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# TWO REGIMES FOR AIR CARRIER LIABILITY: PARALLEL LIVES

## *DOIS REGIMES DE RESPONSABILIZAÇÃO DO TRANSPORTADOR AÉREO: VIDAS PARALELAS*

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**ABSTRACT:** The early efforts of the international community to establish a uniform carrier liability regime applicable to international air transportation were reflected in two separate but similar regimes: one for compensation of damages caused to passengers and goods transported on board the aircraft (the Warsaw System), and other for compensation of damages caused to people and things located on the ground (the Rome/Montreal System). They shared similar characteristics and at some point went into a grave crisis. However, while one of them managed to overcome the difficulties, the other seems doomed not to be able to succeed. This article intends to explain the reasons behind both phenomena.

**KEYWORDS:** International Air Transport. Carrier Liability. Warsaw System. Montreal Convention of 1999. Damages to Third Parties on the ground. Rome Conventions of 1933 and 1952. Montreal Conventions of 2009: The Unlawful Interference Compensation Convention and General Risks Conventions.

**RESUMO:** Os primeiros esforços da comunidade internacional para estabelecer um regime uniforme de responsabilidade dos transportadores aplicáveis ao transporte aéreo internacional foram refletidos em dois regimes separados, mas semelhantes: um para indenização por danos causados a passageiros e mercadorias transportadas a bordo da aeronave (Sistema de Varsóvia), e outro para indenização por danos causados a pessoas e coisas localizadas no solo (Sistema Roma/Montreal). Eles compartilhavam características semelhantes e em algum momento entraram em uma grave crise. No entanto, enquanto um deles conseguiu superar as dificuldades, o outro parece condenado a não conseguir ter sucesso. Este artigo pretende explicar as razões por trás de ambos os fenômenos.

**PALAVRAS-CHAVE:** Transporte Aéreo Internacional. Responsabilidade do Transportador. Sistema de Varsóvia. Convenção de Montreal de 1999. Danos a Terceiros em Solo. Convenções de Roma de 1933 e 1952. Convenções de Montreal de 2009: Convenção de Compensação de Interferências Ilícitas e Convenções Gerais de Riscos.

## INTRODUCTION

The regime of liability for damages caused by the operation of aircraft attracted the attention of the international community very early in the history of aviation. The first efforts to deal with such problem were aimed at trying to establish a universally applicable regime that could respond to the needs of a fledgling aviation industry, exposed not only to safety hazards but also to economic risks. Two different regimes were born, both aimed at establishing the responsibilities of the air carrier, one in relation to damages caused to persons and goods being transported by air, and the other related to damages caused to people and goods located on the land surface, as well as the compensations that should be paid in each case.

It can be stated that, shortly after their entry into force, both regimes were the target of criticism and problems that negatively affected the degree of their acceptance by the community of States. This problem only increased over time, confronting both systems at a sort of a crossroad that could mark their future forever, success or doom.

Guided by the best of intentions, the international legal community tried to find a remedy to such a situation, although the result was very different for each of the systems.

This article intends to discover and analyze the reasons that explain such dissimilar results.

## CHAPTER ONE

## CARRIER LIABILITY: THE INTERNATIONAL LEGAL REGIME

### 1. BIRTH AND KEY FEATURES OF THE CARRIER LIABILITY SYSTEM.

*The Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed on October 13, 1929 in Warsaw, Poland, and commonly known as "The Warsaw Convention", was born with the objective of creating a unified system to be applied to the compensation of damages suffered by passengers and goods (baggage and cargo) transported by air, and to determine what the responsibility of the air operator in those cases would be.

This system was designed in a very particular way, its most recognizable feature being the so-called "limitation of carrier liability". In fact, the Warsaw Convention does not limit liability in a strict sense, but rather sets instead a limitation to the compensatory debt to be paid,

so that in some cases such compensation may be less than the actual damage caused by the carrier. Such limitation did not mean anything other than the following: once it was established that the carrier is legally responsible for the production of the damage, the amount that it must pay to the victims will be capped, thanks to pre-established limits contained in the Warsaw Convention, and even when the damages caused amount to a higher value, the carrier will not be obliged to pay any sum above that fixed in such monetary limits, except for some exceptional cases.[1]

This singularity can be adequately understood when the economic and technical situation of the aeronautical industry at the time when the Warsaw Convention was drafted is taken into account. The commercial transportation of passengers and goods by air was a completely new business venture, which had to fiercely struggle to compete with railroad and maritime transportation systems. Also, the airlines faced a high rate of accidents, due to the precariousness of the technical equipment available at that time. Therefore, in order to survive, the carriers needed to limit the amount of compensations to be paid, for that would not only prevent the submission of too high claims, but would also reduce the amount of litigation and, at the same time, reduce the cost of the insurance premiums.

As a counterweight to this limitation, and with the aim of achieving a basic level of protection for the passengers, the Warsaw Convention established a system of "presumed fault", meaning that it is no longer the passenger or claimant who must prove the fault of the carrier. Instead, the carrier is presumed to be guilty of a fault and can be exonerated only if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures.[2] Indeed, that represented a positive step in favor of the users of the commercial air services, since in view of the technical and operational complexity of aviation the claimant would find it very difficult to produce the necessary evidence of the carrier´s fault.

During its first two decades of life, the Warsaw Convention served its purpose satisfactorily, reducing legal claims and achieving an acceptable degree of legislative uniformity. In fact, many States replicated this liability system in their own national legislation, applying it to domestic air transportation. Another peculiarity of the new legal regime, which also marked a significant difference with respect to the ordinary tort law system, is the fact that not every damage that may occur in air transportation

1 Art. 25.

2 Arts. 20 and 21.

was covered by the Warsaw Convention. In fact, its protection extends only to air carrier liability for:

1. Death, wounding and other bodily injury of the passenger,

2. Destruction or loss of or damage to baggage and cargo, and

3. Damaged caused by delay in the carrier of passengers, baggage and cargo.

The rest of the so-called "aerial misfortunes", which today are the subject of protection of the legal plexus known as "passenger rights", was absent from the text of the Warsaw Convention.

## 2. THE "DAMAGES ON THE SURFACE" ISSUE.

Paradoxically, the subject of the very first recorded judicial decision in the field of air law, *Guille v. Swan*,[3] was not any of those events "protected" by the Warsaw Convention: in 1822 Mr. Guille's balloon went out of control and landed on Mr. Swenson's property causing some damage in the vegetable garden. Moreover, scores of onlookers rushed to the garden -either in an effort to help or simply out of curiosity- and damaged the fences, flowers and vegetable. Mr. Guille was found strictly liable not only for the damage caused directly by his balloon but also for the damage caused by the crowd since the attraction of a curious crowd was regarded as a logical consequence of the uncontrolled landing.

As noted:[4]

> "[a]t the first glance, this type of accidents does not create difficult problems of applicable law or jurisdiction that would have to be solved by unification of law. In the theory of conflict of laws this type of damage would be governed by the law of the place where the damage was caused (*lex loci damni commissi*) and the court in that place would have jurisdiction. However, problems could arise if the damage is caused by a foreign airline; would the judgement of the local court be recognized and enforced in the country of the aircraft operator's residence or principal place of business? Would there be

3 Cited by MILDE, Michael, International Air Law and ICAO, Eleven International Publishing, The Hague (The Netherlands), 2nd. Edition, pp. 300-301 [herein after: MILDE, International…].

4 Ibidem.

a guarantee that sufficient funds would be available to compensate for the damage?"

Of course, these questions were not overlooked by the drafters of the Warsaw Convention, but they preferred to put them aside for a special study and to be included in a different piece of legislation. It was a well-founded decision both from the point of view of the facts and the legal technique. First of all, the scenarios were different: while the Warsaw Convention dealt with damages caused to persons or goods transported by air, the second case involved injuries or death of people and damage to things placed on the ground, and for this reason they are called "third-parties on the surface".

Also, it follows that the legal relationship between the victims and the carrier is quite different as well. In the first case, what we have is a typical contractual relationship: the passengers, their baggage and the cargo are transported by virtue of the previous conclusion of a specific agreement. In the contract of transport, both parties assume an obligation: the users of the service, the payment of a fee, and the carrier, to carry the passengers, their luggage and the cargo to their destination timely and safely. In the second case, on the contrary, there is no contractual relationship at all between the victims and the carrier, and the operation of the aircraft, most of the time, goes unnoticed by the potential victims, until the injury, death or damage occurs.

It is for these reasons that, as soon as the process of adopting the Warsaw Convention was concluded, the international legal community began to elaborate a different legal instrument, the objective of which would be to regulate the liability of the air carrier with respect to damages caused to these third-parties on the surface.

## 3. THE 1933 ROME CONVENTION

The problem attracted the attention of CITEJA[5] by 1930, and an International Conference on Private Law was convened in Rome. As a result of this meeting, the Convention *for the Unification of Certain Rules*

5 *The Comité International Technique d'Experts Juridiques Aériens* (CITEJA) was created pursuant to a recommendation adopted at the First International Conference on Private Air Law, held in Paris in 1925, to develop a code of private international air law through the preparation of draft international conventions for final adoption at periodic international conferences on private air law. Four International Conferences on Private Air Law were held until the war interrupted the work of CITEJA. The 1st Session of the ICAO Assembly, held in Montreal from 6 to 27 May 1947, adopted Resolution A1-46 creating the Legal Committee as permanent body of the Organization replacing the CITEJA.

*Relating to Damage Caused by Foreign Aircraft to Third Parties* was adopted on 29 May 1933.

The 1933 Rome Convention did not achieve wide acceptance and it was expressly overtaken by its successor, the 1952 Rome Convention (see below). Nevertheless, the 1933 Rome Convention established some fundamental principles that were either reproduced in later documents or served as the ground for future legal elaborations. Among them were the following:

- Liability attaches to the operator of the aircraft
- Strict liability is imposed on the operator of the aircraft.
- The operator can be exonerated only if he proves intervention of a third party
- Liability is limited to sums depending on the weight of aircraft.
- Such limitation is expressed in a "gold clause" (French gold franc).
- One third of the compensation to be reserved for material damage, two-thirds to persons with a limit of 200,000 francs per person killed or injured
- A financial guarantee must be obtained by each aircraft operator in international operations.

## CHAPTER II

## CLOUDS IN THE HORIZON

### II.1.

As mentioned, liability represented the core subject of the Warsaw Convention, where the liability of the carrier is based on its fault (intention or negligence), and such fault is presumed. However, this element favorable for the claimant was counterbalanced by the imposition of monetary limits of liability. This is why the Warsaw Convention is regarded as having established a *quid pro quo system.*

However, as the aeronautical industry evolved, the public's perception of the compensation limits established in the Warsaw Convention changed; although they were initially deemed necessary, they began to look unreasonable and unsustainable over time.

The currency unit adopted by the Warsaw Convention was the 1927 "Poincaré" gold franc, and the limit of liability for death, wounding or other bodily injury of a passenger was set at 125,000 francs. Between 1929 and 1968 (when the US dollar was pegged at USD 35 per Troy ounce of pure gold), that represented USD 8,300. To make things worse, it must be remembered that this amount was in no way a "lump sum" payable under any circumstance; the claimant had to prove that the damage equaled or exceeded that amount of the limit. Otherwise, only the proven amount of damage was recoverable.

The discontent of the international community with these limits -especially in those countries where levels of prosperity and standards of living would increase year after year- grew.

This crisis was replicated in its "sister system", that of damages to third parties on the surface, due to their similarities in this regard. Under the 1933 Rome Convention the claimant had to accept limits of liability and the amount of 200,000 francs was only marginally above the Warsaw limit of 125,000 for passengers -persons who knowingly and willingly entered into the contract of carriage with its intrinsic risks.

To tackle this issue, CITEJA prepared a further document complementing the Rome Convention on matters of insurance guarantee, the "Brussels Protocol", which was ratified by only two countries (Brazil and Guatemala).

### II.2.

At its very first Assembly, held in 1947, ICAO requested the Legal Committee (the then novel replacement for the CITEJA) to resume the studies on liability to third parties. Consequently, a draft convention was prepared and presented to a Diplomatic Conference, again convened in Rome from September 9 to October 7, 1952. As a result of the deliberations, the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was* adopted. The key features of this convention were:

- Strict liability that attaches to the operator of the aircraft: the victim on the surface is entitled to compensation upon proof

only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom.

- The liability is guaranteed by detailed provisions on security or operator's liability

- Single forum jurisdiction: all claims must be brought to courts in the State where the damage occurred and all claims are to be consolidated for disposal in a single proceeding before the same court.

- The judgment is to be recognized and enforced in other Contracting States.

With respect to the Warsaw Convention, after extensive studies conducted within the ICAO Legal Committee, a Diplomatic Conference was called in 1955 at The Hague, and a protocol to amend the Warsaw Convention, generally referred to as "The Hague Protocol of 1955" was adopted. The protocol would insert new text into the original convention, modify some provisions and delete some others. The result is that the protocol cannot stand by itself but must be read together with the original convention as a single instrument. The primary object of the amendment was to increase the limits of liability with respect to passengers.[6] These limits were considered, in particular in the United States, to be outdated and unrealistically low. The US delegation wished to have the limit of liability with respect to passengers increased at least the equivalent of USD 25,000 but most delegations from the developing world considered such an amount excessive. A compromise was reached to double the Warsaw limit of 125,000 francs to 250,000 francs, equivalent to some USD 16,600. No change was made in limits with respect to baggage, personal effects and cargo.

### III.3.

The Rome Convention of 1952 is still in force, but it did not attract many ratifications. Only 51 out of the 193 ICAO member States did in fact ratify it, and that number did not even include major powers like the United States, the United Kingdom, Germany or Canada. With the exception of Italy, Russia and the UAE no major aviation country is party

6 Art. 17 of the Warsaw Convention.

to the Convention. The reasons for this rather spectacular lack of interests may be listed as follows:

1. The limits for compensation were considered too low. Like in the 1933 Convention, the limits established in the 1952 Rome Convention are tied to the weight of the aircraft (in a scale of five weight categories), a very unconvincing benchmark because even a very light aircraft may cause extensive damage if it crashes against sensitive targets such as gas works, oil refineries, nuclear plants, etc. The specific limit for death or personal injury is set at 500,000 francs. Moreover, this sum may be reduced "proportionately" when the sum of all claims exceeds the overall limit. The maximum limit for any event was established at 10,500,000 francs (USD 773,850) plus 100 francs (USD 7.37) for each additional kilogram.

2. The limits for compensation were considered unfair. As indicated in the Preamble of the Convention, the limitation is clearly aimed at the protection of the infant industry and it is the innocent victims on the ground that are expected to "subsidize" the development of international air transport.

3. It was considered that the States' national legislations provided adequate safeguards for the interests of third parties on the surface. Therefore, the international community felt that there was no need for international rules on the subject.

4. The convention did not deal with problems such as noise, sonic boom or nuclear damage.

5. The convention provided for just one jurisdiction forum.

## CHAPTER III.

## A PERFECT STORM.

None of the responses crafted by the international community to face the growing difficulties faced by the liability systems (both the one referring to damages caused to passengers and goods transported by

air and the one dealing with damages to third-parties on the surface) presented a real solution. It can be argued that, at best, they only provided a temporary relief.

### III.1.

### THE WARSAW SYSTEM.

The limit of 250,000 francs established in The Hague Protocol did not meet the needs of the United States with its high cost of living, and other States in due course came to the same position as the Americans.

A notorious discontent spread throughout much of the world and, consequently, numerous public international law agreements (conventions and protocols) were adopted, one after another, almost always receiving the same criticism as their predecessors, focusing on the fact that the new compensation limits were still low, and also because of their rapid deterioration due to inflation. These instruments, which together made up the so-called "Warsaw System", were the following:

- The Warsaw Convention of 1929.
- The Hague Protocol of 1955.
- The Guadalajara Convention of 1961.
- The Guatemala Protocol of 1971.
- The Montreal Protocols 1, 2, 3 and 4 (1975).

So insufficient were those efforts that it was the industry itself that had to come to the aid of the system, giving rise to another series of agreements -this time of a private nature- and other domestic legislation with application limited to certain subjects or time frames. These include:

- The Montreal Agreement of 1966.
- The Malta Agreement of 1974.
- The Italian Constitutional Law No. 274 (1988).
- The Japanese Initiative of 1992.

- The IATA Intercarrier Agreements (1995-1996).

- The European Union Regulation 2027/97.

In both cases, all these instruments were not much more than palliatives, most of which were short-lived.

**III.2.**

**THE ROME/MONTREAL SYSTEM.**

To tackle problems similar to those faced by the Warsaw System, a conference met at Montreal and focused its attention (again!) on the amounts of limits of liability. The result of the deliberations was the adoption of the *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Montreal on 23 September, 1978.

One of the positive contributions of the Protocol is the adoption of the Special Drawing Rights (SDRs)[7] as the yardstick of values.

The low number of ratifications of the Rome Convention mainly had to do with the fact that great aviation nations such as the United States and Great Britain do not have any maximum liability amounts for third-party damages. Therefore, the revision efforts mainly aimed at at liability amounts that would be acceptable to those States. However, the limit of 125,000 in respect of loss or life or personal injury per person killed or injured fell short of the expectations of most States. This conclusion is even more striking when it is taken into account that:

1. By 1978 many leading airlines had unilaterally increased their liability to passengers -who are willingly by contract part of the flight and its risk- to 100,000 SDRs via the private agreements mentioned in the paragraph above, and.

2. The passengers could manage their share of the risk by purchasing additional personal insurance.

Dr. Milde's assessment of the then recently adopted Protocol was prophetic indeed:

7 The Special Drawing Right (SDR) is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves. The value of the SDR is based on a basket of five currencies—the U.S. dollar, the euro, the Chinese renminbi, the Japanese yen, and the British pound sterling.

> "It is to be hoped that the adoption of the Montreal Protocol of 1978 will lead to a somewhat wider acceptance of the Rome Convention of 1952. However, it is highly unlikely that the Convention as amended will ever attain a wide or nearly universally acceptance because the principle of limitation of liability with respect to third parties on the surface does not appear acceptable in the legislation of the many States. In general, since the first Rome Convention of 1933 States have shown considerable reluctance to become parties to a Convention on the unification of law in a field which, fortunately, deals with extremely rare occurrences and where there are no insurmountable problems of conflicts of law or conflicts of jurisdiction".[8]

At the end of the Diplomatic Conference, this protocol was signed by nine delegations only. Today, the Protocol is in force only for 12 States, among them only Brazil is a major aviation State.

## CHAPTER IV

## A FORK STUCK IN THE ROAD

Towards the end of the last century the situation with regard to the liability system for damages arising from international air transport had become absolutely chaotic, and it faced a point of no return. Two situations acted as catalysts to provoke what was to be a Copernican twist that could mean putting an end to this mess once and for all, safely and efficiently.

### IV.1.

### THE WARSAW SYSTEM.

Under the Warsaw System, the limits of liability had long ago proven inadequate and unrealistic for many Sates. An unrequested attempt to alleviate this problem was the action taken by many Courts which often accepted a creative interpretation of the conventions and protocols, a "most undesirable judicial "amendment" of the real aim"[9] of such instruments. Moreover, some initiatives like the "Montreal Agreement of 1966", a private agreement between the airlines and the US authorities setting a limit of USD 75,000 per passenger's death or injury for any flights to, from or through the territory of the USA, represented a de facto amendment

8 MILDE, Michael, "Tenth International Conference on Air Law", Air Law, Vol IV (1979), pp. 41-44.

9 MILDE, International…, page 286.

of the international legal regime. The agreement was supposed to be an "interim solution" that, in fact, lasted for over thirty years!

The lack of any substantive and enduring progress in the process of modernization of the Warsaw System caused major dissatisfaction and frustration to governments and airlines alike. As mentioned, a series of unilateral actions were taken for practical application to break the deadlock reached in international law-making.

As Dr. Milde brilliantly explained:

> "Unilateral actions of airlines, States or group of States created a *de facto* massive amendment of the Warsaw system but had a fundamental flaw: they could modify the practical application of the provisions relating to the limit of liability (which is permitted by article 22 (1) of the Convention as a "special contract"). However, they cannot amend any substantive provision of the Convention that in itself has "imperative" nature.[10] Thus the unilateral action would remain "attached" to the underlying existence and peremptory provisions of the Warsaw system. That Convention can be amended only in accordance with the rules of international law.[11] No amount of unilateral or collective "patchwork" can replace the appropriate process of amendment of the Convention and establish a solid international legal regime to be applied uniformly by the courts of law".[12]

Shortly after the industry adopted a new private instrument –the Passenger Liability Agreement of 1995- that ICAO decided to take action to elaborate a definite solution that would be able to put an end once and forever to that chaotic status quo. The Legal Committee was trusted with the task to study the modernization of the whole Warsaw System, being that the starting point of a long and controversial path that eventually led to the adoption of the Convention for the *Unification of Certain Rules for International Carriage by Air*, signed at Montreal on 28 May 1999, commonly referred to as the "Montreal Convention of 1999", the international legal instrument that currently governs the system of carrier liability and that proved successful where many others failed before.

10 Article 32 of the Convention declares "null and void" any special agreement or clauses purporting to infringe the rules laid down by the Convention.

11 Vienna Convention on the Law of Treaties of 23 May 1969 – Part IV – Amendments and Modifications of Treaties, Articles 39-41.

12 MILDE, *International...*, page 296.

## IV.2.

## THE ROME SYSTEM.

Things went quite differently for the legal regime on damages to third parties on the surface. Although the shortcomings of this system (and particularly the limitation of the liability of the carrier established there) had been spreading discontent among the States since its inception, the issue did not seem to cause a major problem to the international community, nor did it require extreme and urgent measures to remedy it. This is explained by the low acceptance that the system had achieved (51 ratifications for Rome 1952 and only 12 for the Montreal Protocol of 1978), a situation determined by the lack of enthusiasm generated by these instruments as a result, precisely, of the shortcomings mentioned.

However, a particular event came to place the system at a totally unforeseen crossroads. On the morning of Tuesday, September 11, 2001, the Wahhabi Islamist terrorist group Al-Qaeda conducted a series of four coordinated terrorist attacks. Four commercial airliners were hijacked in mid-flight. Two of the planes crashed into the two towers of the World Trade Center complex in Manhattan (New York City), both of which collapsed. A third flight was crashed into the west side of the Pentagon (the headquarters of the American military) and the fourth plane, initially flown toward Washington, D.C., crashed into a field in Pennsylvania after a struggle between passengers and hijackers.

The attacks resulted in 2,977 fatalities, over 25,000 injuries, and substantial long-term health consequences, plus at least $10 billion in infrastructure and property damage, and remains the deadliest terrorist attack in human history.

Another consequence of the attacks was that risk management became a major problem for airlines around the world. The aviation insurers invoked the overlooked "seven-day-clause" in the policies, and as of 23 September 2001 canceled all war and terrorism clauses from the aviation insurance policies. The lack of available insurance for third party risk would have forced many airlines to be grounded, but some States stepped in with government guarantees.

The total amount of compensation paid to the victims of the September 11, 2001 terrorist attacks (individuals killed or seriously injured and people and businesses affected by the event) reached over USD 38 billion, with insurance companies and the federal government providing more than 90 percent of the payments.[13]

13 Dixon, Lloyd and Rachel Kaganoff Stern: "*Compensation for Losses from the 9/11 Attacks. Santa Monica*", CA: RAND Corporation, 2004. https://www.rand.org/pubs/monographs/MG264.html.

## IV.3.

## ICAO'S RESPONSE TO THE 9/11.

The impact of the 9/11 attacks was felt throughout the world and many governments had to bail out their national airlines from the brink of bankruptcy by massive cash and loan subsidies. ICAO attempted to facilitate the availability of third-party insurance by devising a plan that could serve as an alternative to commercial insurance for airlines.

The proposal "I*CAO Global Scheme on Aviation War Risk Insurance*", generally known as "Globaltime", would have set up a non-profit Insurance Entity collecting premiums payable by passengers and compensation to third parties on the surface, in cases of aviation terrorism, and would be guaranteed by the participating governments. The scheme would become operational once States responsible for 51% of the contributions to the ICAO budget confirm their participation. That threshold was never reached since, inter alia, the then largest contributors (the United States and Japan[14]) did not join.

The 32nd session of the Legal Committee concluded that the situation required more work. Little enthusiasm was indicated for any modernization of the 1952 Convention although the special problem of incidents caused by terrorist acts proved to be somewhat more attractive. The result of these studies were two draft conventions, and the 33 Legal Committee and the ICAO Council considered in 2008 that both drafts were sufficiently mature to go to a Diplomatic Conference.

Nevertheless, the Diplomatic conference adopted and opened for signature with little enthusiasm two instruments:

1. *The Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference*, referred to as the "Unlawful Interference Compensation Convention". As its name indicates, this instrument deals with liability and compensation when the damages on the surface are direct consequence of an act of unlawful interference against an aircraft in flight.

2. *The Convention on Compensation for Damage Caused by Aircraft to Third Parties*, referred to as the "General Risk Convention". This instrument deals with liability and compensation where there is no unlawful interference.

14 Today the second largest contributor to the ICAO budget is China.

Both instruments attach strict liability to the operator upon condition only that the damage was caused by an aircraft in flight. The choice to present the text divided into two independent conventions was based more on political than legal reasons, since it was considered that in this way it would be easier to obtain more ratifications by the States. In the initial phase of negotiations it was already clear that developed countries were more interested in approving an agreement that would address the problem of terrorism, while another group of States, particularly Latin American and African countries, focused their efforts on regulating the compensation for damages derived from general risks. Some authors have spoken out against this split into two texts, arguing that the possibility of catastrophic damage is not reduced to terrorism cases (you can think of an aircraft that crashes into a sport stadium full of people, or a mid-air collision of two aircraft with passengers on board), and therefore it is not well understood why the International Fund is restricted to the terrorist events only.[15]

The Unlawful Interference Compensation Convention was the main task of the Diplomatic Conference, and is applicable in the case of an "event" -defined as an occurrence when damage results from an act of unlawful interference involving an aircraft in flight on an international flight.16 The operator is liable for the direct consequences of the event and damages due to death, bodily injury and mental injury are compensable. Damage to property is also compensable. In a creative contribution that was missed in the 1999 Montreal Convention damages due to mental injury are expressly compensable but "only if caused by a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury".[17]

Since the limit of liability of the operator would be insufficient to fully compensate all potential victims the Convention created a complex and convoluted mechanism called "The International Civil Aviation Compensation Fund", an international organization invested with international legal personality and made of the States parties.

The "International Fund" would be financed by contributions collected by the operators in respect of each passenger and each ton of cargo on an international commerce flight from an airport in a State Party.

15 TULLIO, L., "La regressione del sistema de responsabilità per i danni a terzi sulla superficie", *Diritto dei Transporti, 2008, I, p.3*; *BUSTI, S., "I progetti di nuova normative internazionale uniforme sui danni cagionati a terzi dal volo di aeromibile: evoluzione o involuzioni?", Nuovi profili di responsabilità e di assecurazione nel diritto areonautico*, Napoli, Jovene Editore, 2009, p. 125.

16 Art. 1.b).

17 Art. 3.3.

States are even bound to impose sanctions to ensure that an operator fulfills its obligation to collect and remit the contributions to the International Fund. The Convention would thus impose on the aircraft operators a new and tedious duty that is unrelated to their primary task to provide transportation services. Passengers and shippers of the cargo would be by their contributions carrying the burden of financing the compensation to victims not only in their own country but anywhere an "event" were to take place.

The maximum amount of compensation available from the Fund would be 3 billion SDRs for each event -a very high amount of money but not even 1/3 of the overall compensation paid by the US authorities after 9/11. That could still result in incomplete compensation of the victims of a major "event", leaving innocent third parties in a less advantageous position compared with the passengers under the 1999 Montreal Convention who can expect compensation without any monetary limit (see below).

> "To meet the complex regime of liability and compensation and the International Fund effective, the Convention would enter into force only after some rigorous conditions are met: it would enter into force on the 180th day after the deposit of the 35th instrument of ratification, acceptance, approval or accession on condition that the total number of passengers departing in the previous year from airports of such ratifying States is at least 750 million as appears from the declarations made by such States. That means that the convention will enter into Force only if the 35 ratifying States would account for at least one-third of the entire world passenger traffic. The conditions for the entry into force were made very difficult as if the authors wished the Convention never to be applied..."[18]

The General Risk Convention was a secondary task, but considered useful guidance for some States that do not have any domestic legislation dealing with third party liability of aircraft operators. It is merely a modernized 1952 Rome Convention as amended in 1978 at Montreal and there was no convincing reason for its adoption. It attaches liability for damaged sustained by third parties upon condition only that the damage was caused by an aircraft in flight on an international flight, other than as a result of an act of unlawful interference. The operator's liability is limited in the same manner as in the first Convention, based on the mass of the aircraft involved up to 700 million SDRs for the heaviest aircraft. There is no provision for an additional compensation fund and the compensation

18 MILDE, *International*..., pp. 308-309.

of victims remains limited -a situation contrary to natural justice when liability for passengers is unlimited under the 1999 Montreal Convention.[19]

None of these conventions is yet in force.[20] Again, it seems another prophecy from Dr. Milde will be fulfilled: "These two instruments did not contribute to the development of codified international air law. In all probability they will remain only a momentum to good indications that were misdirected."[21]

## CHAPTER V.

## THE REASONS BEHIND A SUCCESS AND A FRUSTRATION.

It was anticipated above in this paper that the Warsaw System found its way out of the labyrinth it had built itself through a radical solution: quitting the old system and replacing it with a single and innovative instrument, commonly known as the Montreal Convention of 1999. This Convention was able to succeed where all the others had failed, and it became one of the most successful unifications of private international law, to the point that today its rules govern the vast majority of international air transport.[22]

There are several reasons for this success, but without a doubt the main one is to have nipped at the root the problem of the constant deterioration of compensation limits. This was obtained in two ways. First, all limitations in the compensation for the most serious damage event, which is the death or injury of passengers, were completely removed. Second, for those limits that still exist in the new convention, a mechanism for reviewing their amounts was devised. This will guarantee that such limits will be kept updated over time.

Numerous other innovations have also proven to be great successes of the 1999 Montreal Convention, such as: simplification of the formalities for documents of carriage, advance payments, expansion of applicable jurisdictions, arbitration, provisions related to successive and combined carriage, rules applicable to the contractual and actual carriers, and mandatory insurance.

19 The conditions for the entry into force of the Convention are less exacting than the first Convention - it would enter into force on the 60th day following the deposit of the 35th instrument of ratification, acceptance, approval or accession.

20 By the time of this writing, the Unlawful Interference Compensation Convention has received 20 ratifications, and the General Risk Convention has received 25 ratifications.

21 MILDE, International…, page 309.

22 According to the International Air Transport Association (IATA), 98 per cent of world traffic is now covered by the application of the Montreal Convention of 1999: ICAO, A40-WP/293.

All these aspects have been studied, discussed and analyzed in a profuse literature (thousands of books and articles), and the mere citation of the most important of them would fill numerous pages. Rather, the main goal of this paper is to explain the reasons why the "modernization" of the liability system for damages to superficial third parties has not enjoyed the same happy ending as that carried out on the Warsaw System.

The reasons that explain why the new agreements adopted in 2009 cannot even dream of a similar success to that of the Montreal Convention of 1999 are varied, and among them we can mention the following.

**a) The keeping of compensation limitations.**

As already mentioned, the Montreal Convention of 1999 removed all limits for the gravest damages: injuries and death of passengers. On the other hand, keeping compensation limitations in the two new 2009 agreements undoubtedly represents a very great obstacle for their acceptance by the States. This has been the central point of contention for decades; limitation of liability to fixed maximum monetary amount goes contrary to the general principles of liability that compensation should amount to restitution (status quo ante) or equivalent full monetary compensation. Yet, aviation as a nascent industry urgently needed a limitation of liability to survive and develop through the period of gradually improving safety its record and financial viability. The most likely reason for the introduction of the limits of liability was the protection of the infant industry that could not sustain its development without such protection, and the limitation of liability was presented as an equitable quid pro quo for the aggravated regime of liability of the air carrier with its presumption of fault of the carrier. Among other justifications for the limitation of liability was to enable the air carrier to negotiate a realistic insurance coverage within such limits. Moreover, since at that time most internationally operating airlines were State-owned (with the exception of the USA, Japan and some other minor private operators) and State-operated, the States party to the Convention were in fact protecting their own interests. "Whatever other justifications may be formulated, limitation of liability is a departure from common law of liability and from the concept of natural justice."[23]

**b) Limits based on the weight of the aircraft.**

The new conventions opted for keeping a system for the calculation of the compensation limits that is extremely complicated and, moreover,

23 MILDE, International..., page 284.

unrealistic. The maximum amount to be paid is determined by setting a maximum compensation per event (not per victim), quantified in Special Drawing Rights, and that amount will depend on the maximum take-off mass of the aircraft involved in the event (or the one with the greatest mass, if two aircraft operated by the same operator were involved)[24]. This is a fundamental difference with the old Warsaw System and the new Montreal Convention of 1999, where the amounts were always referred to each passenger individually, and not attributed as collective compensation.

The liability of the operator is limited based on the mass of the aircraft involved, the highest limit for aircraft having maximum mass over 500,000 kilograms reaching 700,000,000 SDRs. Although this appears to be a very high sum of money, it is only a small fraction of the overall compensations paid as a consequence of 911. "It remains questionable why the aircraft operator should be held liable at all in case of a terrorist act of which he is himself a victim and which is aimed at a State."25 To make things worse, an order of priority was created, that is: a criterion for the distribution of the overall amount among the victims.

The Convention on Acts of Unlawful Interference provides for a liability system made up of various levels of compensation. At the first level, the operator is strictly responsible within the same limits set in the General Risks agreement. Again, this is a maximum amount per event (and not for each victim), based on the maximum take-off mass of the aircraft involved in the act of unlawful interference (or the heaviest would have more than one aircraft operated by the same operator), and quantified in Special Drawing Rights. In a second level, applicable to an event in which the damages are not sufficiently covered by the compensation paid by the operator, the pending amount will be paid by the International Fund.26 However, even this compensation has a limit: a maximum of 3,000,000,000 Special Drawing Rights.[27]

**c) Failure to acknowledge the lack of interest by the international community of States.**

From the onset of the 2009 Diplomatic Conference, it appeared most unlikely that many States would be willing to adopt and ratify a convention or conventions containing monetary limits of compensation to victims on the surface or channeling the compensation from international

24 Arts. 4.1 and 4.2.

25 MILDE, International…, page 308.

26 Arts. 8-17.

27 Art. 18.

or national resources through the airlines.28 The authorities of the United States recognized, after 9/11, that the airlines should not be liable beyond the extent of their existing insurance and thereafter vast compensations -without any monetary limitation- were paid to the victims directly by the US government. It was believed that States should compensate the victims of terrorism in the same manner as the US did in the wake of 9/11, a rule that should apply regardless whether the terrorism involved aviation or not, and the problem of compensation to victims of terrorism should not be restricted to aviation alone.[29] In fact, in some States such compensation is regulated by law,[30] special funds were created for this purpose, [31] and the European Union has laid down key guidelines for the assistance to crime victims in general, encouraging its member States to be proactive and diligent in protecting the victims' rights.[32]

At the Conference, the delegations of the major aeronautical countries were reticent to accept any decision on the limits of liability but decided not to vote against the text but instead to abstain; the conference took its decision by two-thirds majority of those present and voting and the massive abstentions permitted to adopt the Protocol.

**1. d) Failure to take advantage of the opportunity to introduce significant improvements.**

The conventions establish that there will be no compensation if the damage is not a direct consequence of the event that caused it,33which means that material and personal damages are included, excluding loss of income.[34] Regarding personal injuries, progress was made by saying that mental injury damage will be compensable only if it was caused by a recognizable psychiatric illness resulting from bodily injury or from

28 MILDE, *International…*, page 307.

29 Ibidem.

30 In France, Act of 9 September 1986. See: https://www.legislationline.org/download/id/5405/file/Codexter_Profiles%202013%20France_EN.pdf

31 See: https://www.fondsdegarantie.fr/wp-content/uploads/2020/07/EN-Fiche-pratique-FGTI-1_NewChart_Juillet2020_EP.pdf

32 See: *Council of Europe, Committee of Ministers, Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims. Also: European Parliament resolution of 30 May 2018 on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime* (2016/2328(INI)).

33 Art. 3.2 of both conventions.

34 DONATO, Marina: "La responsabilidad por daños a terceros en la superficie según la OACI", in TULLIO, L. (a cura di), *Nuovi profili di responsabilità e di asecurazione nel diritto aeronáutico*, Napoli, Jovene Editore, 2009, p. 27.

direct exposure to the probability of imminent death or bodily injury. This eliminates the risk that lawsuits based on mere fears or anxiety will proliferate, and it is line with the predominant classic jurisprudence on the matter.[35]

1. The keeping a single litigation forum, and the rejection of the initiative introduced during the debates to include the jurisdiction of the State in which the operator has its main place of business as an alternate jurisdiction.[36]

2. No compensation for other damages such as noise, sonic boom[37] or nuclear damage.[38]

3. No introduction of the choice to turn to arbitration as a means to settle the claims, as the Montreal Convention of 1999 did.

**e) The forced connection with the 9/11 attacks.**

It is some author´s view that this modernization initiative -and particularly the Unlawful Interference Compensation Convention- was flawed because the driving force behind it, that is, to provide a legal response to the 9/11 terrorist attacks, is misdirected. According to that opinion, such event lacks a substantively direct relationship with international aeronautical law. The nature of the 11 September 2001 disaster was purely domestic and did not involve any international element that would necessitate international regulation, and the claims for compensation resulting from it would not attract the application of foreign law or need for international instrument for the unification of private law.

> "The wish of some States to go ahead and attempt to adopt yet another instrument along the lines of the 1952 Rome convention is perplexing. The trigger of 9/11 for this initiative is not convincing -that tragedy was not an attack on the operators of the aircraft -American Airlines and United- it was an attack against the United States and their symbols; the airlines themselves were victims of this attacks and it

35 *Ibidem.*

36 *Ibidem*, p. 57.

37 The efforts of some States to define clear regulations in the Rome Convention for it to be applied to damages from aircraft noise and sonic boom did not reach a majority, and the question remained unsolved since then.

38 On the contrary, the 2009 "General Risks Convention" expressly excludes liability arising from for damage caused by a nuclear incident (art. 3.6).

> seems improper to attach or channel any liability for compensation to or through the aircraft operators".[39]

At this point, it becomes needless to say that these characteristics of both the Unlawful Interference Compensation Convention and the general Risks Convention present a serious obstacle to the well-meant efforts of the participants of the Convention to produce new legal instruments that will achieve universal acceptance.

## CONCLUSION

We all have probably read or heard stories about identical twins separated at birth who, when reunited many years later, have either led lives that turned out being astonishingly similar or different. The classic explanation for this phenomenon lies in the contrast "nature vs. nurture". Something similar can be said with respect to the two liability systems discussed in this article.

While they were not born simultaneously, their origins are separated by just a few years, and their genetic marker was nearly identical. With a simple glance, we can tell that they were related, thanks to their unique characteristics, common to both, among which one is paramount: limited liability of the operator in case of damage to third parties, in exchange for a presumption of its fault.

Both systems led parallel lives and, like the characters in Plutarch's famous play, there were crucial moments in their lives at which they had to face difficult decisions.

Here, the result was more similar to the case of twins whose lives end up being very dissimilar; while the Montreal Convention of 1999 has been an outstanding success that replaced the old Warsaw System de *iure* and *de facto* almost everywhere around the world, the most recent efforts to modernize the Rome/Montreal System have aroused even less interest than the founding documents of that system, to the point that the Montreal Protocol has received only 12 ratifications, while the detailed 2009 Conventions have not even yet reached the number of adhesions necessary to enter into force and appear to be a long way from achieving it.

Although we can account for external factors that have contributed to the production of this result, the main reason is to be found in those crossroads decisions to which we made reference and, among them, the number one position must go to the insistence on applying limitations

39 MILDE, *International...*, page 306-307.

to the compensation that the carrier must pay in case of damage to third parties on the surface.

We have seen that this approach was at odds from the beginning with the usual practice of the States, which in many cases already had appropriate domestic legislation to deal with problems of this nature, with no limitation at all on the compensatory sums to be paid. Adding this to the fact that, by definition, these types of claims are always settled within the jurisdiction of the State where the harmful event had occurred, it should not be a surprise that States never showed much interest in adhering to a supranational regime in this matter.

Moreover, it is the very principle of limited compensation that is being highly questioned today. The arguments that explained its *raison d'être* during the first years of aviation are practically untenable in modern times.

> "With the 1999 Montreal Convention there is no monetary limit of liability for passenger's death or injury. Third parties on the surface have no relationship with the operator of the aircraft and it is difficult to justify why they should share the operator's risk by having their right of compensation limited. It appears contrary to natural justice to limit the liability with respect to innocent third parties on the surface while the passengers — who willingly contracted with the operator to become part of the flight, a venture the risk of which they knowingly assumed, may enjoy unlimited compensation."[40]

And if this is true as a statement in general, it is much more so when it applied to damages caused to victims as a result of an event provoked by an act of terrorism. There is a saying that "special cases make bad law", and the Unlawful Interference Compensation Convention, although inspired by good intentions, is a clear example of how right that axiom is. As pointed out,[41] "[l]iability for terrorist risks is not about the realization of an operation risk of the dangerous item "aircraft", but rather about liability for a danger intentionally taken to the aircraft from the outside. The response to this risk to create an absolute liability basis for claim is only justifiable if terrorism is either considered an inseparable part of the phenomenon "aviation" or if absolute liability is open to the risk from the outside, for example arguing that aviation is predestined to be the target of terrorist attacks. However, this would lead to the otherwise

40 MILDE, *International*..., page 304.

41 GIEMULLA, Elmar M. and Van SCHYNDEL, Heiko: "*Liability in International Law (Private Air Law)*", in: International and EU Aviation Law. Selected Issues. Wolter Kluwer, The Netherlands, 2011, page 276.

strictly separated areas of "security" (aviation security) and "safety" (flight safety") being blurred. One also has to take into consideration that the most effective counter to prevent terrorist attacks have to take place on the ground, before passengers and their baggage come on board the aircraft. Today these measures are mainly carried out by public authorities. It is inconsistent with the institution of absolute liability to include measures of other parties, which in addition take place before operation of the aircraft, in the operational risk."

Dr. Milde wrote: "The attacks of September 11, 2001, constituted a tragic incident but so far an isolated one and without International elements. It is more important to look for new ways and means how to prevent similar terrorist attacks acts than to calculate how to protect the Governments or airlines against extreme liability and shift a share of the risk on the innocent victims on the ground."[42]

Since the onset of aviation, the international community has proven to have sufficient capacity to react to the new legal challenges that this activity presented. And without a doubt, in all cases it tried to respond by designing what it believed would be the most suitable instruments to deal with such problems. The analysis made in this paper shows that this effort has not always been satisfactory. But what is important here, as almost always happens in every human activity, is to be able to identify the factors that prevented or assured success in each case, and to know how to recognize which of them should be applied or set aside to deal with new situations, alike or not, unprecedented or not, that may arise in the future.

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42 MILDE, *International...*, page 307. As Dr. Dempsey expressed: "However, law itself is not enough. Terrorists tend not to study international treaties and domestic laws before committing lethal acts. Law must work in tandem with personnel, policies and procedures designed to both deter or abort acts of terrorism and t punish those who attempt to commit them. [...] Contemporary terrorists are less discriminating in their targets, less concerned with surviving the mission, and more creatively murderous than their predecessors. The most effective means of deterring hijacking may be first through each nation's domestic legislation and domestic airport securities systems."

44 MILDE, *International...*, page 307. As Dr. Dempsey expressed: "However, law itself is not enough. Terrorists tend not to study international treaties and domestic laws before committing lethal acts. Law must work in tandem with personnel, policies and procedures designed to both deter or abort acts of terrorism and t punish those who attempt to commit them. [...] Contemporary terrorists are less discriminating in their targets, less concerned with surviving the mission, and more creatively murderous than their predecessors. The most effective means of deterring hijacking may be first through each nation's domestic legislation and domestic airport securities systems."

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