resulting from the terrorist attack, given that the attack was considered an accident.⁹² However, it was not clear whether the accident occurred during the process of embarkation or disembarkation, as this is a crucial element in determining airline's liability.

The Court determined that in order to establish whether a passenger was in the process of boarding or disembarking, several elements needed to be analyzed. These elements included the passenger's actions leading up to the accident, any constraints on their mobility, their proximity to the boarding gate, and their level of readiness to board the aircraft. The passengers in question had already completed several steps in the boarding process and were situated in the area designated for flight departures.⁹³ Trans World Airlines contended that it could not be held responsible for compensating passengers under the Warsaw Convention because they were waiting in a transit lounge for a final security check when the terrorist attack occurred, and therefore were not in the process of embarking.⁹⁴ However, the Court disagreed with this argument and determined that carrier was indeed liable. They concluded that the passengers were close enough to boarding the aircraft and were restricted in their movement, and therefore were in the course of embarkation.⁹⁵

In another case *Buonocore v. Trans World Airlines* solved by United States Court of Appeals, where terrorists had attacked an airport in Rome and injured several people, unlike in the Day case, the plaintiff had not entered the secured area of the airport as they had only completed the check-in process and were still in the public area.⁹⁶ As a result, the court

⁸⁹ Richard David Hendlin, "Day, Evangelinos, and Martinez Hernandez: Embarking on an Interpretation of Article 17 of the Warsaw Convention," *California Western International Law Journal* Volume 7, no. 2 (1977): pp. 473-507, accessed April 14, 2023, available on: <https://bit.ly/3MXFsHB>.

⁹⁰ *Ibid.*

⁹¹ U.S. District Court for the Southern District of New York, *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y. 1975), March 31, 1975.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ U.S. Court of Appeals, Second Circuit, *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir. 1990), Mar 27, 1990.

determined that Article 17 is not applicable. The court relied on the precedent set by the Day case and emphasized the significance of several factors in deciding whether an incident falls under Article 17. These include the passenger's proximity to the aircraft, the timing of their departure or arrival, and the degree of control exercised by the carrier over the passenger.⁹⁷ These factors are critical in determining whether the accident is within the scope of the Convention. Essentially, the closer a passenger is to the aircraft and the more they are under the carrier's control, the higher the likelihood of the accident falling under the Convention.

It can be equally challenging to determine whether a passenger is considered to be "disembarking." However, if a passenger falls on a footstool at the bottom of a staircase intended for passengers, it is evident that they were injured while disembarking. This is due to the fact that "disembarkation" generally refers to the act of descending from the aircraft, as clarified by a court. Specifically, the court in *Fedelich v. Am. Airlines* case has stated that descending from the aircraft is commonly understood to be the definition of "disembarkation."⁹⁸

In another case, where a passenger fell on a non-operational escalator shortly after her flight had landed, the court concluded that she was also in the process of disembarking.⁹⁹ The court determined that despite not physically exiting the aircraft, the passenger was still considered to be under the airline's direction, as she was climbing an escalator that was intended for passengers and directed by the airline towards customs and immigration.¹⁰⁰ This was different from previous cases where the argument of a passenger being an independent agent roaming freely around the terminal had been persuasive. Additionally, the passenger fell in a location that was both spatially and temporally close to the flight, having only recently exited the jetway.¹⁰¹ Therefore, the court concluded that the passenger's fall on the non-functional escalator occurred during the course of disembarkation, and therefore, the airline was held liable for her injuries.

It is true that determining liability for injuries during the embarkation or disembarkation process can be challenging and requires careful examination. While the Montreal Convention has provided framework for dealing with such incidents, the scope of the Article is somewhat ambiguous. As a result, the determination of liability often relies on analyzing several factors such as the relationship between the injury and the flight in terms of time and space more significant than other factors. Ultimately, each case is unique, and courts must analyze specific circumstances of each case. In hindsight, scope of Montreal Convention could have been clarified further during the Montreal Conference, but the Drafters seem to have chosen the easiest solution by leaving the Article 17 unchanged and allowing the interpretation of the terms contained within it to evolve through judicial decisions.

⁹⁷ *Ibid.*

⁹⁸ U.S District Court, First Circuit, District of Puerto Rico, *Fedelich v. American Airlines*, 724 F. Supp. 2d 274 (D.P.R. 2010), Civil No. 09-1218 (SEC), July 10, 2010.

⁹⁹ William E. Hiller, "An Interpretation of the Embarking and Disembarking Requirements of Article 17 of the Warsaw Convention," *Columbia Journal of Transnational Law Volume 16, no. 1* (1977): pp. 105-137, accessed April 14, 2023, available on: <https://bit.ly/3mSyOHZ>.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

4. LIABILITY LIMITATIONS AND THE ADEQUACY OF THE MONETARY UNIT USED TO CALCULATE COMPENSATION FOR PASSENGER DEATH AND INJURY

Montreal Convention sets forth specific liability limitations for air carriers in several of its Articles. The first limitation is the principle of strict liability. Article 21(1) sets forth that the air carrier is strictly liable for any damages resulting from Article 17 (1) up to 100,000 SDR.¹⁰² Strict liability means that the carrier can be held liable for any damage that occurs during carriage, regardless if they were or were not negligent or at fault.¹⁰³ This means that even if the carrier exercised all reasonable care and took necessary precautions, they may still be liable for any damage that results from their operations. This can make it easier for passengers to seek compensation for their losses, as they do not need to prove negligence or fault on the part of the carrier.

The second liability limitation established by the Montreal Convention is the monetary limitation. The Convention sets a specific monetary limit on the liability of air carriers, which is currently set at 128,821 SDR. The monetary limitation serves as a cap on the carrier's liability, beyond which the carrier can avoid liability by demonstrating that the damages were solely caused by a third party's negligence or the negligence of the injured or deceased passenger.¹⁰⁴ However, for claims up to the limit, the carrier cannot exclude or limit its liability unless it can prove that the passenger's injury or death was not due to its own negligence or wrongful act or omission.

In addition to the above, it's worth noting that Article 20 emphasizes that if the carrier can prove that the damages resulted from the negligence or wrongful act of the person claiming compensation, the carrier may be exonerated from liability.¹⁰⁵ However, the carrier bears the burden of proof, and the defense only applies to the extent of the claimant's contribution to the damages. In reality, the carrier is rarely granted partial or complete exoneration. Examples of situations where the carrier has been partially or completely exonerated include instances where 1) a passenger disregarded the seat belt sign and was injured while walking around the aircraft or 2) when a passenger used the wrong exit and was killed by a propeller.¹⁰⁶

Article 24 of the Convention states that the Depositary (ICAO) has to review the liability limits set out in the Convention every five years.¹⁰⁷ If the inflation rate exceeds 10 percent, ICAO has to notify the State Parties regarding the necessity of revising the liability limits. These limits were increased twice, in 2009 and 2019, using this review mechanism (see Table 4.1.).¹⁰⁸ However, even though the revisions were communicated to the State Parties and considered effective under the Convention, some jurisdictions have not implemented them, which harms the Convention's goal of promoting uniformity across nations. To address this issue, it may be beneficial to consider incorporating an automatic treaty update mechanism.

¹⁰² *Supra* note 11.

¹⁰³ *Supra* note 26.

¹⁰⁴ *Supra* note 11.

¹⁰⁵ *Supra* note 11.

¹⁰⁶ George Leloudas, "International Air Carrier Liability: The Montreal Convention of 1999. By Paul Dempsey and Michael Milde," *The Cambridge Law Journal* Volume 65, no. 2 (2006): pp. 466–67, accessed April 15, 2023, doi: <https://doi.org/10.1017/S0008197306287191>.

¹⁰⁷ *Supra* note 11.

¹⁰⁸ International Civil Aviation Organization. 2019 Revised Limits of Liability Under the Montreal Convention of 1999, available on: <https://bit.ly/3MV9b3N>. Accessed April 15, 2023.

Table 4.1.

Revised limits of liability under the Montreal Convention in 2009 and 2019¹⁰⁹

Montreal Convention of 1999	Original limit (SDRs)	Revised limit (SDRs) as of 30 December 2009	Revised limit (SDRs) as of 28 December 2019
Article 21	100 000	113 100	128 821

Looking only at the economic aspect, it is commendable that the liability limits in the Montreal Convention are being adjusted to account for inflation. However, it is imperative to critically assess the suitability of using the SDR as the unit of account to express these limits. As stability is a desirable trait in a currency, it is essential to evaluate whether the SDR is a more suitable choice compared to stable currencies like the US dollar or the Euro. It is crucial to consider any potential drawbacks and weigh the benefits and limitations associated with using the SDR in this context. Furthermore, a thorough examination will be performed to ensure that the chosen unit of account effectively reflects the liability limits and guarantees fair outcomes for all parties involved.

4.1. The impact of monetary developments on damages calculation

Under the Warsaw Convention, the liability limits for damages were calculated based on a specific monetary unit known as the French gold franc. Article 22(4) of the Convention provided a conversion standard, stating that the sums mentioned in the previous articles regarding liability limitations should be considered as French francs consisting of 65 1/2 milligrams of gold with a fineness of 900 thousandths.¹¹⁰ These sums could be converted into any national currency using round figures.¹¹¹

For almost fifty years, this conversion standard posed no issues. However, changes in monetary systems since 1929 made it challenging to determine the appropriate conversion rate under Article 22. The price of one ounce of gold in 1929 was approximately \$20 in the U.S.¹¹² In 1934, the U.S. brought stability in the gold market by establishing a fixed price of \$35.00 per ounce for gold in response to the devaluation of the dollar.¹¹³ This price remained unchanged until 1971 when the US dollar experienced an 8.6 percent devaluation, and the value of gold was established at \$38.00 per ounce, later readjusted to \$42.2222 per ounce in 1973.¹¹⁴

The turning point came in 1971, when the gold market split and the established official price of gold was later abolished through actions taken by the US.¹¹⁵ These actions led to the

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* note 15.

¹¹¹ *Ibid.*

¹¹² Miroslav A. Kriz, "The Price of Gold," *International Finance Section of the Department of Economics and Social Institutions in Princeton University: Essays in International Finance no 15* (1952): pp. 1-27, accessed May 06, 2023, available on: <https://ies.princeton.edu/pdf/E15.pdf>.

¹¹³ *Ibid.*

¹¹⁴ Barbara Reukema, "No New Deal on Liability Limits for International Flights," *International Lawyer (ABA) vol. 18, no. 4* (1984): pp. 983-998, accessed May 06, 2023, available on: <https://bit.ly/3pkz6Z6>.

¹¹⁵ James M. Boughton, *The IMF and the Silent Revolution: Global finance and development in the 1980s* (International Monetary Fund, 2001), pp. 1-45.

elimination of the fixed "official" price of gold in relation to the US dollar.¹¹⁶ As a consequence, the free-market value of gold became subject to fluctuations relative to the U.S. dollar, often reaching levels that were up to five times higher.¹¹⁷ However, when the U.S. abandoned its official price for gold, the Civil Aeronautics Board (CAB) did not require revised tariffs. As a result, while the free-market price of gold soared to over \$400 per ounce,¹¹⁸ the CAB permitted airline carriers to determine their liability limitation using the obsolete value of \$42.22 per ounce, which was previously recognized as the official price by the United States.¹¹⁹

The existence of dual pricing posed difficulties in deciding which price to utilize as the foundation for converting gold francs into national currencies. Several courts, like the Athens court in the case of *Olympic Airways v. Zacoboulos* and the Swedish court in the case of *Saga v. Sagoland*, opted to employ the market value of gold.¹²⁰ However, the majority of courts opted to utilize the official value of gold as the reference point.¹²¹ The differing approaches taken by courts regarding the valuation of gold highlighted the challenges posed by the dual pricing system. It also emphasized the need for a more standardized and universally accepted methodology for calculating damages and liabilities.

It is crucial to recognize that the role of gold in relation to national currencies underwent a transformation as a result of the international trading exchange environment.¹²² Gold maintained its function as a means of quantifying the value of a currency, yet it gradually distanced itself from the artificial constraints imposed by governments, particularly the United States, and began to experience unrestricted variations in international markets.¹²³ The coexistence of multiple gold exchange rates and market fluctuations prompted the exploration of an alternative unit of measurement that could offer stability and legitimacy to global trade and transactions. This exploration gave rise to the concept of a Special Drawing Right, as a more dependable and reputable instrument for facilitating international exchanges.

The initial action towards incorporating the Special SDR as a standardized unit of liability limitation measurement was initiated during a conference in 1975 with the aim to amend the Warsaw Convention.¹²⁴ During the conference, the introduction of SDR as a replacement for the French gold francs came as a surprising proposal. The proponents of this change highlighted the issues with the existing "Two-tier" gold market and suggested that using a widely recognized unit of account with readily available daily quotations would offer a viable solution as the SDR is an established monetary measurement by the IMF, a specialized agency of the United Nations with 126 Member States at that time.¹²⁵ With no alternative proposals put forward, the SDR was accepted as the only viable solution and introduced as the unit of measurement to express the liability limits in the four Montreal Protocols of 1975.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ I. Nyiri, "Gold – Gold Price – Currency Reserves," *Acta Oeconomica* 26, no. 1/2 (1981): pp. 123–132, accessed May 06, 2023, available on: <http://www.jstor.org/stable/40728839>.

¹¹⁹ *Supra* note 117.

¹²⁰ Patricia Barlow, "Article 22 of the Warsaw Convention: In a State of Limbo," *Air and Space Law Volume 8, Issue 1* (1983) pp. 2 – 30, accessed May 06, 2023. doi: <https://doi.org/10.54648/AILA1983001>.

¹²¹ *Ibid.*

¹²² Louis Robert Martinez, "Article 22 of the Warsaw Convention and Franklin Mint v. TWA: A Conflict between Treaty and Municipal Statute," *Cornell International Law Journal Volume 16, no. 2* (1983): pp. 397-430, accessed May 06, 2023, available on: <https://bit.ly/3LFvF6R>.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Supra* note 31.

The introduction of the SDR into the Montreal Protocols was not extensively discussed, as there was an unanimous consensus that the gold franc needed to be replaced. Indeed, the primary argument supporting the adoption of SDR was its perceived stability in value compared to gold. It is worth noting that the Conference missed an opportunity for comprehensive discussions on the broader implications of introducing the SDR into the Montreal Protocols. Surprisingly, neither the ICAO Legal Bureau nor the Council sought consultation from financial authorities regarding this matter.¹²⁶ Additionally, there were no representatives from the IMF or any financial experts present at the Conference.¹²⁷

Unfortunately, the absence of any financial experts during the Conference in 1975 is concerning, as it deprived the discussions of valuable insights and perspectives. The participation of financial authorities or experts could have provided a more comprehensive understanding of the potential advantages and drawbacks of adopting the SDR as a unit of account. Their expertise could have shed light on the stability, practicality of implementation, and long-term implications of using SDR in the context of air law conventions. Without the input of financial experts, there is a possibility that the Conference missed valuable opportunities to explore the potential drawbacks of the SDR beyond its perceived benefit of stability in comparison to gold.

Nevertheless, SDR was adopted as an unit of account in the Montreals Protocols, after which it was also used in the Montreal Convention.

4.2. Special Drawing Rights: an adequate unit of account?

In 1969, the IMF established the SDR as a supplementary currency to complement the official reserves of its member nations.¹²⁸ The value of SDR is based on four biggest international currencies such as US dollar, pound sterling, euro, and Japanese yen.¹²⁹ The IMF consists of 190 member countries as of 2023, making it a globally recognized financial institution.¹³⁰

The value of SDR is periodically reviewed and updated to reflect changes in the currency values of its constituent currencies.¹³¹ The regular review ensures that the value of SDR remains relevant and up-to-date. As global trading and financial systems evolve, the relative importance of different currencies can shift, and the review process ensures that the value of SDR accurately reflects these changes.

However, it is crucial for a unit of account to be unaffected by currency fluctuations, easily convertible into national currencies, and relevant to consumer prices and purchasing power. Stability is a key objective to ensure that fluctuations in currencies do not negatively impact the limits established in the conventions. This stability provides security for insurers, carriers, and the public, ensuring that obligations and demands can be fulfilled. Yet, the regulations in transportation conventions present a unique situation where the monetary

¹²⁶ Ron Bartsch, *International Aviation Law: A Practical Guide* (Routledge, 2020), pp. 125-146.

¹²⁷ *Ibid.*

¹²⁸ Khalifa Hassanain, "Special Drawing Right and Currency Risk Management," *International Journal of Economics and Financial Issues* 5 (2015): pp. 780-785, accessed April 15, 2023, available on: <https://bit.ly/41N0g8Z>.

¹²⁹ *Ibid.*

¹³⁰ International Monetary Fund. IMF Country Information, accessed May 06, 2023, available on: <https://www.imf.org/en/Countries>. Accessed April 15, 2023.

¹³¹ *Supra* note 130.

measurement is used to express a carrier's limitation of liability. Consequently, the pivotal question arises for the passenger: how many SDRs or other units of account they may receive and what would be the corresponding value once converted into national currency, determining to what extent such conversions adequately compensate for the incurred damages.

Having stated the above, it is possible to assess the suitability of the SDR as a unit for expressing the limit of liability. To facilitate this assessment, Table 4.2 below presents a comprehensive overview of the exchange rates between the SDR and six different national currencies, such as the Euro, Pound Sterling, Chinese Yuan, U.S. Dollar, Japanese Yen and Swiss Franc. These particular currencies were chosen because they are among the most widely traded and globally important currencies. They represent major economies and financial centers, and their exchange rates have significant impacts on international trade, investment, and financial markets. The data is extracted from the IMF official website archives.

The time period analyzed spans from the implementation of the Montreal Convention in November 2003 to April 2023. By thoroughly examining this data, a more comprehensive understanding of the effectiveness and viability of employing the SDR as a unit of account can be obtained.

Exchange Rates Between SDR and Six National Currencies¹³²

Table 4.2

	2003	2006	2009	2012	2015	2018	2021	2023
Euro	1.24	1.16	1.08	1.2	1.27	1.22	1.22	1.23
U.K. pound	0.85	0.78	0.96	0.96	0.90	1.07	1.04	1.09
Chinese yuan	11.76	11.69	10.85	9.65	8.83	9.60	9.01	9.29
U.S. dollar	1.42	1.49	1.59	1.53	1.39	1.39	1.41	1.35
Japanese yen	156.56	174.66	143.3	123.06	168.87	156.9	160.9	180.97
Swiss Franc	1.93	1.85	1.63	1.44	1.38	1.39	1.29	1.20

Let's assume that the maximum compensation recoverable would not exceed the Convention's specified original threshold of 100,000 SDRs. Expressed in terms of national currencies, the analysis reveals compelling insights. For instance, in Switzerland, based on the data, in 2003, the passenger would have been entitled to receive 193,000 Swiss Francs. However, in 2012, this amount would have reduced to 144,000 Swiss Francs, and as of 2023, it would further decrease to 120,000 Swiss Francs. This substantial decline of 38% in the potential compensation amount highlights the significant impact of currency fluctuations. On the other hand, examining the United Kingdom, the victim's entitlement to compensation in 2003 stood at 85,000 pounds sterling, which gradually increased to 96,000 pounds sterling in 2012 and reached 109,000 pounds sterling in 2023. This noteworthy rise of 28% in the potential compensation amount signifies the differing outcomes experienced in different countries.

¹³² International Monetary Fund. Exchange Rate Archives By Month, available on: <https://bit.ly/42mWbJd>. Accessed May 06, 2023.

In countries where the Euro is utilized as the national currency, the potential compensation amount has demonstrated relative stability throughout the years. Notably, the only instance of a notable decrease in the possible compensation occurred in 2009, wherein the victim would have received approximately 13% less compared to 2003. In contrast, in the United States, the compensation amount has exhibited notable fluctuations over the years. Specifically, in 2003, the victim would have received an estimated sum of 142,000 US dollars, which experienced a modest increase of 7% by 2012. However, in 2023, this amount witnessed a decline to approximately 135,000 US dollars, signifying a decrease of 5% compared to the 2003 figure and a significant 12% decrease when compared to 2012. Moreover, this analysis does not take into account the Consumer Price Index, which has shown significant increases across all the analyzed countries over a period of 20 years.

Thus, upon examination, it becomes evident that the utilization of the Special Drawing Right as a unit of account to express liability limits yields significant and far-reaching consequences in the majority of countries whose currencies are being analyzed. Moreover, the outcome may vary if these figures were converted into different currencies due to the fluctuations in exchange rates, such as those with U.S. dollars, over time. What implications does this have for a victim seeking compensation? Should they consider relocating to a country with a more favorable exchange rate? As a result, the potential for forum shopping arises, which raises important considerations. While it is reasonable for victims to be motivated by the prospect of higher compensation in jurisdictions with advantageous exchange rates, this practice poses complexities and challenges to the legal system. Therefore, it becomes crucial to establish a standardized compensation framework that considers currency fluctuations and aims to achieve equitable outcomes for all parties involved. By doing so, we can mitigate the risks associated with forum shopping and ensure a fair and consistent approach to compensating victims.

The compelling illustrations provided clearly demonstrate how the use of SDR as a unit of account in liability conventions affects different countries to varying degrees. The social impact of this situation is pretty obvious. Considering these factors, it is my contention that the utilization of SDR as a unit of account in transportation conventions is fundamentally flawed and, therefore, unacceptable. It is evident that greater consideration should have been given to the potential consequences of currency fluctuations during the conferences where the decision to adopt SDR was made. The stability and reliability of a currency are paramount when it comes to compensating individuals for damages, and SDR fails to meet these crucial requirements.

In these final remarks, it is worth revisiting the Montreal Diplomatic Conference and questioning whether the Conference had a comprehensive understanding of the implications arising from the introduction of SDR in the Warsaw Convention. One cannot overlook the remarks of a Swiss delegate who expressed the view that the gold franc should be substituted with a different unit to ensure a reliable and stable unit of account.¹³³ The delegate emphasized that the Swiss delegation found no alternative solution more suitable than the SDR.¹³⁴ This consensus was also reflected in the majority of supporting opinions shared throughout the Conference. This raises the important question of whether the Conference had access to a complete assessment of the potential drawbacks associated with adopting the SDR. It suggests that a more thorough evaluation of various options and expert opinions could have contributed

¹³³ International Civil Aviation Organization. *International Conference on Air Law Montreal September 1975 Volume 2 Documents*. Available on: <https://bit.ly/3B7G6uQ>. Accessed May 06, 2023.

¹³⁴ *Ibid.*

to a more informed decision-making process during the Conference. While the initial reception of the SDR as a replacement for the gold franc may have seemed favorable, the passage of time has revealed potential drawbacks and unintended effects that were not adequately considered.

5. CONCLUSION

To sum up, the extent of air carrier liability for passenger death or bodily injury under the Montreal Convention is defined in Article 17. According to this provision, air carriers are liable for damages sustained in the event of passenger death or bodily injury, provided that the accident causing the death or injury occurred on board the aircraft or during the processes of embarking/disembarking. The Convention sets out three essential conditions for liability: the occurrence of an accident, resulting in death or bodily injury to the passenger, and the accident taking place during the flight or embarking/disembarking process.

While the Convention establishes specific conditions for liability, the interpretation of certain terms within these conditions can often be unclear and open to varying interpretations. Consequently, the determination of air carrier liability very often is subject to the discretion of the courts, resulting in a case-by-case basis approach. This dynamic nature of interpretation adds complexity to the legal landscape surrounding air carrier liability, as judgments can vary depending on the specific circumstances and judicial interpretations of the involved parties.

For instance, one aspect that introduces ambiguity is the term "accident." The liability of air carriers under the Montreal Convention is contingent upon the presence of an "accident". This term has been subject to various judicial interpretations and extensive litigation, leading to a diverse range of outcomes in different air carrier liability cases. The landmark case of *Air France v. Saks*, resolved by the United States District Court in California in 1985, holds particular significance as it was the first case to provide clarity regarding the criteria necessary to classify an incident as an "accident" under Article 17. It established that an incident must be unexpected and unusual, deviating from the normal course of events during a flight. Subsequent court decisions have further refined the understanding of an "accident," emphasizing the need for external events causing harm, rather than internal bodily reactions to regular flight operations.

The recent ruling in the *GN v. ZU* case by the ECJ marks a notable departure from the previous interpretation established in the *Saks* case. Specifically, the ECJ introduced a significant shift in the understanding of the term "accident" by deviating from the requirement of externality. This departure introduces a significant development, potentially altering the approach to defining accidents, at least in Europe. This shift may raise uncertainties and impact various legal areas, including insurance, liability, and compensation. Whether this new interpretation gains wider acceptance or not, future modifications to the phrasing of the relevant articles may be necessary to clarify and reinforce the understanding of "accident" and ensure the consideration of externality.

Another aspect that adds ambiguity to the interpretation of Article 17 is the question of whether bodily injury encompasses mental injury as well. During the drafting phase of the Convention, the proposal aimed to include mental injury as a compensable damage was turned down and not introduced. As a result, with the Convention lacking clarity on the matter, Courts have been tasked with interpreting the term 'bodily injury' and whether it includes mental injury.

The *Eastern Airlines Inc v. Floyd* case, resolved by the U.S. Supreme Court, holds significant importance in determining the extent of passenger injury claims under the Montreal Convention. In this case, the Court explicitly ruled that mental injury alone is not compensable under the Convention. This ruling can be understood as a cautious and conservative approach, aiming to avoid the expansion of scope of the Convention and the right to compensation beyond what the participating States originally agreed to commit themselves to. However, over time, the interpretation of the term has evolved. Subsequent cases, for example *Ehrlich v American Airlines, Inc* solved by U.S Court of Appeals, have recognized the compensation for mental injury that directly stems from physical injury. This shift reflects a changing understanding of the interplay between physical and mental injuries and acknowledges the impact of such injuries on passengers' well-being.

Recent developments, such as the ECJ's decision in *BT v Laudamotion GmbH*, have challenged the traditional understanding of "bodily injury" and established that passengers have the right to seek damages for pure mental injuries without accompanying bodily injuries. The ECJ emphasized the importance of medical evidence and the significant impact of the mental state on overall well-being. Advancements in medical science and the field of mental injury research, along with a deeper understanding of psychological well-being, could potentially contribute to shaping the current perspective on this matter. The ECJ ruling has the potential to shape future case law and expand the scope of recoverable damages. However, it is yet to be seen how other legal systems will interpret and apply this ruling, and there may be implications such as forum shopping as claimants may seek jurisdictions within EU Member States to pursue mental injury claims. In this context, judges are faced with the delicate task of striking a balance between two conflicting interests: safeguarding the individual's right to health and compensation, while also respecting the position of air carriers and their right to conduct business without undue external interference.

The interpretation of the scope of embarkation and disembarkation under Article 17 is another and final aspect that introduces ambiguity under the Convention due to the lack of a clear definition and specific guidelines. This has led to varying interpretations and applications by different courts. The *Day v. Trans World Airlines* case has provided a significant interpretation, but the scope remains uncertain and often determined on a case-by-case basis. To address this issue, revisiting the Convention and incorporating a more precise and comprehensive definition of embarkation and disembarkation could offer a solution. Such a revision would provide clearer guidelines, leaving less room for interpretation and enabling courts to determine liability more effectively in cases involving injuries during these processes.

Moreover, the Montreal Convention imposes a set of liability limitations on air carriers to govern their obligations in cases of passenger injury or death. First, the Convention establishes strict liability on the air carriers, which means that air carriers are held strictly liable for proven damages suffered by passengers. This means that the carrier's responsibility is not dependent on proving fault or negligence. This shifts the burden of proof from the passenger to the air carrier, simplifying the process for passengers and ensuring consistent compensation, but it can also impose financial burdens on airlines.

Another significant limitation imposed by the Montreal Convention is the establishment of a monetary threshold on the liability of air carriers, currently set at 128,821 Special Drawing Rights (SDR). The carrier's liability cannot be excluded or limited below this threshold unless it can prove that the injury or death of the passenger was not a result of negligence or wrongdoing. However, the use of SDRs as a standardized unit for calculating compensation

introduces uncertainties due to currency fluctuations when converting into national currencies. This creates potential disparities in compensation amounts across different countries, raising concerns of forum shopping and unequal outcomes for victims. To ensure fairness and consistency in compensating victims, a standardized compensation framework that accounts for currency fluctuations is essential.

In conclusion, after more than two decades since the introduction of the Montreal Convention's normative framework, three notable conclusions can be drawn.

First, the Montreal Convention provides a comprehensive framework governing air carrier liability and the compensation available to victims in cases of death and injury. While the Convention effectively replaced the outdated Warsaw System and introduced updated liability limits, it is notable that significant updates between the two conventions were limited. Many issues that were originally raised by the Warsaw System remain persistent today. Therefore, there is a continued need for further consideration and potential revisions to address the ongoing challenges.

Second, because there are numerous ambiguous provisions governing air carrier liability that remain unclarified within the Convention, Courts are consequently left with the responsibility of interpreting these terms. The reliance on judicial interpretation of terms has led to fragmentation and legal uncertainty across different jurisdictions, as evidenced by the case law analyzed from the US, UK, and EU. This situation poses disadvantages for both passengers and air carriers, emphasizing the need for a more uniform and precise framework to ensure consistent and fair outcomes in air carrier liability cases.

Third, this bachelor thesis has shed light on the limitations of using SDR as a monetary measurement to express liability limits. The volatility of currency fluctuations has revealed that SDR may not be an adequate and stable unit of account. While the initial adoption of SDR seemed promising, it is evident that more thorough consideration and research should have been given to ensure a more reliable measurement. Moving forward, it is crucial to reevaluate and explore alternative approaches that offer greater stability and accuracy in reflecting liability limits.

Finally, looking ahead, the efficacy and adaptability of the Montreal Convention will ultimately be determined by future developments. It remains to be seen whether the Convention is equipped with the necessary principles and mechanisms to effectively respond to emerging issues, such as medical and technological advancements, currency exchange rate fluctuations and changing passenger needs. Thus, continued evaluation and possible amendments are vital to maintain the Montreal Convention as a strong and flexible instrument, protecting passenger rights and establishing a unified framework for global air carrier liability.

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